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The New General Common Law of Severability

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The doctrine of "severability" permits a court to excise the unconstitutional portion of a partially unconstitutional statute in order to preserve the operation of any uncontested or valid remainder. Severability figures centrally in a broad array of constitutional litigation, including recent litigation over the "individual mandate" provision of the Patient Protection and Affordable Care Act. Nevertheless, the doctrine remains underexplored. In particular, no commentator has thoroughly examined choice-of-law rules pertaining to its application. This Article aims to fill that void. The Article contends that in recent decisions the Supreme Court has quietly established the severability of state statutes in federal court to be a matter of general federal common law, and that this doctrine is not only inconsistent with dozens of cases decided since Erie Railroad Co. v. Tompkins, *but also displaces a large body of diverse state law without constitutional authorization or a supporting federal interest. The new doctrine thus challenges standard accounts of the limits of federal common law and calls into question the contemporary vitality of* Erie*'s principle of judicial federalism. The Article closes by proposing an alternative that would harmonize the precedent, help to revitalize* Erie*, and honor the bounds of Article III judicial power.*

I. Introduction

Consider the following problem: A federal court has declared a single provision in a large state statute to be facially unconstitutional, and must decide what effect that declaration has on the rest of the statute. If it is possible to excise and discard the unconstitutional part, then the declaration's effect will be limited and the remainder will continue in force. If excision is not possible, however, the unconstitutional part will in effect bring down the entire statute with it. The stakes may be high. But under whose law should the court decide whether to engage in this form of statutory surgery? Is it the federal law of the reviewing court? Or is it the potentially different law of the state whose enactment is under review? The question is one of vertical choice of law with respect to the doctrine of "severability." And within the last few years the Supreme Court has quietly developed a surprising answer—an answer that has general federal common law partially displace a large body of what can be materially different state common law, without specific constitutional authorization or any supporting federal interest. It is

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an answer that is reminiscent of the era of *Swift v. Tyson*,[1] and that calls into question the traditional limits of federal common law and the contemporary meaning of *Erie Railroad Co. v. Tompkins*.[2]

The doctrine of severability holds that upon finding an application or textual component of a statute to be unconstitutional, a court may, in appropriate circumstances, excise the unconstitutional part rather than declare the entire statute invalid.[3] The basic rationales for severance are that it can minimize judicial interference with legislative lawmaking, honor legislative intent, and promote legislative innovation by lowering the stakes of a ruling of partial unconstitutionality.[4] The doctrine is frequently relevant because any holding that a statute is partially invalid will give rise to questions concerning what to do with the valid remainder. And the doctrine is powerful because the viability of large statutory schemes can hinge entirely on whether an unconstitutional component is severable.[5]

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1. 41 U.S. (16 Pet.) 1 (1842).

2. 304 U.S. 64 (1938).

3. *See* 2 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 44:8, at 585–90 (7th ed. 2009) (surveying the use of severability clauses). For significant academic commentary on severability doctrine, see generally Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495 (2011) (arguing for the abolition of severability doctrine); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994) (discussing constitutional limits on severability in the context of facial challenges); Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303 (2007) (evaluating severability as a form of "fallback law"); Michael C. Dorf, *The Heterogeneity of Rights*, 6 LEGAL THEORY 269 (2000) (arguing that severability should be a key determinant of the success of facial challenges); Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915 (2011) (discussing the role of severability in facial challenges); David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639 (2008) (proposing a doctrine that would make severance permissible where it does not require extensive judicial rewriting of a statute); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873 (2005) (discussing the role of severability in facial challenges); Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41 (1995) (comparing statutory and contract severability); John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993) (discussing severability jurisprudence and advocating several general principles to guide courts); Emily Sherwin, *Rules and Judicial Review*, 6 LEGAL THEORY 299 (2000) (examining the effects of statute-saving devices including severance); Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227 (2004) (critiquing the current doctrine and arguing that courts should sever partially unconstitutional statutes absent a clear congressional directive to the contrary); Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 79–82, 106–25 (1937) (providing a historical summary of severability doctrine and discussing problems with provision severability); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997) (discussing the tension between the avoidance and severability doctrines); *and* Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738 (2010) (advocating "displacement without inferred fallback law" as a new approach to severability).

4. Gans, *supra* note 3, at 653–54; Nagle, *supra* note 3, at 250–52.

5. Recent litigation over the constitutionality of the Patient Protection and Affordable Care Act offered a salient illustration of severability in action. A majority held that the "individual mandate," which requires qualifying individuals to purchase federally approved health insurance or pay a penalty, is constitutional as a valid exercise of Congress's power to tax. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594–601 (2012). This holding rendered unnecessary an analysis on severability. The Court also held, however, that the Constitution prohibits the federal government from applying the Act to withdraw existing Medicaid funds from states that fail to comply with new requirements for Medicaid expansion. *Id.* at 2601–07 (Roberts, Breyer, & Kagan, JJ.); *id.* at 2657–

The Supreme Court's severability jurisprudence spans from the late 1800s to the 2012 decision *National Federation of Independent Business v. Sebelius*.[6] As others have recounted in detail, the doctrine's content has varied significantly over time.[7] Whether statutes are to be presumed severable, for example, has changed repeatedly.[8] Whether the Court honors the plain text of severability clauses has varied.[9] And precedent has historically differed on whether the test for severability focuses on legislative intent alone, on the effect of severance on the functionality of the statute, or on some combination of both.[10] The Court has not explained most of these shifts.[11] The cases, moreover, have varied in the depth of treatment they give to severance questions, with some opinions deciding without reasoned analysis or citation to authority, and others providing such support.[12]

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66 (Scalia, Kennedy, Thomas, & Alito, JJ.). This holding required the Court to address the application's severability. Because a majority held that severance was appropriate, the rest of the Act survived. *Id.* at 2607–08 (Roberts, Breyer, and Kagan, JJ.); *id.* at 2641–42 (Ginsburg & Sotomayor, JJ., concurring). In dissent, Justices Scalia, Kennedy, Thomas, and Alito argued that both the individual mandate and Medicaid expansion were unconstitutional, and that severance was unavailable. *See id.* at 2668–77. If this view had prevailed, two provisions would have brought hundreds of others down with them. In this and many other cases, the question of severance can affect the enforceability of a challenged statute as significantly as the merits analysis itself.

6. 132 S. Ct. 2566 (2012).

7. *See* Stern, *supra* note 3, at 79–82, 106–25 (surveying the doctrinal history); Nagle, *supra* note 3, at 218–25 (same); Shumsky, *supra* note 3, at 232–45 (same); Walsh, *supra* note 3, at 755–76 (same).

8. *Compare* Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 234 (1932) ("Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."), *with* Williams v. Standard Oil Co., 278 U.S. 235, 241 (1929) ("In the absence of [a severability clause], the presumption is that the legislature intends an act to be effective as an entirety."), *and* Packet Co. v. Keokuk, 95 U.S. 80, 89 (1877) (failing to state a presumption).

9. *Compare* Hill v. Wallace, 259 U.S. 44, 70–72 (1922) (holding a statute unseverable notwithstanding the presence of a severability clause), *with* Ohio Tax Cases, 232 U.S. 576, 594 (1914) (holding a statute severable due to the presence of a severability clause).

10. *Compare* Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 395 (1894) (explaining that severance is permissible "if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the legislature would not have enacted that which is within, independently of that beyond its power"), *with* Supervisors v. Stanley, 105 U.S. 305, 312 (1881) (explaining that severance is appropriate if the constitutional provisions are "unaffected by" the unconstitutional provisions and "can stand without them"), *and* R.R. Cos. v. Schutte, 103 U.S. 118, 142 (1880) (explaining that severability "all depends on the intention of the legislature").

11. *See* Shumsky, *supra* note 3, at 243 (explaining that it was "typical" for the Court to "spen[d] little time justifying the severability tests it enunciated").

12. *E.g.*, Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 513 (1937); *Champlin Ref. Co.*, 286 U.S. at 238; Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 675 (1923); Int'l Bridge Co. v. New York, 254 U.S. 126, 130 (1920); *Ohio Tax Cases*, 232 U.S. at 594; Grand Trunk R.R. Co. v. Mich. R.R. Comm'n, 231 U.S. 457, 473 (1913); Louisville & Nashville R.R. Co. v. Garrett, 231 U.S. 298, 311 (1913); W. Union Tel. Co. v. City of Richmond, 224 U.S. 160, 172 (1912); Grenada Lumber Co. v. Mississippi, 217 U.S. 433, 443 (1910); Waters-Pierce Oil Co. v. Deselms, 212 U.S. 159, 174 (1909); Diamond Glue Co. v. U.S. Glue Co., 187 U.S. 611, 617 (1903); *Keokuk*, 95 U.S. at 89; *see also* Gans, *supra* note 3, at 652 (explaining that the Court has often "decide[d] questions of severability implicitly and on an ad hoc basis, sometimes choosing to sever and sometimes refusing to do so").

Compounding the doctrinal uncertainty, there is, as David Gans has explained, "a wide divide between the announced judicial doctrine of severability and the reality of what courts actually do. Severability doctrine's strictures are routinely ignored. Even courts that sever unconstitutional portions of a statute often do not mention, let alone apply, severability doctrine."[13] The state of the doctrine has prompted several proposals for reform.[14]

I aim to add a new element to this discussion by critiquing the Supreme Court's choice-of-law rules for severability from a historical and doctrinal perspective. Although a significant literature on severability has developed in recent years,[15] and although the choice-of-law question arises any time a federal court holds a state statute to be partially invalid, academic treatment has been sparse. Only two articles even mention the matter. One is a piece from 1937 by Robert Stern, who briefly described the doctrine of that era.[16] The other is a recent article by Abbe Gluck, who mentions severability in the course of exploring vertical choice of law for methods of statutory interpretation.[17] Given severability's importance, further work is needed to make sense of the doctrine's federal choice-of-law component as it has evolved to the present.

My thesis has three basic components. First, I argue that, historically, the U.S. Supreme Court had a generally coherent answer to the question of whether federal or state law governs for state statutes in federal court. From the 1940s to 2006 the Court explicitly and consistently followed a single rule: The law of the sovereign whose statute is at issue determines severability. While the doctrine certainly evolved over time, that evolution closely tracked the deeper, tectonic shifts in doctrine and theory that accompanied the Court's movement from *Swift v. Tyson* to *Erie Railroad Co. v. Tompkins*.

Second, I argue that the Supreme Court effectively rejected its post-*Erie* doctrine through a combination of recent cases—the 2006 decision of *Ayotte v. Planned Parenthood of Northern New England*,[18] the 2010 decision of

13. Gans, *supra* note 3, at 651.

14. *See, e.g.*, Gans, *supra* note 3, at 688–90 (urging adoption of a test focused on the extent to which rewriting is necessary to save the statute, rather than on legislative intent); Nagle, *supra* note 3, at 206 (proposing the resolution of severability questions in accordance with general rules of statutory construction); Shumsky, *supra* note 3, at 272 (arguing that courts should sever partially unconstitutional statutes absent a clear congressional directive to the contrary); Walsh, *supra* note 3, at 777–93 (advocating "displacement without inferred fallback law" as a new approach to severability).

15. *See supra* note 3.

16. Stern, *supra* note 3, at 107.

17. *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1950 & n.199 (2011) (suggesting that federal courts rarely consider state law in determining whether to sever state statutes).

18. 546 U.S. 320 (2006).

Free Enterprise Fund v. Public Co. Accounting Oversight Board,[19] and the 2012 decision in *National Federation of Independent Business v. Sebelius*.[20] In contravention of an overwhelming number of post-*Erie* severability decisions, *Ayotte* unmistakably created federal severance guidelines for state statutes in federal court.[21] And in tension with *Erie*'s declaration that there is no general federal common law, *Free Enterprise Fund* and *National Federation of Independent Business* applied *Ayotte* to sever parts of federal statutes.[22] Together, these decisions suggest that the state or federal nature of a statute under review is irrelevant to the source of severance doctrine in federal court, and that that source is always general federal common law. This choice-of-law rule raises serious questions about the extent to which there are consistent and discernable limits on federal courts' common lawmaking powers.

For a clearer view of these first two components of the thesis, it is helpful to view the history of the Court's severability jurisprudence as an evolution that breaks down into four stages. In Stage 1, which spanned from the late 1800s to the early 1900s, the Court adjudicated severance questions without regard to whether the underlying statute was state or federal, and without relying upon available state court precedent. In doing so, the Court operated on what I will call the "transcendence premise"[23]—the idea that judges did not make law, but instead discovered and applied broadly applicable a priori principles that transcended jurisdictional lines and thus obviated the need to examine and follow precedent from any particular state courts. In Stage 2, which spanned from the early 1900s to the Supreme Court's decision in *Erie*, the transcendence premise began to falter due to the increasing influence of positivism on the Court and the proliferation of severability clauses in state statutes.[24] The Court responded by beginning to treat the severability of these statutes as a question of state law. In Stage 3, which spanned from *Erie* to *Ayotte*, the Court generally adhered to *Erie*-inspired choice-of-law rules by applying a federal common law of severability to federal statutes, and applicable state rules to state statutes. Finally, Stage 4 begins with *Ayotte* and extends to the decision's recent

19. 130 S. Ct. 3138 (2010).

20. 132 S. Ct. 2566 (2012).

21. 546 U.S. at 329–30.

22. *Free Enter. Fund*, 130 S. Ct. at 3161; *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2607–08, 2641–42.

23. This premise was closely related to the so-called declaratory theory of the law, commonly associated with Blackstone. *See infra* notes 30–31 and accompanying text.

24. *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 67–68, 78–79 (2000) ("By the beginning of the twentieth century the jurisprudential assumptions underlying the declaratory theory of law and attributed to *Swift* were subject to intense theoretical criticism."). *See generally* William R. Casto, *The* Erie *Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907 (1988) (discussing the decline of the declaratory theory and its replacement by positivism).

consequences in the lower courts. In *Ayotte*, the Court suddenly reverted to its pre-*Erie* approach of supplying a single federal rule for federal and state statutes alike. Although few have noticed, a significant number of lower courts have begun to apply *Ayotte* to state statutes notwithstanding the widespread availability of competing state law doctrines. It is conceivable that the Court adopted this new doctrine to protect its stated preference for as-applied challenges. But whatever the rationale, the result has been quiet displacement of a traditional area of state common law with new federal common law.

As the last component of the thesis, I argue for an improvement upon the recent doctrine. The improvement is to hold that the severability of a state statute is a question of state law, subject to a potential Article III override reflecting inherent limits on federal courts' powers to engage in the legislative function of statutory revision. The override would displace an applicable state law severability test where application of the test would require statutory revision in a fashion that exceeds the bounds of federal judicial power. But where the override triggers, federal courts would have a specific mandate in enacted constitutional text, and thus justification under *Erie*, for declining to apply the relevant state law. Such an approach would reconcile the Stage 3 precedent, *Ayotte*'s apparent concern for limits on the remedial powers of federal courts, and the demands of judicial federalism.

This Article proceeds as follows. Part II lays out the historical evolution based on a comprehensive assessment of the decisions in which the Supreme Court explicitly decided the severability of a state statute. These decisions show that the choice-of-law component of the Court's severability doctrine was generally consistent with *Swift* and rules of federal equity during Stages 1 and 2, and with *Erie* in the post-*Erie* period of Stage 3. Part III argues that while the jurisprudence of prior stages was doctrinally justifiable in historical context, the Stage 4 cases of *Ayotte* and its progeny are not. Specifically, the new cases are inconsistent with the long line of Stage 3 precedent that held the severability of a state statute to be a matter of state law. And the new cases are hard to reconcile with standard accounts of *Erie*. Part IV then reflects on Stage 4's implications, which include the rise of a general common law of severability that applies broadly to both state and federal enactments; severability-based forum shopping; uncertainty for legislators about the standard that will govern the severability of state statutes, and in turn about how to craft severable statutes; and the possibility of a federal common law with few real limits. Part V describes and justifies the proposed alternative to the recent doctrine—the contingent Article III override.

II. Severability's Choice-of-Law Evolution

In this Part, I examine the historical development of choice-of-law rules for severability in the U.S. Supreme Court. This history shows that the

Court's contemporary approach of deciding the severability of state statutes as a matter of federal common law is new in its departure from decades of post-*Erie* precedent, but also old in its similarity to a method of common lawmaking under *Swift*.

A. Stage 1: Severability Under the Transcendence Premise

Stage 1 begins in the era of *Swift* itself, which was decided in 1842.[25] In *Swift*, as one will recall, the Supreme Court held that a federal court sitting in diversity and adjudicating an action at law could announce "general" commercial law on subjects that were neither addressed by existing state statutes nor "local" in nature.[26] Otherwise, the court was to apply state law.[27] Some have argued that the original *Swift* decision empowered federal courts to "find" general law only in the limited sense that it empowered those courts to discern freely the agreements—and thus the legally binding obligations—of parties to commercial transactions.[28] But whatever its original scope, federal courts applied the decision in the ensuing decades to justify federal declarations of general principles on "most common law subjects."[29] In part because of the liberality of this application, *Swift* "has been regularly identified as expressing the so-called 'declaratory' theory of law."[30] According to this theory, commonly associated with Blackstone, the common law was a single body of freestanding and objectively discernable legal principles rather than the command of a sovereign, and the task of judges

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25. 41 U.S. (16 Pet.) 1 (1842).

26. *Id.* at 18–19; *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 245–52 (1977) (explaining *Swift* and its consequences); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 899–902 (1986) (same).

27. *Swift*, 41 U.S. (16 Pet.) at 18–19.

28. RANDALL BRIDWELL & RALPH U. WHITTEN, THE CONSTITUTION AND THE COMMON LAW 1–6 (1977); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1400–02 (1997).

29. TONY ALLAN FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY 55–56, 111 (1979); PURCELL, *supra* note 24, at 51–52; Casto, *supra* note 24, at 914 ("*Swift* might have been restricted to matters of commercial law, but subsequent courts viewed the doctrine as virtually limitless."); *see also* TONY ALLAN FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM 47–58 (1981) (discussing the expansion of the *Swift* doctrine). Indeed, the breadth of *Swift*'s application was one of the focal points of the Court's critique of *Swift* in *Erie*. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 75–76 (1938) (criticizing *Swift* in part because of the "broad province accorded to the so-called 'general law' as to which federal courts exercised an independent judgment").

30. HORWITZ II, *supra* note 81, at 245. Whether *Swift* itself operated on the premise of the declaratory theory, or instead acquired that interpretation because of subsequent case law, has been a subject of debate. *Compare* PURCELL, *supra* note 24, at 51 ("*Swift* seemed to rely on what was called the 'declaratory' theory of law, the idea that the common law consisted of principles existing independently of judicial decisions. In that view, the role of judges was to find, declare, and apply those preexisting principles to new fact situations."), *and* Casto, *supra* note 24, at 912–14 ("*Swift*'s intellectual antecedents are easily traced to William Blackstone's *Commentaries*."), *with* BRIDWELL & WHITTEN, *supra* note 28, at 1–9 (acknowledging that the declaratory-theory interpretation of *Swift* was the interpretation that *Erie* overturned, but also arguing that that interpretation had been a product of decisions that extended *Swift* far beyond its original holding after approximately 1860).

was to discover and apply these principles to new contexts.[31] Because judges of different sovereigns were by presumption equally capable of making such discoveries, it followed that the pronouncements of state courts were not binding on federal courts.[32] The effect of the declaratory-theory interpretation of *Swift* was to empower federal courts to articulate transcendent principles of general law without regard to existing state common law.

In the late nineteenth century, during the middle of the *Swift* era, and as cases explicitly addressing severability began to emerge,[33] the Supreme Court approached the topic as a subject of general common law in numerous cases addressing the validity of state statutes and local ordinances. *Packet Company v. Keokuk*[34] provides an early illustration. There, the issue was whether a provision in a Keokuk, Iowa ordinance unconstitutionally restrained interstate commerce by imposing fees on steamboats for use of the town's wharves on the Mississippi River.[35] The Court concluded that although a party might justifiably challenge the constitutionality of other parts of the ordinance in subsequent litigation, the fees were constitutional.[36] The likely unconstitutionality of the other parts, moreover, posed no risk to the fees provision because they were severable: "Statutes that are constitutional in part only, will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are severable. We think a severance is possible in this case."[37] While it seems premature for the Court to have addressed severability without having held any part of the ordinance unconstitutional, the important point is that the Court articulated a severability doctrine for a local ordinance, and did so only by reference to general principles. And *Keokuk* was not an outlier in this regard. In several subsequent cases, the Court relied upon *Keokuk* as establishing a general doctrine applicable to state statutes.[38]

Supervisors v. Stanley,[39] decided four years after *Keokuk* in 1881, offers another example. There, the issue was whether a New York statute was void in its entirety, given that one of its applications taxed shares of national banks at a higher rate than other capital of citizens of the state in violation of

31. *See* ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 23–30 (1998).

32. Casto, *supra* note 24, at 912–13.

33. The Court began to explicitly address severability questions at a time when legislation was emerging as an important source of law in America, with questions of statutory interpretation receiving greater attention than ever before from treatises and courts. *Cf.* WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 59–63 (1999) (describing the emerging importance of state and federal legislation in the late nineteenth century).

34. 95 U.S. 80 (1877).

35. *Id.* at 84.

36. *Id.* at 88–89.

37. *Id.* at 89.

38. For examples of this trend, see Kimmish v. Ball, 129 U.S. 217, 222 (1889); Presser v. Illinois, 116 U.S. 252, 263 (1886); and Penniman's Case, 103 U.S. 714, 716–17 (1880).

39. 105 U.S. 305 (1881).

an act of Congress.[40] By 1881, New York courts had already issued a series of opinions on severance.[41] But the Court ignored this precedent. Instead, *Stanley* cited exclusively to the Court's own decisions in concluding that the invalid application did not undermine the validity of the rest of the statute.[42] The Supreme Court followed the same approach to severability questions involving state statutes in multiple other cases around this time,[43] and the effect was to limit the ability of states to dictate the principles by which courts would evaluate state enactments.

On top of declining to apply state law, the Court showed little solicitude for state sovereignty or federalism in declaring the content of the general doctrine. The Court applied the same test to federal and state statutes alike. In addressing the severability of part of a Virginia statute in *Poindexter v. Greenhow*,[44] for example, the Court relied upon the *Trade-Mark Cases*,[45] which addressed the severability of certain provisions of the federal Patent Act of 1870.[46] And in addressing the severability of part of a federal criminal statute in *Baldwin v. Franks*,[47] the Court relied in part upon *Poindexter* and *Allen v. Louisiana*,[48] both of which concerned state statutes.[49]

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40. *Id.* at 311.

41. *See, e.g.*, *In re* Roberts, 81 N.Y. 62, 68 (1880) (severing part of an 1861 statute establishing the New York Board of Revision and Assessment); *In re* Ryers, 72 N.Y. 1, 6 (1878) (severing part of the General Drainage Act); Wynehamer v. People, 13 N.Y. 378, 440 (1856) (Selden, J., concurring) (declining to sever provisions of an "act for prevention of intemperance, pauperism and crime"); *In re* De Vaucene, 31 How. Pr. (n.s.) 289, 343–45 (1866) (severing part of a New York statute related to the sale of liquor without a license).

42. *Stanley*, 105 U.S. at 312–15.

43. *See, e.g.*, Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 395–96 (1894) (severing a portion of a state statute without citing to state case law); Little Rock & Fort Smith Ry. v. Worthen, 120 U.S. 97, 102 (1887) (same); Spraigue v. Thompson, 118 U.S. 90, 94–95 (1886) (declining to sever a portion of a state statute without citing to state case law); Poindexter v. Greenhow, 114 U.S. 270, 304–06 (1885) (declining to sever a portion of a state statute while citing only federal case law); Supervisors v. Stanley, 105 U.S. 305, 312–15 (1881) (severing a portion of a state statute while primarily citing to federal case law); R.R. Cos. v. Schutte, 103 U.S. 118, 142 (1880) (severing a portion of a state statute without citing to state case law); Allen v. Louisiana, 103 U.S. 80, 83–84 (1880) (discussing the severability of part of the Missouri city charter while citing to Massachusetts case law). In this regard, the Court's method of deciding severability appears to have mirrored its methods for deciding many other legal questions at the time. *See* Louise Weinberg, *Back to the Future: The New General Common Law*, 35 J. MAR. L. & COM. 523, 529 (2004) (describing the period as one where federal judges "ignor[ed] the case law of relevant states . . . upon such questions as the validity of a common contract or even a local mortgage").

44. 114 U.S. 270, 304–06 (1885).

45. 100 U.S. 82 (1879).

46. *Id.* at 92, 99.

47. 120 U.S. 678 (1887).

48. 103 U.S. 80 (1880).

49. *Baldwin*, 120 U.S. at 688–89 (referring to *Poindexter* as the "*Virginia Coupon Cases*"); *Poindexter*, 114 U.S. at 274 (reviewing the constitutionality of a Virginia statute); *Allen*, 103 U.S. at 83 (reviewing the constitutionality of a Missouri statute).

Perhaps the most extreme precedent was *Spraigue v. Thompson*,[50] where the Court went so far as to reverse a state ruling on the severability of a state statute. The case concerned the validity of a Georgia statute that imposed piloting fees upon ship commanders who traveled to Georgia from any state other than South Carolina or Florida.[51] Having been assessed the fee, the *Spraigue* defendants argued that its authorizing provision discriminated between ports in violation of an act of Congress and was therefore invalid.[52] The Georgia Supreme Court agreed, severed the discriminatory provision, and concluded that the defendants were still liable for payment.[53] But *Spraigue* in turn reversed this decision and held that the entire statute must fall because the discriminatory provision was not severable.[54] *Spraigue* did so, moreover, without citation to supporting authority and based upon a unique federal doctrine.[55] Whereas the Georgia court had granted severance primarily based on the separability of the invalid text from the rest of the statute,[56] *Spraigue* denied severability by focusing exclusively on legislative intent.[57]

To be clear, state court precedent was not completely irrelevant. Early on, the Court relied upon a severability test articulated by the Massachusetts Supreme Court in *Warren v. Mayor & Aldermen of Charlestown*[58] to formulate its own doctrine.[59] Not once, however, did the Court defer to a state rule. In establishing the basic contours of the general doctrine, the Court reserved for itself the role of final arbiter.

The primary effect of the Court's early cases was to create a substantial federal overlap of existing state common law severability rules. This overlap appears to have influenced the manner in which state courts understood and applied their own doctrines. In many cases, the influence took the form of state courts citing to U.S. Supreme Court precedent for support.[60] Less frequently, the Court's precedent displaced applicable state common law as

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50. 118 U.S. 90 (1886).

51. *Id.* at 93–94.

52. *Id.* at 94.

53. *Id.*

54. *Id.* at 94–95.

55. *Id.* at 95.

56. Thompson v. Spraigue, Soulle & Co., 69 Ga. 409, 424 (1883).

57. 118 U.S. at 94–95.

58. 68 Mass. (2 Gray) 84 (1854).

59. *See id.* at 89–99 (articulating the test); Int'l Textbook Co. v. Pigg, 217 U.S. 91, 113 (1910) (citing to *Warren*); Berea Coll. v. Kentucky, 211 U.S. 45, 55 (1908) (same); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 635 (1895) (same); Allen v. Louisiana, 103 U.S. 80, 84 (1880) (same).

60. *See, e.g.*, City of Newport v. Horton, 47 A. 312, 312–13 (R.I. 1900) (citing to *Keokuk*); Gorman v. Bepler, 4 Ohio N.P. 241, 242–43 (Ohio Ct. Com. Pl. 1897) (citing to Supreme Court cases); State v. Gerhardt, 44 N.E. 469, 477 (Ind. 1896) (same); *In re* Wong Hane, 41 P. 693, 694 (Cal. 1895) (same); People *ex rel.* Carter v. Rice, 20 N.Y.S. 293, 295 (N.Y. 1892) (same); Rothermel v. Meyerle, 20 A. 583, 587–88 (Pa. 1890) (same); Lane v. Bd. of Cnty. Comm'rs, 13 P. 136, 140 (Mont. 1887) (citing to *Keokuk*).

the primary authority on which courts relied. In Rhode Island, for example, state courts had decided the severability of state statutes on several occasions before the U.S. Supreme Court developed any significant precedent on the issue.[61] And yet once the Court began to develop a general doctrine, Rhode Island courts relied upon the federal precedent.[62] In this sense, the overlap was significant because it gave the federal courts significant influence over the doctrine's ongoing evolution in state courts.

The overlap was also significant because it manifested in the lower federal courts. Unsurprisingly, these courts followed the Supreme Court's method for deciding severability questions pertaining to state statutes.[63] The effect was to limit further the influence of state doctrine and create the potential for divergent outcomes depending on whether litigants used a state or federal forum.

Given these effects, one might fairly wonder whether the Court was doctrinally justified in utilizing the Stage 1 method. For several reasons, I think the answer is yes. First, during this period, severability was the type of issue that the Court could, in at least some cases, decide as a matter of general common law pursuant to *Swift*.[64] State statutes on the subject were rare and did not become common until the early twentieth century, over a half century after *Swift* was decided.[65] The doctrine, moreover, was not a matter of "local"—as opposed to "general"—law. Whereas local law typically covered matters pertaining to real or personal property, severability concerned the unrelated question of how to remedy a statute's partial unconstitutionality.[66] Additionally, while *Swift* established a federal judicial power only to find general "commercial" law, subsequent reliance on the

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61. *See* State v. Paul, 5 R.I. 185, 195 (1858) (severing an invalid provision from the remainder of a valid act); State v. Copeland, 3 R.I. 33, 36–37 (1854) (same); State v. Snow, 3 R.I. 64, 70 (1854) (same).

62. *See, e.g.*, *City of Newport*, 47 A. at 312–13 (citing only to *Penniman's Case* and *Keokuk* to decide the severability of part of a state statute).

63. *See, e.g.*, S. Pac. Co. v. Bd. of R.R. Comm'rs, 78 F. 236, 258 (N.D. Cal. 1896) (citing to Supreme Court precedent in holding an invalid part of the California constitution to be severable); Levis v. City of Newton, 75 F. 884, 895 (S.D. Iowa 1896) (citing Supreme Court precedent in holding the invalid portion of a local ordinance to be severable); *Ex parte* Kinnebrew, 35 F. 52, 56–57 (N.D. Ga. 1888) (following Supreme Court severability precedent in reviewing a Georgia state statute).

64. *Loeb v. Columbia Township Trustees* illustrates the type of analysis that *Swift* authorized. *See* 179 U.S. 472, 487–90 (1900) (deciding a severability question in a diversity suit seeking payment on municipal bonds).

65. Nagle, *supra* note 3, at 222 ("The first severability clauses appeared in the late nineteenth century, and they became much more common around 1910."); Note, *Effect of Separability Clauses in Statutes*, 40 HARV. L. REV. 626, 626 (1927) ("[Severability clauses] seem to have come into vogue about 1910 . . . .").

66. Comment, *What Is "General Law" Within the Doctrine of* Swift v. Tyson*?*, 38 YALE L.J. 88, 94 (1928) ("The only consistency to be found [regarding the distinction between general and local law] is in the field of real and personal property, so-called 'rules of property' being considered binding on the federal courts as local questions.").

decision as justification for general law in a variety of contexts[67] paved the way for a general law of severability. Further, severance questions could arise in diversity cases because the courts used diversity jurisdiction to decide federal constitutional questions prior to and shortly after the advent of federal question jurisdiction in 1875.[68] And federal courts could properly decide severance questions in cases at law or in equity: A court makes a finding for or against severability for the purpose of determining the scope of a declaration on a statute's invalidity. For this reason, a severability ruling often precedes declaratory judgment—a remedy that has historically been available in both types of civil proceedings.[69] Although *Swift* originally applied only to actions at law, the Court extended the doctrine to cases in equity only a few years later in 1851.[70]

In cases where the Court's Stage 1 doctrine was not justifiable even as a liberal application of *Swift*, it was alternatively permissible under then-current rules of equity. Prior to the promulgation of the Federal Rules of Civil Procedure in 1938, federal courts operated under a bifurcated procedural framework that permitted the adjudication of matters of law and equity only in separate actions.[71] If, for example, a plaintiff sought money damages and injunctive relief in a challenge to a statute's constitutionality, he or she would have had to file two separate federal actions—one at law for damages, and one in equity for the injunction. Under this framework, federal equity was "a 'special system' of federal jurisprudence" "wholly independent of state law" on matters such as remedies.[72] Federal courts would apply independent federal principles to decide the availability of injunctive relief,

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67. *See supra* note 29.

68. Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 89–92 (1997); *see also, e.g.*, *Loeb*, 179 U.S. at 477 (reviewing a constitutional challenge to an Ohio statute in a diversity suit).

69. *See, e.g.*, Liberty Warehouse Co. v. Grannis, 273 U.S. 70, 71 (1927) (discussing a Kentucky statute that provided for declaratory judgments "by means of a petition on the law or equity side of the court"); *see also* William H. Wicker, *Declaration of Rights Without Consequential Relief*, 11 TENN. L. REV. 217, 218–19 (1933) ("In 1883 a Supreme Court Rule adopted under the [English] Judicature Act of 1873 broadened the basis of declaratory relief by making it applicable to both equity and law courts . . . ."); Edson R. Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment*, 16 MICH. L. REV. 69, 75 (1917) ("For thirty-five years the English courts have exercised . . . jurisdiction, both at law and in equity, of advising parties as to their rights, with or without coercive relief at the option of the parties.").

70. *See, e.g.*, Russell v. Southard, 53 U.S. (12 How.) 139, 147–48 (1851) (extending the doctrine).

71. Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 42 (1951).

72. PURCELL, *supra* note 24, at 75; *see also* Kristin A. Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 274–80 (2010) (explaining the uniform system of federal equitable remedies); Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1138–40 (1969) (describing this jurisprudence as the "counterpart of the system of 'general law' that was administered in suits at common law in accordance with . . . *Swift*"); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 469–70 (2003) (discussing the development of the separate body of federal equity jurisprudence).

for example, even where cases arose in diversity, reviewed standard common law claims, and involved a state with a developed remedial standard of its own.[73]

Severability was an issue that federal courts could properly decide independently of state law within this separate system of equity.[74] Severance commonly preceded and informed the scope of a declaratory judgment,[75] a remedy that was, historically, more closely associated with courts of equity. The High Court of Chancery became the first English court to hold the power to issue declaratory judgments in the 1850s, and in ensuing decades decided requests for such relief in a large percentage of its cases.[76] In some of these the Chancery Court even issued declarations concerning the "validity or invalidity . . . of statutory and administrative rules and orders."[77] American commentators also frequently referred to declaratory relief as equitable in nature.[78]

Finally, regardless of whether *Swift* or rules of federal equity applied, the announcement and application of general severability principles drew support from the transcendence premise.[79] By the late 1800s, the declaratory theory was well past its heyday in America.[80] Many scholars and lawyers had long since rejected its assertion that the common law embodies natural law as an independent realm of a priori principles and logic.[81] The Court, however, did not necessarily accept these critiques. In fact, a fair reading of precedent from the period suggests that the Court continued to rely on some

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73. *See* Pa. R.R. Co. v. St. Louis, Alton & Terre Haute R.R. Co., 118 U.S. 290, 298–306 (1896) (deciding the availability of injunctive relief in a diversity action in equity without reference to state law); Baker v. Pottmeyer, 75 Ind. 451, 458 (1881) (declining to issue an injunction where a different remedy would have afforded "appropriate as well as prompt relief").

74. *Reagan v. Farmers' Loan & Trust Co.* illustrates this category of precedent. *See* 154 U.S. 362, 395–96 (1894) (holding, in an action in equity, that the unconstitutional portions of a Texas statute were severable).

75. *See supra* note 69 and accompanying text.

76. EDWIN BORCHARD, DECLARATORY JUDGMENTS 215–19 (2d ed. 1941); Edwin M. Borchard, *The Supreme Court and the Declaratory Judgment*, 14 A.B.A. J. 633, 634–35 (1928).

77. Borchard, *supra* note 76, at 635; *see also* Oleck, *supra* note 71, at 24 (noting that statutory interpretation was a matter of equity).

78. *E.g.*, Edwin M. Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 YALE L.J. 1, 30 (1918).

79. *See* PURCELL, *supra* note 24, at 52, 57–63 (illustrating how the concept of "general law" under *Swift* influenced the manner in which the Court interpreted the Constitution and enabled the Court to declare general principles in cases that did not arise out of federal diversity jurisdiction).

80. *See* Horwitz, *supra* note 26, at 30 ("By 1820 the legal landscape in America bore only the faintest resemblance to what existed forty years earlier. . . . Law was no longer conceived of as an eternal set of principles expressed in custom and derived from natural law.").

81. *See* HORWITZ, *supra* note 26, at 1–3 (explaining that the emergence of an instrumental concept of law in the early nineteenth century placed emphasis on law as a policy instrument and allowed judges to create legal doctrine with the goal of fostering social change); SEBOK, *supra* note 31, at 83–103 (discussing the rejection of Blackstonian transcendentalism by legal formalists). *But see* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 119 (1992) [hereinafter HORWITZ II] (explaining that, even in the late 1800s, a declaratory theory of law was still essential to "all orthodox defenses of the common law").

form of transcendence paradigm in a variety of contexts. In *Pana v. Bowler*,[82] for example, the Court rejected an Illinois state court decision that had held that, as a matter of state law, bonds issued pursuant to a procedurally irregular local election are void even in the hands of bona fide holders.[83] In refusing to follow the state decision, the Court explained that the bond question fell among the "general principles and doctrines of commercial jurisprudence, upon which it is our duty to form an independent judgment, and in respect of which we are under no obligation to follow implicitly the conclusions of any other court, however learned or able it may be."[84] In *Baltimore & Ohio Rail Co. v. Baugh*,[85] the Court addressed whether one employee was precluded on the basis of the fellow-servant rule from recovering from his employer for injuries caused by another employee's negligence.[86] Concluding that the question was one of general law because it "rest[ed] upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law,'"[87] the Court proceeded to reject the state court's fellow-servant rule and hold as a matter of general law that the injured employee could not recover.[88] In these cases, the Court appears to have been "finding" law, not in the limited sense of merely discerning the agreements and, in turn, the legally binding obligations of transacting parties, as *Swift* itself arguably did,[89] but rather in the more extraordinary sense of discerning general principles without reference to a particular positive source. The general law rested on "gathered" principles of "right and justice" because it was coincident with a preexisting natural law, and the federal judiciary possessed authority to exercise "independent judgment" in discerning them because the principles did not belong to any particular sovereign who could claim a unique capacity for their identification and exposition.[90] Other cases of the period similarly appear to have rested on this view.[91]

Given the Court's apparent embrace of this theory in these decisions, the contemporaneous announcement of a general law of severability is unsurprising. By characterizing common law principles as existing independent of the command of a federal or state sovereign, and by

82. 107 U.S. 529 (1882).
83. *Id.* at 540–41.
84. *Id.* at 541.
85. 149 U.S. 368 (1893).
86. *Id.* at 370.
87. *Id.* at 378.
88. *Id.* at 378–79, 389–90.
89. *See supra* note 28.
90. *Baugh*, 149 U.S. at 371, 378.
91. *See, e.g.*, Smith v. Alabama, 124 U.S. 465, 478 (1888) (describing the "independent though concurrent jurisdiction of federal courts," which requires them to "ascertain and declare the law according to their own judgment"); Burgess v. Seligman, 107 U.S. 20, 32–34 (1883) (declaring that federal courts are "bound to exercise their own judgment as to the meaning and effect of [state] laws"); *see also* Casto, *supra* note 24, at 912–18 (discussing the Blackstonian premise of *Swift*).

presuming the Supreme Court to be just as capable as any state court at discovering them, the transcendence premise would have rendered unnecessary any form of vertical choice-of-law analysis on the severability of state statutes. Citing to state courts would have been to rely upon tribunals with no greater authority or capacity for doctrinal discovery than the Court itself.

In summary, Stage 1, which ranged from the mid-1800s to approximately the turn of the century, was a period in which the Supreme Court uniformly treated severability doctrine as a matter of general common law. The evidence of this treatment is that the Court adjudicated the severability of dozens of state statutes in accordance with a uniform set of general principles that applied to federal and state statutes alike, and that the Court discerned without adherence to existing state precedent. The Supreme Court's cases created a substantial federal overlap that influenced the subsequent development of doctrine in the state courts while limiting the ability of states to control the severability of their own statutes. But the Court's methodology was not without justification, as *Swift v. Tyson*, rules of federal equity, and theory of a transcendent source of law each provided support.

B. Stage 2: Anti-Transcendence on the Court at the Turn of the Century

Stage 2 spans from approximately the start of the twentieth century to immediately before the Supreme Court's 1938 decision in *Erie*, and marks the beginning of the end for Stage 1's doctrinal and theoretical foundations. During this period, the Court continued to apply the Stage 1 methodology of adjudicating severability independent of state law in a majority of its cases, but also began to express deference to state law rules in a growing number of decisions. Stage 2 was thus a period of instability, during which the Court began to move away from its old jurisprudence. This instability corresponded with the increasing influence of legal positivism on the Court and the proliferation of severability clauses in state statutes, both of which made it difficult for the Court to continue its Stage 1 methods: Positivism began to close off the theoretical safe haven that the transcendence premise had created, and the rise of severability clauses—a form of state statutory law—precluded an application of general common law under the holding of *Swift* itself. Nascent respect for state law was the period's defining characteristic.

To say that Stage 2 was a period of instability is not to say that the Court immediately discarded its old methodology. A majority of Stage 2 cases continued Stage 1's tradition of deciding the severability of state statutes without reliance upon state law.[92]

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92. *See* Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 513 (1937) (citing only federal precedent in deciding a severability question); Thompson v. Consol. Gas Utils. Corp., 300 U.S. 55, 81 (1937) (same); Carter v. Carter Coal Co., 298 U.S. 238, 312–17, 320–23, 334–38 (1936) (same

What distinguished the period was that alongside these cases, the Court began to defer to state rules in limited circumstances. Two separate deference doctrines emerged. The first required deference to state court rulings on the severability of specific state statutes. In *Gatewood v. North Carolina*,[93] for example, the Court explained that the allegedly unconstitutional provisions of a North Carolina statute were severable because a prior North Carolina Supreme Court ruling to that effect was "conclusive."[94] In *Berea College v. Kentucky*,[95] the Court similarly held that a Kentucky statute was severable in part because a state court had interpreted the statute as such.[96] Other decisions also expressed this rule.[97] These cases extended specifically to severability a preexisting federal doctrine of deference to state court interpretations of state statutes,[98] and departed

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save one citation); R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 361–62 (1935) (same); Champlin Ref. Co. v. Corp. Comm'n, 286 U.S. 210, 238 (1932) (same); Williams v. Standard Oil Co., 278 U.S. 235, 241–45 (1929) (same save one citation), *overruled on other grounds by* Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, 313 U.S. 236 (1941); Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 675 (1923) (citing no authority); Lemke v. Farmers Grain Co., 258 U.S. 50, 60 (1922) (citing only federal precedent); Bowman v. Cont'l Oil Co., 256 U.S. 642, 647–48 (1921) (same); Int'l Bridge Co. v. New York, 254 U.S. 126, 134 (1920) (same); Okla. Operating Co. v. Love, 252 U.S. 331, 338 n.1 (1920) (same); McFarland v. Am. Sugar Ref. Co., 241 U.S. 79, 87 (1916) (citing no authority); Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 565 (1902) (citing only federal precedent), *overruled on other grounds by* Tigner v. Texas, 310 U.S. 141 (1940).

93. 203 U.S. 531 (1906).

94. *Id.* at 543.

95. 211 U.S. 45 (1908).

96. *Id.* at 54–56 ("[W]hen a state statute is [interpreted as severable by a state supreme court,] this court should hesitate before it holds that the Supreme Court of the State did not know what was the thought of the legislature in its enactment.").

97. *See, e.g.*, Charles Wolff Packing Co. v. Ct. of Indus. Relations, 267 U.S. 552, 562 (1925) (describing the state court's decision on the issue as "conclusive"); Dorchy v. Kansas, 264 U.S. 286, 290–91 (1924) (same); Hallanan v. Eureka Pipe Line Co., 261 U.S. 393, 397 (1923) (characterizing severability as a "state question"); Hampton v. St. Louis, Iron Mountain & S. Ry. Co., 227 U.S. 456, 465 (1913) (deferring to the state court's decision on severability); Ky. Union Co. v. Kentucky, 219 U.S. 140, 152 (1911) (same); King v. West Virginia, 216 U.S. 92, 101 (1910) (same); Hammond Packing Co. v. Arkansas, 212 U.S. 322, 344 (1909) (same); Olsen v. Smith, 195 U.S. 332, 342 (1904) (same); W.W. Cargill Co. v. Minnesota, 180 U.S. 452, 465–67 (1901) (same); Chesapeake & Ohio Ry. Co. v. Kentucky, 179 U.S. 388, 394 (1900) (same); Tullis v. Lake Erie & W. R.R. Co., 175 U.S. 348, 353 (1899) (same); Noble v. Mitchell, 164 U.S. 367, 372–73 (1896) (same). *Noble* and *Tullis* appear to have been the first decisions in which the Court expressly deferred to a state court decision on the severability of a state statute. Technically, the dates of those decisions place them in Stage 1. It remains the case, however, that the development of this form of deference was in essence a Stage 2 phenomenon. *Noble* and *Tullis* were right on the cusp of the 1900s, and the Court issued a majority of the decisions that utilized this form of deference in the first few decades after the nineteenth century.

98. *See, e.g.*, *Berea Coll.*, 211 U.S. at 56 (citing *Tullis*); *see also* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 611 (1874) (establishing more generally that state court rulings on matters of state law are authoritative). Even as early as *Swift*, however, the Court had viewed state court interpretations of state statutes as "rules of decision" in diversity actions at law. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (explaining that "the positive statutes of the state, and the construction thereof adopted by the local tribunals," are rules of decision). In my view, the Court's failure to follow this rule even occasionally in severability cases until Stage 2 shows that *Swift* receives more blame than it deserves for the rise of general common law.

significantly from the Court's Stage 1 decision in *Spraigue*, which had gone so far as to reverse the Georgia Supreme Court's decision regarding a Georgia enactment.[99]

The second deference doctrine required the Court to apply state law severability rules where available. The Court foreshadowed this doctrine in *Loeb* and *Hamilton v. Brown*,[100] both of which appear to have relied on a mixture of general principles and precedent from relevant state courts to determine the severability of state statutes.[101] The most influential case, however, seems to have been *Guinn & Beal v. United States*,[102] which evaluated whether the Fifteenth Amendment invalidated two provisions of the Oklahoma Constitution, one imposing a general voter-literacy test and the other waiving the test for descendants of individuals entitled to vote before 1866.[103] The Court held that while the provision imposing the literacy test was constitutional, the second provision selectively waiving the test was not, and that both were void because the latter was unseverable.[104] As in so many other cases of the time, the analysis relied exclusively upon the Court's own precedent.[105] But *Guinn & Beal* was unique because it explained that the severability of provisions within a state enactment is "really a question of state law," to be decided by the Court according to the general doctrine only "in the absence of any decision on the subject by the Supreme Court of the State."[106] Thus, although the Court applied a federal severability test, it did so simply because there was no Oklahoma alternative. For the first time, the Court explicitly framed severance as a question of state law.

Guinn & Beal thus marked an important shift. Before the decision, the Court had routinely followed the Stage 1 practice of applying a general federal rule even where the courts of the relevant state had developed a competing rule.[107] Afterward, the Court relied upon the new doctrine in a

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99. Spraigue v. Thompson, 118 U.S. 90, 94–95 (1886); *see also supra* notes 50–58 and accompanying text.

100. 161 U.S. 256 (1896).

101. *See* Loeb v. Columbia Twp. Trs., 179 U.S. 472, 489–90 (1900) (relying on general principles and Ohio Supreme Court precedent); *Hamilton*, 161 U.S. at 274 (citing to U.S. and Texas Supreme Court precedent).

102. 238 U.S. 347 (1915).

103. *Id.* at 357.

104. *Id.* at 366–67.

105. *See id.* (ruling on severability without relying upon state law).

106. *Id.* at 366.

107. *Compare, e.g.*, S. Covington & Cincinnati St. Ry. Co. v. City of Covington, 235 U.S. 537, 549 (1915) (not citing to Kentucky severability doctrine in deciding the severability of part of a Kentucky statute), *with* Brown v. Moss, 105 S.W. 139, 141 (Ky. 1907) (applying Kentucky's rule); *compare* Ohio Tax Cases, 232 U.S. 576, 594 (1914) (not citing to Ohio's rule), *with* Metropolis v. City of Elyria, 23 Ohio C.C. (n.s.) 544, 545–46 (Cir. Ct. 1912) (applying Ohio's rule); *compare* Louisville & Nashville R.R. Co. v. Garrett, 231 U.S. 298, 311 (1913) (not citing to Kentucky's rule) *with Moss*, 105 S.W. at 141 (applying Kentucky's rule); *compare* S. Pac. Co. v. Campbell, 230 U.S. 537, 553 (1913) (not citing to Oregon's rule), *with* Kiernan v. City of Portland, 111 P. 379, 382 (Or. 1910) (applying Oregon's rule); *compare* Minn. Rate Cases, 230 U.S. 352, 380 (1913) (not citing to

series of actions at law. *Myers v. Anderson*,[108] for example, applied a federal test to a state enactment, but only after applying the *Guinn & Beal* choice-of-law rule to determine that a federal test was in fact appropriate.[109] Other decisions cited to *Guinn & Beal* for similar purposes.[110]

The pro-state shift to which *Guinn & Beal* contributed, however, remained incomplete during Stage 2 because of the lingering independence of federal equity. Apparently relying on the circumstance that the *Guinn & Beal* cases all involved actions at law, the Court continued to apply general severability rules in equity cases throughout Stage 2 even when the relevant state had a competing rule.[111] In doing so, the Court implicitly cabined

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Minnesota's rule), *with* State v. Duluth Gas & Water Co., 78 N.W. 1032, 1034 (Minn. 1899) (applying Minnesota's rule); *compare* S. Pac. Co. v. City of Portland, 227 U.S. 559, 572–73 (1913) (not citing to Oregon's rule), *with Kiernan*, 111 P. at 382 (applying Oregon's rule); *compare* W. Union Tel. Co. v. City of Richmond, 224 U.S. 160, 172 (1912) (not citing to Virginia's rule), *with* Bertram v. Commonwealth, 62 S.E. 969, 971 (Va. 1908) (applying Virginia's rule); *compare* Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 65–67 (1910) (not citing to Minnesota's rule), *with Duluth Gas & Water Co.*, 78 N.W. at 1034 (applying Minnesota's rule); *compare* Grenada Lumber Co. v. Mississippi, 217 U.S. 433, 443 (1910) (not citing to Mississippi's rule), *with* State v. Jackson Cotton Oil Co., 48 So. 300, 301 (Miss. 1909) (applying Mississippi's rule); *compare* Sw. Oil Co. v. Texas, 217 U.S. 114, 120–21 (1910) (not citing to Texas's rule), *with* Proctor v. Blackburn, 67 S.W. 548, 550 (Tex. Civ. App. 1902) (describing the Texas rule); *compare* Int'l Textbook Co. v. Pigg, 217 U.S. 91, 113 (1910) (not citing to Kansas's rule), *with* Conklin v. City of Hutchinson, 70 P. 587, 588 (Kan. 1902) (applying Kansas's rule); *compare* Wilcox v. Consol. Gas Co., 212 U.S. 19, 53–54 (1909) (not citing to New York's rule), *with In re* De Vaucene, 31 How. Pr. (n.s.) 289, 344–45 (N.Y. Sup. Ct. 1866) (applying New York's rule). There appears to have been at least one decision before *Guinn & Beal* in which the Court applied its federal rule in the absence of a corresponding state rule, but such a practice was rare and, it seems, purely coincidental. *Compare* Diamond Glue Co. v. U.S. Glue Co., 187 U.S. 611, 617 (1903) (not citing to Wisconsin state law and instead applying a general rule), *with* State *ex rel.* Buell v. Frear, 131 N.W. 832, 836 (Wis. 1911) (describing a state rule for the first time in a reported decision by a Wisconsin court).

108. 238 U.S. 368 (1915).

109. *Id.* at 380–82.

110. *See, e.g.*, Dorchy v. Kansas, 264 U.S. 286, 289–91 (1924) (citing to *Guinn & Beal* for the proposition that a state court's decision on severability is conclusive); Schneider Granite Co. v. Gast Realty & Inv. Co., 245 U.S. 288, 290–91 (1917) (same). Still other decisions were consistent with *Guinn & Beal* even though they did not cite to the decision. *See, e.g.*, Liggett Co. v. Lee, 288 U.S. 517, 541 (1933) (remanding for a determination of severability by Florida state courts in accordance with Florida law); Weller v. New York, 268 U.S. 319, 325 (1925) (deciding the severability of a state statute without reference to state doctrine, where no such doctrine had been developed); Brazee v. Michigan, 241 U.S. 340, 344 (1916) (same).

111. *Compare* Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 513 (1937) (not applying Alabama's rule), *with* Yeilding v. State *ex rel.* Wilkinson, 167 So. 580, 594 (Ala. 1936) (applying Alabama's rule); *compare* Utah Power & Light Co. v. Pfost, 286 U.S. 165, 183–85 (1932) (not applying Idaho's rule), *with* Carlson v. Mullen, 162 P. 332, 333–34 (Idaho 1917) (explaining Idaho's rule); *compare* Williams v. Standard Oil Co., 278 U.S. 235, 241–43 (1929) (not applying Tennessee's rule), *with* Daniel v. Larsen, 12 S.W.2d 386, 387 (Tenn. 1928) (explaining Tennessee's rule); *compare* Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 675 (1923) (not citing to Rhode Island's rule), *with* State v. Copeland, 3 R.I. 33, 36–37 (1854) (explaining Rhode Island's rule); *compare* Lemke v. Farmers Grain Co., 258 U.S. 50, 60 (1922) (not citing to North Dakota's rule), *with* McDermont v. Dinnie, 69 N.W. 294, 296 (N.D. 1896) (explaining North Dakota's rule); *compare* Bowman v. Cont'l Oil Co., 256 U.S. 642, 647–48 (1921) (not citing New Mexico's rule), *with* State v. Brooken, 143 P. 479, 480 (N.M. 1914) (announcing New Mexico's rule); *compare* McFarland v. Am. Sugar Ref. Co., 241 U.S. 79, 87 (1916) (not citing to New Jersey's severability

Guinn & Beal and created a two-track approach of adherence and departure: (1) adhere to the Stage 1 jurisprudence by continuing to apply a general test in actions in federal equity regardless of whether there is a competing state test, and (2) depart from the Stage 1 jurisprudence by deferring to state court decisions on the severability of specific state statutes and, in actions at law, applying available state doctrine.

Two background changes correspond with this shift.[112] First, the transcendence premise that supported the Court's methodology during Stage 1 lost influence on the Court as Stage 2 progressed.[113] What we would now describe as "positivist" scholars and reformers had been criticizing the declaratory theory for a long time.[114] As early as the late eighteenth century, Austin and Bentham critiqued the theory's failure to recognize the potential for divergence between descriptive accounts of what the law is and prescriptive accounts of what it ought to be.[115] Later, in the nineteenth century, Holmes argued that any theory that failed to account for the contemporary policy decisions underlying most cases provided an inaccurate explanation of the process of judicial decision making.[116] And formalists such as Langdell and Beale rejected the notion of a transcendent source of law.[117]

But it was not until Stage 2, in decisions such as *Guinn & Beal*, that the Court began to operationalize these critiques in the context of severability. *Guinn & Beal* fit poorly with the notion of a transcendent, general law independently discernable by federal and state courts alike; if law were truly general in nature, there would have been no need for federal deference to the doctrines developed by courts from other jurisdictions, and the Court should have been able to disregard and even reject state court tests, as it had done in Stage 1. The decision fit better with a positivist paradigm: To conclude that

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rule), *with* Eastwood v. Russell, 81 A. 108, 110 (N.J. 1911) (applying New Jersey's rule); *compare* Phoenix Ry. Co. v. Geary, 239 U.S. 277, 282–83 (1915) (not applying Arizona's severability rule), *with* State ex rel. Gilmore v. High, 130 P. 611, 613 (Ariz. 1913) (explaining Arizona's rule).

112. To borrow Lawrence Lessig's taxonomy, the Court's response to these changes was an example of both nascent "structural translation" and "fact translation." Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 426–33 (1995).

113. *See* JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 47–50 (2010) (discussing the decline of the declaratory theory during the Progressive Era).

114. *See* Casto, *supra* note 24, at 922–25 (discussing nineteenth-century critiques of the declaratory theory by David Dudley Field, John Chipman Gray, and Holmes); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 596–98 (1958) (discussing nineteenth-century positivist critiques by Bentham and Austin).

115. *See* Hart, *supra* note 114, at 596–99 (discussing Austin's and Bentham's protests "against blurring the distinction between what law is and what it ought to be").

116. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 465–66 (1897) (arguing that behind the logic of a judicial decision "lies a judgment as to the relative worth and importance of competing legislative grounds" that is the "very root and nerve" of the decision).

117. SEBOK, *supra* note 31, at 83–103; *see also* Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2056–57 (1995) (explaining that "although legal positivism did not properly emerge as a major theory of law in America until . . . 1940, positivism had been playing a major role in shaping American jurisprudence since the late nineteenth century").

severability is "a question of state law" is to characterize that law as belonging to a particular sovereign, rather than existing independently, and to acknowledge that a choice of legal source must precede determination of the question itself.[118]

A likely explanation for the Court's nascent philosophical shift is a change in personnel. Several Justices with anti-transcendence views joined the Court during Stage 2. Most influential of these was Justice Holmes, who critiqued transcendence in a series of dissents following his appointment in 1902.[119] In *Kuhn v. Fairmont Coal Co.*,[120] he argued that *Swift* should be abandoned, and that state courts make rather than simply declare the law.[121] Later, in *Southern Pacific Co. v. Jensen*,[122] he famously asserted in a flair of positivism that the common law "is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified."[123] And in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,[124] he argued at length that the declaratory theory on which *Swift* was premised was a "fallacy and illusion," and that the common law does not exist apart from the rulings of state courts.[125] In each of these opinions, Justice Holmes was writing in dissent, but he was not alone. Justices White and McKenna concurred in the *Kuhn* dissent,[126] while Justices Brandeis and Clarke concurred in *Southern Pacific*,[127] and Justices Brandeis and Stone concurred in *Black & White Taxicab*.[128] Importantly, Holmes, Brandeis, Clarke, and Stone all joined the Court during Stage 2,[129] as did others with anti-transcendence inclinations.[130] Those inclinations complicated any continuation of the Stage 1 jurisprudence.[131]

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118. *See* James Audley McLaughlin, *Conflict of Laws: The New Approach to Choice of Law: Justice in Search of Certainty, Part Two*, 94 W. VA. L. REV. 73, 97 (1991) ("Choice of law presupposes legal positivism . . . .").

119. For a discussion of some of the nuances of Justice Holmes's positivism, see Patrick J. Kelley, *The Life of Oliver Wendell Holmes, Jr.*, 68 WASH. U. L.Q. 429, 437–39 (1990) (reviewing SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES (1989)).

120. 215 U.S. 349 (1910).

121. *Id.* at 370–71.

122. 244 U.S. 205 (1917).

123. *Id.* at 222.

124. 276 U.S. 518 (1928).

125. *Id.* at 532–35.

126. 215 U.S. at 372.

127. 244 U.S. at 255.

128. 276 U.S. at 536.

129. *See Members of the Supreme Court of the United States*, SUP. CT. U.S. (Oct. 10, 2012), http://www.supremecourt.gov/about/members_text.aspx (Holmes, 1902; Brandeis, 1916; Clarke, 1916; Stone, 1925).

130. *See, e.g.*, HORWITZ II, *supra* note 81, at 190 (discussing Cardozo's position that law "is not found, but made").

131. *Cf.* Casto, *supra* note 24, at 930 ("Although the error in *Swift* was perfectly obvious to legal positivists in 1885, 1893, 1910, and 1928, the profession in general, or at least a majority of the Supreme Court, adhered to the traditional doctrine. *Swift*'s dethronement did not take place until the Court's makeup became predominantly positivist.").

The second background shift was that states began to develop more substantial bodies of law on severability. State statutes with severance clauses began to proliferate.[132] Courts refined their common law tests.[133] Case law explaining severability principles was more voluminous, and judicial treatment of the topic was more thoughtful than ever before.[134] These developments corresponded with a rise in the importance of legislation generally—a change that included greater respect for statutory law and generated a substantial body of common law concerning statutory construction and application.[135] The effect was that cases before the Court were more likely to involve states with developed severability doctrines. Given an increasingly refined and codified alternative to general common law, the application of state law had become necessary even under *Swift* itself.

In sum, Stage 2 was a period of transition. The Court followed its Stage 1 method of applying general principles to decide the severability of state statutes in equity cases. In actions at law, however, it began to defer to specific state court severability rulings and to apply state law doctrines where available. This partial shift away from the Stage 1 methodology coincided with two background developments: personnel changes that placed several anti-transcendence Justices on the Court, and the development of more substantial bodies of relevant state law. These changes made it more likely

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132. *See* Nagle, *supra* note 3, at 222–23 ("The first severability clauses appeared late in the nineteenth century, and they became much more common around 1910."); Note, *Partial Unconstitutionality of Statutes—Effect of Saving Clause on General Rules of Construction*, 25 MICH. L. REV. 523, 523 (1927) ("In recent legislation it has become fairly common to incorporate so-called 'saving' clauses or sections."); Note, *Effect of Separability Clauses in Statutes*, *supra* note 65, at 626 ("[Severability clauses] seem to have come into vogue about 1910, and have been steadily increasing in popularity."). It appears that as a result of this proliferation, severability clauses became common features of legislation by at least the 1930s. *See, e.g.*, Colo. Nat'l Bank of Denver v. Bedford, 310 U.S. 41, 44 (1940) ("The usual separability clause is contained in the act."); Helvering v. Davis, 301 U.S. 619, 645 (1937) ("The usual separability clause is embodied in the act.").

133. *See, e.g.*, Castle v. Mason, 110 N.E. 463, 465 (Ohio 1915) ("It is impossible, therefore, to regard the act as a separate and distinct act and severable, and the inspection features must either fall or stand as a single pronouncement of legislative intent."); State *ex rel.* Monnett v. Buckeye Pipe-Line Co., 56 N.E. 464, 467 (Ohio 1900) ("It is quite familiar doctrine that in determining the constitutional validity of statutes their different provisions are not necessarily subject to the same conclusion."); Baltimore & Ohio R.R. Co. v. Kreager, 56 N.E. 203, 208 (Ohio 1899) ("[I]f that section should be held unconstitutional, it is distinct and severable from the other provisions of the act, and could not affect their validity."); State v. Sinks, 42 Ohio St. 345, 364–66 (Ohio 1884) ("[A]ssuming the proviso is void for that reason, 'it does not result from this that the whole statute is void: a part of a statute may be void from want of conformity with the constitution and the remainder valid.'"); City of Piqua v. Zimmerlin, 35 Ohio St. 507, 511–12 (Ohio 1880) ("If it be true that the second section, . . . is open to the objection stated, that circumstance does not affect the provisions of the first section, unless [they] are so connected . . . as to lead to the inference that the first section would not have been adopted without the second.").

134. For example, see the cases in the previous footnote.

135. *See* POPKIN, *supra* note 33, at 115–17 (explaining that "[t]wentieth-century legislation at both the state and federal levels had a vitality and scope that earlier legislation lacked" and that the early 1900s produced a "growing faith in a science of legislation").

that the Court would look to state law to determine severability by, respectively, favoring adjudication on the basis of a positive source of doctrine rather than general law, and making positive law more readily available and thus easy to apply in place of the general law.

C. Stage 3: Severability After Erie

Stage 3 spans from 1938 to immediately before the Court's 2006 decision in *Ayotte*.[136] During this period, the Court settled upon a single choice-of-law rule: The sovereign whose statute is at issue dictates the severability test.[137] Thus, where federal statutes were at issue, the Court applied a federal test,[138] and where state statutes were at issue the Court repeatedly treated severance as a question of state law.[139]

Leavitt v. Jane L.[140] stands out as the most robust illustration of the state law side of this approach. There, the Court reversed a Tenth Circuit decision that had held one portion of a Utah abortion statute to be unconstitutional and, under Utah law, unseverable.[141] Explaining that "[s]everability is of

136. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006).

137. *See* Dorf, *The Heterogeneity of Rights*, supra note 3, at 290–91 ("[S]everability is in turn a question of statutory construction, and in a challenge to a state law, state rather than federal principles of statutory construction govern.").

138. For examples of the Supreme Court's application of a federal test, see United States v. Booker, 543 U.S. 220, 246–48 (2005); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 190–92 (1999); Reno v. ACLU, 521 U.S. 844, 882–83 (1997); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 767–68 (1996); New York v. United States, 505 U.S. 144, 186–87 (1992); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 294 (1988); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 685–86 (1987); Regan v. Time, Inc., 468 U.S. 641, 653 (1984); INS v. Chadha, 462 U.S. 919, 931–35 (1983); Buckley v. Valeo, 424 U.S. 1, 108–09 (1976); Blanchette v. Conn. Gen. Ins. Corps., 419 U.S. 102, 136 (1974); Griffin v. Breckenridge, 403 U.S. 88, 104 (1971); Maryland v. Wirtz, 392 U.S. 183, 200 (1968); United States v. Jackson, 390 U.S. 570, 585–86 (1968); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 283 (1960); United States v. Harriss, 347 U.S. 612, 627 (1954); Lockerty v. Phillips, 319 U.S. 182, 189 (1943); Elec. Bond & Share Co. v. SEC, 303 U.S. 419, 438–39 (1938).

139. *See, e.g.*, Virginia v. Hicks, 539 U.S. 113, 121–22 (2003); Virginia v. Black, 538 U.S. 343, 367 (2003); Leavitt v. Jane L., 518 U.S. 137, 139 (1996); Fulton Corp. v. Faulkner, 516 U.S. 325, 347 (1996); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 785 n.1 (1995); U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 509 n.8 (1993); Wyoming v. Oklahoma, 502 U.S. 437, 459–61 (1992); Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612, 623–24 (1985); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 & n.15 (1985); Exxon Corp. v. Eagerton, 462 U.S. 176, 196–97 (1983); New York v. Ferber, 458 U.S. 747, 769 n.24 (1982); Zobel v. Williams, 457 U.S. 55, 64–65 (1982); City of New Orleans v. Dukes, 427 U.S. 297, 302 (1976); Sixty-Seventh Minn. State Senate v. Beens, 406 U.S. 187, 197–98 & n.9 (1972); Harrison v. NAACP, 360 U.S. 167, 178 (1959); Morey v. Doud, 354 U.S. 457, 469–70 & n.16 (1957), *overruled on other grounds by* City of New Orleans v. Dukes, 427 U.S. 297 (1976); Pollock v. Williams, 322 U.S. 4, 17 (1944); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 542–43 (1942); Allen-Bradley Local No. 1111, United Elec., Radio & Mach. Workers of Am. v. Wis. Emp't Relations Bd., 315 U.S. 740, 747–48 (1942); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); Watson v. Buck, 313 U.S. 387, 396–98 (1941); Reitz v. Mealey, 314 U.S. 33, 38–40 (1941), *overruled on other grounds by* Perez v. Campbell, 402 U.S. 637 (1971).

140. 518 U.S. 137 (1996).

141. *Id.* at 137–38.

course a matter of state law," the majority made clear that the Tenth Circuit had correctly looked to Utah law to decide severance.[142] But the Court also took the Tenth Circuit to task for misapplying Utah's doctrine, and then utilized that doctrine to hold that the statute was in fact severable.[143] In doing so, the Court demonstrated that it would apply state law to decide the severability of state statutes, as it had done several times before, and signaled a willingness to police the lower federal courts to ensure a correct application of that law.

The Stage 3 doctrine extended Stage 2's shift in favor of state law in several ways. First, while the Court had applied its own rules in federal equity cases during Stage 2, it began in Stage 3 to frame the severability of state statutes as a question of state law regardless of whether the underlying action was at law or in equity. In the 1941 case of *Watson v. Buck*,[144] for example, certain authors and publishers filed an action in federal district court to obtain an injunction against the enforcement of a Florida copyright statute.[145] A panel of district court judges held that part of the statute was invalid and unseverable, and that the entire statute must fall as a result, but the Court reversed this ruling.[146] Previously, because of the nature of the relief sought, the Court would have decided severance under its separate remedial rules for federal equity.[147] But rather than disregard state law, the Court in *Watson* reversed the district court entirely because the severability ruling misapplied Florida statutory and case law.[148] Far from irrelevant, state law was now determinative—even in federal equity.[149]

Second, in appeals from state courts, the Court extended the Stage 2 shift by developing a practice of remanding severability questions without any apparent regard for whether the state court had a pre-existing doctrine to apply.[150] The decision to remand in these cases not only declared, in effect,

142. *Id.* at 138–39.

143. *Id.* at 139–45.

144. 313 U.S. 387 (1941).

145. *Id.* at 394.

146. *Id.* at 395.

147. *See supra* notes 58–70 and accompanying text.

148. 313 U.S. at 395–97.

149. For other equity cases following the approach in *Watson*, see, for example, Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506–07 (1985) (reversing the Court of Appeals after determining that it did not follow Washington law on severability); Sixty-Seventh Minn. State Senate v. Beens, 406 U.S. 187, 197–98 & n.9 (1972) (concluding that the District Court erred in invalidating a reapportionment law in light of Minnesota's policy of statutory severability); and Reitz v. Mealey, 314 U.S. 33, 38–40 (1941) (affirming the District Court's interpretation of New York severability precedent), *overruled on other grounds by* Perez v. Campbell, 402 U.S. 637 (1971).

150. *See* Virginia v. Black, 538 U.S. 343, 363–67 (2003) (stating that the Virginia Supreme Court did not reach the issue of severability under Virginia law and leaving the question open for that court to decide); Davis v. Mich. Dep't of the Treasury, 489 U.S. 803, 818 (1989) ("The permissibility of either approach, moreover, depends in part on the severability of a portion of § 206.30(1)(f) from the remainder of the Michigan Income Tax Act, a question of state law within

that the severability of state statutes was a question of state law, but also that state courts were best equipped to decide the question. The decision to remand regardless of the preexistence or adequacy of state law further suggested that state courts were best equipped to decide even if they had never done so before.

Cases such as *Jane L.* and *Watson* illustrate the final way in which the Court extended the Stage 2 shift. Rather than merely defer to state court rulings on state statutes and apply state law where available, these decisions affirmatively enforced state law severability doctrines that had been, in the Court's view, misapplied by lower federal courts.[151] The Court would not only require the application of state law, but also ensure that the application was faithful.

These cases were a logical product of two important events in 1938: the Court's *Erie* decision[152] and the procedural merger of federal law and equity. In *Erie*, as one will recall, the Court overruled *Swift* on the ground that the Constitution does not authorize federal courts to exercise a general lawmaking authority, and held that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State," regardless of whether that law is statutory or judge made.[153] With the procedural merger of law and equity, federal courts began to adjudicate legal and equitable claims in single actions.[154]

Erie and the Stage 3 cases aligned in two ways. First, they aligned doctrinally. At the time, no precedent identified the severability of state statutes as a matter "governed by the Federal Constitution."[155] Nor was it a matter governed by "[a]cts of Congress."[156] Thus, under the understanding of *Erie* at the time, the severability of state statutes was to be a matter of state law in "any case."[157] The application of state law doctrines in federal equity cases, such as *Watson*, made sense under this framework because the distinction between law and equity no longer mattered to vertical choice-of-

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the special expertise of the Michigan courts."); City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 772 (1988) ("Severability of a local ordinance is a question of state law . . . . Accordingly, we remand this cause to the Court of Appeals to decide whether the provisions of the ordinance we have declared unconstitutional are severable, and to take further action consistent with this opinion.").

151. *See Leavitt*, 518 U.S. at 139–45 (reversing the Court of Appeals for misapplying Utah state law); *Watson*, 313 U.S. at 395–97 (reversing the district court for overlooking the purpose of the Florida legislature, given that the Florida Supreme Court's severability doctrine seeks to honor legislative intent).

152. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

153. *Id.* at 78. For a classic discussion of *Erie* and some common misconceptions about the decision, see John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974).

154. *See* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1044 (3d ed. 2010) (discussing the effects of the merger of law and equity).

155. *Erie*, 304 U.S. at 78; *see* Stern, *supra* note 3, at 91–93 (citing Supreme Court precedent for the proposition that state courts alone have the duty of construing state statutes).

156. *Erie*, 304 U.S. at 78.

157. *Id.*

law determinations. The procedural merger of law and equity in the same year as *Erie* and the Court's explicit extension of *Erie* to federal equity in 1945[158] confirmed as much. The remand cases also made sense: Once state law had become the source of doctrine, it made sense to remand where possible so that state courts could decide the issue themselves. And what we might call the "affirmative enforcement" cases of *Jane L.* and *Watson* made sense as efforts to reinforce *Erie* by ensuring a faithful federal application of state law.

Second, *Erie* and the Stage 3 jurisprudence aligned philosophically. *Erie* is widely understood as an embrace of legal positivism.[159] Similarly, the Court's severability jurisprudence was uniquely positivist during Stage 3 because it reflected an acute awareness of vertical choice-of-law questions and the aptitude of state courts to decide matters of state law. Severability was no longer a matter of general, transcendent common law, but instead a doctrine emerging in varying forms from specific sovereigns within the federal system.

The tidiness of the Stage 3 precedent should not be overstated, however. Notwithstanding the consistency of an overwhelming majority of decisions, and the alignment of those cases with the major jurisprudential developments of the period, a small number of cases disregarded state rules in deciding the severability of state statutes. Two of them concerned Establishment Clause challenges. In *Sloan v. Lemon*,[160] the Court held that a Pennsylvania statute violated the Establishment Clause by providing tuition reimbursements to parents of children attending private school because the statute included reimbursements for religious schools.[161] Citing to its own precedent, rather than Pennsylvania law, the Court further held that statutory text and legislative history precluded severance of the part concerning nonreligious schools.[162] Two years later, *Meek v. Pittenger*[163] decided the severability of a similar statute by relying on federal precedent rather than available state

158. *See* Guar. Trust Co. v. York, 326 U.S. 99, 111 (1945) ("To make an exception to [*Erie*] on the equity side of a federal court is to reject the considerations of policy which, after long travail, led to that decision.").

159. *See, e.g.*, Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1479–81 (1997) (stating that *Erie* embraced the positivist position that law is the product of human will and consists exclusively of sovereign commands); Casto, *supra* note 24, at 921–30 (describing legal positivist attacks on *Swift* before *Erie* and how these ideas caused the Court to overturn *Swift*); Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655, 1677 (2002) (reviewing JULES COLEMAN, THE PRACTICE OF PRINCIPLE (2001)) (describing the time of the Court's decision in *Erie* as the "zenith of positivism's practical importance" in American jurisprudence). *But see* Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 680–94 (1998) (arguing that there is insufficient evidence of a historical connection between positivism and *Erie*).

160. 413 U.S. 825 (1973).

161. *Id.* at 827–28.

162. *Id.* at 834.

163. 421 U.S. 349 (1975).

law.[164] Three other cases adopted the same methodology in holding that invalid portions of certain state laws restricting reproductive rights were unseverable.[165]

It is hard to reconcile these decisions with the remainder of the Stage 3 jurisprudence. In over twenty cases from the period, the Court made clear that state law controls for state statutes.[166] Those decisions pre- and post-dated the outliers. Those decisions, moreover, deferred to state law without regard to statutory subject matter. And the Court never attempted to reconcile the outliers, or even explain them. One could conceivably rationalize some of the decisions on the ground that they applied severability tests no different than those established by the relevant state courts.[167] Other decisions, however, utilized tests that were materially different.[168] Although doctrinally unsatisfying, the inconsistency may simply reflect lack of consideration by the Court, perhaps due to inadequate briefing by the parties. Or it may reflect that the disputes in those cases over salient and politically charged social issues exerted, in the words of Justice Holmes, a "hydraulic pressure" that distorted the otherwise well-settled doctrine.[169]

In sum, Stage 3 was a period in which the Court generally settled upon the rule that the sovereign whose statute is at issue dictates the severance test.

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164. *Id.* at 371 n.21.

165. *See* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 764–65 (1986) (holding an abortion statute unseverable based on federal precedent); Carey v. Population Servs. Int'l, 431 U.S. 678, 708 n.2 (1977) (Powell, J., concurring) (contending, based on federal precedent, that a provision in a contraception statute was unseverable); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 83 (1976) (holding an abortion statute unseverable).

166. *See supra* note 139 and accompanying text.

167. *Compare Thornburgh*, 476 U.S. at 764–65 (holding a Pennsylvania statute unseverable because severance would have required a "radical dissection" and left the statute with "little resemblance to that intended by the Pennsylvania legislature"), *and Sloan*, 413 U.S. at 834 (holding a Pennsylvania statute unseverable because the text of the statute did not suggest that severance was possible and because severance would have "create[d] a program quite different from the one the legislature actually adopted"), *with* Saulsbury v. Bethlehem Steel Co., 196 A.2d 664, 667 (Pa. 1964) (establishing that severance is appropriate where (1) the legislature intended that the statute be severable and (2) the statute is in fact capable of separation); *compare Danforth*, 428 U.S. at 83 (holding a Missouri statute unseverable because its provisions were "inextricably bound together"), *with* State *ex rel.* Enright v. Connett, 475 S.W.2d 78, 81 (Mo. 1972) ("The test of the right to uphold a law . . . is whether . . . after separating that which is invalid, a law in all respects complete . . . is left, which the Legislature would have enacted . . . had [it] known that the exscinded portions were invalid." (quoting State *ex rel.* Audrain Cnty. v. Hackmann, 205 S.W. 12, 14 (Mo. 1918)).

168. *Compare Carey*, 431 U.S. at 708 n.2 (Powell, J., concurring) (contending that a New York statute was unseverable because severance would have created "a program quite different from the one the legislature actually adopted" (quoting *Sloan*, 413 U.S. at 834)), *with* People *ex rel.* Alpha Portland Cement Co. v. Knapp, 129 N.E. 202, 207 (N.Y. 1920) ("The question is in every case whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether."); *compare Meek*, 421 U.S. at 371 n.21 (holding a Pennsylvania statute unseverable because it could not be assumed "that the Pennsylvania General Assembly would have passed the law solely" to enact the valid portion), *with Saulsbury*, 196 A.2d at 667 (establishing that severance is appropriate when (1) the legislature intended that the statute be severable and (2) the statute is in fact capable of separation).

169. N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting).

The case law of the period completed the pro-state evolution that Stage 2 began. The Court applied state law without regard to whether the action was at law or in equity, and framed the severability of state statutes as a matter of state law without regard to whether the relevant state had developed any law on the matter. The Court also consistently remanded severability questions for state court adjudication and even reversed lower federal courts for incorrectly applying state law tests. These practices comported doctrinally and philosophically with *Erie* and the merger of law and equity.

D. Stage 4: Severability After Ayotte

Stage 4 completes the doctrinal evolution and spans from the Court's 2006 decision in *Ayotte v. Planned Parenthood of Northern New England*[170] to the present. Within this period, the Court has developed a new general common law of severability.

The analysis of the contemporary approach to severability begins with *Ayotte* itself. There, the Court reviewed a challenge to a New Hampshire statute that prohibited a physician from performing an abortion on a minor until 48 hours after written notice of the pending abortion had been delivered to her parent or guardian.[171] An exception to the notice requirement applied only if (1) abortion was necessary to save the minor's life and there was insufficient time to provide notice, (2) a person entitled to receive notice certified that he or she had already been notified, or (3) a judge concluded that the minor was mature and able to provide informed consent or that an abortion without notification was in the minor's best interests.[172] The First Circuit had held the statute partially unconstitutional because it did not contain an exception for the preservation of a minor's health, and because the life exception was too narrow, but then used those infirmities as justification for permanently enjoining enforcement of the entire statute.[173] Taking the First Circuit's adjudication of the merits as essentially correct, *Ayotte* focused on whether the broad remedy of wholesale invalidation was appropriate, given that only part of the statute was unconstitutional.[174]

The substance of the opinion was straightforward: *Ayotte* established that federal courts remedying a statute's partial unconstitutionality must follow three guidelines: (1) "try not to nullify more of a legislature's work than is necessary,"[175] (2) refrain "from 'rewrit[ing] state law to conform it to constitutional requirements' even [while] striv[ing] to salvage it,"[176] and (3) ask whether the "legislature [would] have preferred what is left of its

170. 546 U.S. 320 (2006).
171. *Id.* at 323–24.
172. *Id.* at 324.
173. *Id.* at 325–26.
174. *Id.* at 328–31.
175. *Id.* at 329.
176. *Id.* (quoting Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988)).

statute to no statute at all."[177] The Court then held that because "[o]nly a few applications of New Hampshire's parental notification statute would present a constitutional problem," the lower court had to reconsider the breadth of its equitable relief in light of whether application severance would be faithful to legislative intent.[178]

One might argue that *Ayotte* established a doctrine that applies only in the narrow context of abortion litigation. Some language in the opinion appeared to frame the basic issue in that manner.[179] Ultimately, however, such a narrow reading seems unpersuasive. The Court discussed the *Ayotte* guidelines in general terms[180] and justified them by reference to authorities that had nothing to do with abortion. The Court also utilized them in *Free Enterprise Fund* to decide whether to sever part of the Sarbanes-Oxley Act[181] and in *National Federation of Independent Business* to decide the severability of an application of the Affordable Care Act.[182] *Ayotte* thus supplies a set of substantive federal guidelines for evaluating a broad array of enacted law.

One might further argue that *Ayotte* did not in fact establish a severability test. For the most part, the Court announced the guidelines without specifically discussing severance,[183] and the parties apparently agreed on remand that New Hampshire law governed whether wholesale invalidation was appropriate.[184] This interpretation, however, also seems unpersuasive. Regardless of whether they are also applicable to other remedial questions, the guidelines plainly dictate whether severance is warranted. The *Ayotte* Court explicitly stated a preference for "*sever*[*ing* a statute's] problematic portions while leaving the remainder intact";[185] the opinion relies primarily upon severability precedents; and the third guideline's command to ask whether "the legislature would have preferred

177. *Id.* at 330.

178. *Id.* at 331.

179. *See id.* at 328 ("When a statute restricting access to abortion may be applied in a manner that harms women's health, what is the appropriate relief?").

180. *See id.* at 329–30 (discussing severability in terms of "nullify[ing] a legislature's work" and compliance with "legislative intent").

181. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010) (citing *Ayotte* in considering the severability of part of the Sarbanes-Oxley Act).

182. *See* 132 S. Ct. 2566, 2607–08 (2012) (Roberts, C.J., joined by a plurality) (citing *Ayotte* for the discussion on severability). Federal district courts addressing the severability of the individual mandate also cited *Ayotte*. Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1303–04 (N.D. Fla. 2011); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 789–90 (E.D. Va. 2010).

183. *See* 546 U.S. at 329–30 (discussing "remedies" for partial unconstitutionality).

184. Plaintiffs' Memorandum of Law in Support of Their Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion for Partial Summary Judgment at 1, Planned Parenthood of N. New Eng. v. Ayotte, 546 U.S. 320 (2006) (No. 03-491-JD). Notwithstanding this stated agreement, the plaintiff also cited to federal law in arguing against severance. *Id.* at 6 n.4.

185. 546 U.S. at 329 (emphasis added).

what is left of its statute to no statute at all"[186] is simply a reiteration of one of the Court's classic severability tests.[187] The authority for the third guideline, moreover, included *Champlin Refining Co.* and *Allen v. Louisiana*—two pre-*Erie* decisions that decided severance for state statutes without reliance upon applicable state law doctrines. And the focus on severability was not dicta; whether to sever the unconstitutional applications of the New Hampshire statute was the central question on remand.[188] Moreover, if the Court had intended for state law to apply, it would have been easy to instruct the lower courts accordingly. Other recent decisions seem to have confirmed this interpretation by explicitly relying upon *Ayotte* to decide a severance question,[189] and by adopting *Ayotte*'s method of deciding severance without following state law.[190] Prominent commentators have also interpreted *Ayotte* as a decision about severability.[191]

Ayotte's broad federalization is not a mere formality. A significant number of lower federal courts have begun to employ the guidelines to rule on a range of state statutes and local ordinances. Many have used the guidelines instead of available state law.[192] Others, perhaps confused about

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186. *Id.* at 330.

187. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191 (1999) (citing *Champlin Ref. Co.* for the "traditional test of severability," namely, "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law"); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (noting that "[t]he standard for determining the severability of an unconstitutional provision is well established," and quoting the above language from *Champlin*, as cited in *Buckley*).

188. *Ayotte*, 546 U.S. at 331; *see* Planned Parenthood of N. New Eng. v. Ayotte, 571 F. Supp. 2d 265, 268 (D.N.H. 2008) (explaining that the State requested severance in the event of partial unconstitutionality); *see also* Metzger, *supra* note 3, at 886 ("[T]he case law does not support drawing a strict distinction between text severability and application severability. The Court has applied severability in both contexts, and its inquiry in both is the same . . . .").

189. *E.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010).

190. *E.g.*, Randall v. Sorrell, 548 U.S. 230, 262 (2006). *Randall* cited to a Vermont severability statute, but only at the end of a string cite otherwise comprising only U.S. Supreme Court cases. *Id.* Moreover, the decision failed to apply the rule imposed by the state statute, and reached a conclusion opposed to that prescribed by the rule. *Compare id.* (declining to sever because of a contrary legislative intent) *with* VT. STAT. ANN. tit. 1, § 215 (2003) (requiring severance where valid provisions "can be given effect without the invalid provision or application"). *Randall* is thus consistent with *Ayotte* as a decision on severability that did not apply state law.

191. *See, e.g.*, Fallon, *supra* note 3, at 956 (analyzing *Ayotte* as illustrative of "the distinction between surgical severing and a presumption that some unspecified way of severing can be found in future cases"); Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 792 (2009) (observing that *Ayotte* "identified the principles that should guide courts in determining whether to sever").

192. *See, e.g.*, Antilles Cement Corp. v. Fortuño, 670 F.3d 310, 331–32 (1st Cir. 2012) (citing *Ayotte* in support of a decision to sever the unconstitutional provisions of a Puerto Rican statute); Kan. Judicial Review v. Stout, 519 F.3d 1107, 1122 (10th Cir. 2008) (citing *Ayotte* in support of a decision to enjoin only the unconstitutional provisions of a Kansas canon on judicial conduct); Northland Family Planning Clinic, Inc. v. Cox, 487 F.3d 323, 333–39 (6th Cir. 2007) (applying *Ayotte*'s severability principles in concluding that the district court had properly declared a

the state or federal law nature of the issue, have employed the guidelines alongside state law.[193] State courts have also cited to *Ayotte* to decide severability questions.[194] In these cases, the guidelines have, to varying degrees, displaced state law, and they will continue to do so.

This displacement matters in part because the guidelines materially differ from a number of state doctrines. For example, whereas *Ayotte* favors severance over wholesale invalidation, and requires courts to examine whether the "legislature [would] have preferred what is left of its statute to

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Michigan statute unconstitutional *in toto*); Asociación de Educación Privada de Puerto Rico, Inc. v. García-Padilla, 490 F.3d 1, 18 (1st Cir. 2007) (citing *Ayotte* in support of a decision to limit the application of a district court injunction to the unconstitutional provisions of a Puerto Rican statute); López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 204–08 (2d Cir. 2006) (applying *Ayotte*'s severability guidelines in affirming a district court injunction against a New York statute), *rev'd on other grounds*, 552 U.S. 196 (2008); Cam I, Inc. v. Louisville/Jefferson Cnty. Metro Gov't, 460 F.3d 717, 720–21 (6th Cir. 2006) (applying *Ayotte* in affirming a decision to sever the unconstitutional provisions of a city ordinance); Advantage Media, L.L.C. v. City of Eden Prairie, 456 F.3d 793, 800–01 (8th Cir. 2006) (relying upon *Ayotte* in affirming the severability of provisions in a city ordinance); Planned Parenthood Cincinnati Region v. Taft, 444 F.3d 502, 516–18 (6th Cir. 2006) (discussing *Ayotte*'s severability principles as justification for vacating in part an overbroad district court order that had enjoined all enforcement of an Ohio statute); Chase v. Town of Ocean City, 825 F. Supp. 2d 599, 626–27 (D.Md. 2011) (citing H.B. Rowe Co. v. Tippett, 615 F.3d 233, 257 (4th Cir. 2010), which quotes *Ayotte*, in support of a decision to enjoin the unconstitutional applications of certain town ordinances); Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858, 874–76 (N.D. Tex. 2008) (applying *Ayotte* in declining to enforce the savings clause in a partially unconstitutional city ordinance); Baude v. Heath, No. 1:05-cv-0735-JDT-TAB, 2007 WL 2479587, at *28–31 (S.D. Ind. Aug. 29, 2007) (applying *Ayotte* in deciding to strike only those provisions of an Indiana statute that violated the Commerce Clause), *aff'd in part and rev'd in part on other grounds*, 538 F.3d 608 (7th Cir. 2008); Jeffrey O. v. City of Boca Raton, 511 F. Supp. 2d 1339, 1359 (S.D. Fla. 2007) (applying *Ayotte* in deciding to enjoin the enforcement of the unconstitutional applications of a city ordinance).

193. *See, e.g.*, BellSouth Telecomms., Inc. v. Farris, 542 F.3d 499, 510 (6th Cir. 2008) (applying a Kentucky severability statute and simultaneously citing to *Ayotte*); Am. Bankers Ass'n v. Lockyer, 541 F.3d 1214, 1217 (9th Cir. 2008) (applying California's severability doctrine and citing to *Ayotte*); Frazier *ex rel.* Frazier v. Winn, 535 F.3d 1279, 1283 (11th Cir. 2008) (applying both the federal standard for severability, as articulated in *New York v. United States*, and Florida common law); Covenant Media of S.C., LLC v. City of N. Charleston, 493 F.3d 421, 437–38 (4th Cir. 2007) (citing to both South Carolina common law and United States Supreme Court decisions on severance); Cincinnati Women's Servs., Inc. v. Taft, 468 F.3d 361, 371 (6th Cir. 2006) (applying *Ayotte* alongside an Ohio common law test for determining severability); Bench Billboard Co. v. City of Toledo, 690 F. Supp. 2d 651, 670–71 (N.D. Ohio 2010) (same); Tex. Midstream Gas Servs., L.L.C. v. City of Grand Prairie, No. 3:08-CV-1724-D, 2008 WL 5000038, at *14 & n.10 (N.D. Tex. Nov. 25, 2008) (citing to state common law on severability and discussing *Ayotte*); IMS Health Corp. v. Rowe, 532 F. Supp. 2d 183, 186 & n.1 (D. Me. 2008) (same); ACLU of N.M. v. Santillanes, 506 F. Supp. 2d 598, 644–45 (D.N.M. 2007) (applying *Ayotte* and noting that "similar considerations apply under state law").

194. *See, e.g.*, Dallman v. Ritter, 225 P.3d 610, 638 (Colo. 2010) (en banc) (citing *Ayotte* in attempting to "fix" a partially invalid Colorado statute while avoiding any attempt to "rewrite" it); People v. Taylor, 878 N.E.2d 969, 992 (N.Y. 2007) (citing *Ayotte* in enjoining only the unconstitutional applications of a New York statute); Sohigian v. City of Oakland, No. A10303, 2006 WL 763198, at *5 n.7 (Cal. Ct. App. Mar. 24, 2006) (same with respect to a California statute); Cravedi v. Houseman, No. 298594, 2006 WL 344962, at *9 (Mass. Land Ct. Feb. 15, 2006) (quoting *Ayotte* at length in considering a severability issue); Weinschenk v. State, 203 S.W.3d 201, 227 (Mo. 2006) (en banc) (Limbaugh, J., dissenting) (describing *Ayotte* as "perhaps the best recitation of the notion of severability").

no statute at all," Tennessee formally disfavors severance and permits the remedy only where it is "fairly clear" from the plain text that the legislature would have passed the statute without the invalid provision, and there will remain "enough of the act for a complete law capable of enforcement and fairly answering the object of its passage."[195] South Carolina has a presumption against severance in the absence of a statutory severability clause.[196] California and Washington permit severance only where an invalid provision is "grammatically, functionally, and volitionally separable" from the remainder.[197] And there is a split of authority on whether severance is appropriate in the event that logrolling may have secured passage of multisubject legislation, part of which is invalid.[198] The diversity of these authorities, moreover, is not unique. States throughout the country have developed varying and nuanced doctrines. *Ayotte* quietly papered over all of them with a uniform test for federal courts.[199]

It is not difficult to imagine how the state doctrines could produce outcomes different from those of *Ayotte* in any given case. As an illustration, imagine that State Statute A has three provisions—A1, A2, and A3. A3 alone is unconstitutional. There is no severability clause, but the legislative history clearly shows that the legislature would have passed A even without A3. What would be the result? Under *Ayotte*, it seems that A3 would be severable because *Ayotte*'s third guideline does not preclude ascertainment of legislative preference through an examination of legislative history—the guideline simply asks the reviewing court to determine whether the enacting legislature "[would] have preferred what is left of its statute to no statute at all."[200] Because the legislative history shows that the legislature would have passed A without A3, it would be appropriate to conclude that the legislature would prefer A as only A1 plus A2 over no A of any form, and accordingly

195. State v. Tester, 879 S.W.2d 823, 830 (Tenn. 1994) (quoting Gibson Cnty. Special Sch. Dist. v. Palmer, 691 S.W.2d 544 (Tenn. 1985)).

196. *See* S.C. Tax Comm'n v. United Oil Marketers, Inc., 412 S.E.2d 402, 405 (S.C. 1991) ("In the absence of a legislative declaration that invalidity of a portion of the statute shall not affect the remainder, the presumption is that the legislature intended the act to be effected as an entirety or not at all.").

197. Jevne v. Super. Ct., 111 P.3d 954, 971–72 (Cal. 2005) (internal quotations omitted); State v. Abrams, 178 P.3d 1021, 1025–27 (Wash. 2008) (same).

198. *See* Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 403–04 n.14 (Pa. 2005) (discussing the split).

199. Samuel Issacharoff and Catherine Sharkey have referred to the "quiet federalization" of various other areas historically governed by state law, such as punitive damages, as "backdoor federalization." Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1353–54 (2006). Barry Friedman has described several other precedents from the Court's 2006 term as examples of "stealth overruling." Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 6–8 (2010). I think both descriptions are appropriate here because *Ayotte* effectively overruled the Stage 3 doctrine and federalized severability without mentioning the choice-of-law question or acknowledging the prior doctrine.

200. *Ayotte*, 546 U.S. at 330.

that severance would be appropriate. The doctrine of Tennessee and perhaps South Carolina, by contrast, would likely hold A3 to be unseverable because, absent a severability clause, there is no textual evidence of a preference for severance.[201]

Additionally, even where state doctrine and *Ayotte* will generally produce similar outcomes, *Ayotte*'s federalization matters because it discourages future changes in state doctrine. Imagine, for example, that the doctrine of State B is a mirror image of *Ayotte*'s. As long as State B remains satisfied with that doctrine, no real problem will arise. But suppose that State B one day chooses, for example, to categorically prohibit severance. There are legitimate policy concerns that could support such a choice: State B might prohibit severance on the view that the doctrine encourages legislators to shirk a responsibility to carefully evaluate the constitutionality of proposed legislation.[202] Or State B might prohibit severance on the view that statutory revision of any kind is an exclusively legislative function. *Ayotte* discourages doctrinal change on the basis of such concerns by ensuring that the changes have no effect in federal court.

III. The Evolutionary Critique of the New Doctrine

In this Part, I critique the new general common law of severability. I conclude that the doctrine is flatly inconsistent with the Court's post-*Erie* precedent, and in serious tension with *Erie* itself.

A. A Stare Decisis Problem

In view of the Court's historical approach to severance, the new doctrine is hard to justify. As shown above, *Ayotte* contradicted nearly two dozen cases decided over the course of a century by creating a federal doctrine for state statutes.[203] Stages 2 and 3 in combination constituted a steady evolution toward increasingly robust statements about the state law

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201. *Cf.* State v. Tester, 879 S.W.2d 823, 830 (Tenn. 1994) (stating that under Tennessee law, severance is only permissible if a supporting legislative intent is "fairly clear . . . from the face of the statute" (internal quotation omitted)); *United Oil Marketers, Inc.*, 412 S.E.2d at 404–05 (describing South Carolina's severability test as asking whether "that which remains is complete in itself, capable of being executed, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed that the Legislature would have passed it independently of that which is in conflict with the Constitution . . . ." (internal quotation omitted)).

202. *See* Dorf, *Fallback Law*, *supra* note 3, at 351 ("Severability, if improperly used, permits legislators to shirk [their legislative duty] . . . by enacting laws they regard as constitutionally dubious or worse, and leaving the courts to sort things out."); *see also* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 57–58 (1999) (arguing that judicial supremacy in constitutional interpretation promotes legislative "irresponsibility" by ensuring that the courts will "bail [legislators] out of any difficulties they get into"). Professor Tushnet's argument suggests that severability may be particularly problematic as an encouragement of legislative irresponsibility because it maintains judicial supremacy in the realm of constitutional interpretation while minimizing the consequences of a violation of judicially established constitutional limits.

203. *See supra* note 139.

nature of questions concerning the severability of state statutes, an evolution which culminated in *Leavitt v. Jane L.*'s declaration in 1996—repeated by *Virginia v. Hicks*[204] in 2003—that the matter is "of course" one of state law.[205] Because New Hampshire, like every other state, had developed a severability doctrine for its statutes,[206] the overwhelming majority of Stage 3 cases would have required application of that authority to the New Hampshire abortion statute. Nevertheless, *Ayotte* never mentioned New Hampshire's doctrine.

The Court, moreover, relied on a curious assortment of authorities for support. Most of the cases concerned federal statutes, and thus provided no support for the proposition that a federal test is appropriate for state statutes.[207] Several were from Stage 1 or early Stage 2, a time when the Court applied a general common law of severability in line with *Swift v. Tyson*, the independent system of federal equity, and pre-positivist notions about the source of law.[208] Another cited case, *Brockett v. Spokane Arcades, Inc.*,[209] contradicts *Ayotte* by plainly characterizing the issue as one of state law.[210] Still others simply do not address severability.[211] Notably missing was any discussion of Stage 3 precedent such as *Jane L.* The Court simply provided no authority for federalizing the issue.

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204. 539 U.S. 113, 121 (2003) ("Whether these provisions are severable is of course a matter of state law.").

205. 518 U.S. 137, 139 (1996).

206. *See, e.g.*, Associated Press v. State, 888 A.2d 1236, 1255 (N.H. 2005) (evaluating a severability argument under New Hampshire's doctrine); Claremont Sch. Dist. v. Governor, 744 A.2d 1107, 1112 (N.H. 1999) (same); *see also* Dorf, *Facial Challenges to State and Federal Statutes*, *supra* note 3, at 285 (explaining that in "forty-eight states, whether by judicial decision, statute, or both, courts presume statutes to be severable," and that in the two remaining statutes there is formally a presumption against severance).

207. *See* 546 U.S. at 329–30 (citing to United States v. Booker, 543 U.S. 220, 227–29 (2005); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191 (1999); United States v. Treasury Emp., 513 U.S. 454, 479 n.26 (1995); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987); Regan v. Time, Inc., 468 U.S. 641, 652 (1984); United States v. Grace, 461 U.S. 171, 180–83 (1983); Califano v. Westcott, 443 U.S. 76, 94 (1979); United States v. Raines, 362 U.S. 17, 20–22 (1960); Emp'rs' Liab. Cases, 207 U.S. 463, 501 (1908); Trade-Mark Cases, 100 U.S. 82, 97–98 (1879); United States v. Reese, 92 U.S. 214, 221 (1875)).

208. Cases in this category include *Emp'rs' Liab. Cases*, 207 U.S. at 501; Allen v. Louisiana, 103 U.S. 80, 83–84 (1880); *Trade-Mark Cases*, 100 U.S. at 98–99; and *Reese*, 92 U.S. at 221; *see also* Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 234–35 (1932) (applying Supreme Court precedent to decide the severability of an Oklahoma statute); and Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 289 (1921) (same with respect to a Kentucky statute).

209. 472 U.S. 491 (1985).

210. *See id.* at 506 & n.15 (interpreting a Washington state statute and applying Washington severability doctrine).

211. *See* Virginia v. Am. Booksellers Ass'n., 484 U.S. 383, 397 (1988) (discussing the propriety of applying a narrowing construction to a statute, but not mentioning severability); Tennessee v. Garner, 471 U.S. 1, 11–12 (1985) (finding a Tennessee statute constitutional as applied, and noting that the statute would be unconstitutional in other circumstances, but not expressly discussing severability).

It is also doubtful that the new doctrine can claim justification in the small number of aberrational cases involving religious education and reproductive rights. The argument in favor of such a justification would have to proceed as follows: The Establishment Clause and reproductive rights cases established that a federal test is appropriate for state statutes on those specific subjects; *Ayotte* concerned a state statute on abortion and thus involved a statute implicating reproductive rights; therefore, a federal severability test was appropriate in *Ayotte*. Such an argument seems obviously unpersuasive for several reasons. First, the Court did not cite to any of the aberrational cases, and thus appeared not to consider them significant.[212] Second, none of the principles discussed in the decision had anything to do with the subject matter of the statute at issue;[213] *Ayotte* thus framed itself more generally than would have been appropriate for a statutory subject-specific choice-of-law rule. Finally, it is difficult to conceive of an organizing principle that would have a federal rule control in the context of Establishment Clause and reproductive rights cases, but absolutely nowhere else.

Nor can broader contextual changes from Stage 3 to *Ayotte* satisfactorily explain the doctrinal change. The Court did not attempt such a justification under principles of stare decisis.[214] Nor, it seems, could such an attempt have succeeded. The Court has explained that departure from an existing rule may be permissible if the rule has proven unworkable or been abandoned, or if facts have changed in a way that negates the rule's original justification.[215] But none of these conditions were present. Far from proving unworkable, the Court had followed the Stage 3 rule with little difficulty in cases such as *Jane L.*[216] The Court's affirmation of the rule as recently as 2003 demonstrated that it had not been abandoned.[217] There were no apparent factual or doctrinal changes that negated the rule's rationale.[218] And there had been no major philosophical shift away from positivism.[219] In short,

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212. *Ayotte*, 546 U.S. at 329–30.

213. *Id.*

214. *Compare* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (identifying factors that influence whether the Court must adhere to its precedent) *with Ayotte*, 546 U.S. at 329–31 (failing to explain, in terms of stare decisis, the refusal to treat severability as a matter of state law).

215. *Casey*, 505 U.S. at 854–55.

216. *See* Leavitt v. Jane L., 518 U.S. 137, 139 (1996) ("Severability is of course a matter of state law.").

217. Virginia v. Hicks, 539 U.S. 113, 121 (2003) ("Whether these provisions are severable is of course a matter of state law.").

218. *See, e.g.*, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2535–36 (2011) (applying *Erie* to determine whether a rule of federal common law was appropriate).

219. *See, e.g.*, Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1131 (2003) ("The dominant, contemporary position in analytical jurisprudence is positivism."); Abner S. Greene, *Can We Be Legal Positivists Without Being Constitutional Positivists?*, 73 FORDHAM L. REV. 1401, 1401 (2005) ("Most of us are, to one degree or another, legal positivists.").

nothing about the content or context of the Court's modern severability precedent justified the new doctrine.

To illustrate the precedential problem in a different way, the new doctrine's closest analogues come from Stage 1 cases such as *Keokuk*[220] and *Stanley*.[221] Now, as then, the Court substitutes the decisional law of states with a single, general common law that applies regardless of the type of statute under review.[222] Now, as then, the resolution of the choice-of-law question seems to happen without an acknowledgement that the question even exists. *Ayotte* is in this sense a throwback, an atavism at odds with the last century of doctrinal evolution. But the new general law is in a sense even more robust and problematic than its historical counterpart. More robust because, while federal courts under *Swift* still applied state statutory law, the logic of *Ayotte* requires federal courts to apply the guidelines even if the doctrinal alternative is embodied in a state statute.[223] And more problematic because, while the *Swift*-era decisions cohered with the transcendence premise, *Ayotte* and its progeny clash with the Court's modern positivism.

B. An Erie *Problem*

The new doctrine is also difficult to reconcile with *Erie*. The basic doctrine of *Erie* is that, where federal positive law does not impose a rule of decision, federal courts can develop the rule as a matter of federal common law rather than apply competing state law only if (1) there is a federal constitutional or statutory enactment that places the subject of the rule within the scope of federal power and (2) it is, on balance, appropriate to develop the rule upon consideration of the extent of the federal need for it and the extent to which it would interfere with state interests.[224] The second inquiry

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220. Packet Co. v. Keokuk, 95 U.S. 80 (1877); *see supra* notes 34–37 and accompanying text.

221. Supervisors v. Stanley, 105 U.S. 305 (1881); *see supra* notes 39–49 and accompanying text.

222. *Cf.* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1267 (1996) (contending that the Supreme Court's creation of federal common law threatens state authority in areas where state and federal sovereignty overlap).

223. *See* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329–31 (2006) (developing a common law of severability for state statutes notwithstanding the availability of state law alternatives).

224. *See* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2535–36 (2011) (applying *Erie* in considering whether to develop a rule of federal common law); Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535–38 (1958) (detailing considerations that weigh on the determination whether federal law should apply in place of state law in diversity cases); *see also, e.g.*, Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (recognizing federal common law as appropriate when the two conditions are met); United States v. Kimbell Foods, Inc., 440 U.S. 715, 726–28 (1979) (describing the circumstances in which federal common law is warranted). For a discussion of these requirements, see Field, *supra* note 26, at 886–88 & n.12. Professor Field explains that the Court's "broad formulation of judicial power" has rendered the first requirement so permissive that the second is independently determinative, but still contends that a court must at least "point to a federal enactment, constitutional or statutory, that it interprets as authorizing the

often hinges on whether the application of state law will discourage forum shopping and avoid "inequitable administration of the laws,"[225] but other relevant factors have included whether there is a need for national uniformity, whether the United States is a party to the litigation, whether there is well-developed state law on the subject, whether there is a need for a uniform rule within a state, and a general presumption in favor of state over federal common law.[226] Where the power to create federal common law is absent, state law operates "of its own force," and decides the question at issue unless the state law is unconstitutional.[227]

1. The Question of Authorization in Enacted Text.—Beginning with the first requirement of *Erie*, is there a specific enactment that authorizes the creation of a federal common law of severability for state statutes? For the most part, no, there is not. Certainly, Congress has not specifically directed the application of a federal rule. The Court, moreover, did not attempt to ground any of the *Ayotte* guidelines in a specific federal statutory or constitutional provision.[228] There was simply no mention of enacted authority in the decision.

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federal common law rule." *Id.* at 887–88. Scholars have proposed a variety of alternative formulations. *See, e.g.*, Clark, *supra* note 222, at 1251 (arguing that "transactions governed by [a rule of federal common law] must fall beyond the legislative competence of the states" and "must operate to further some basic aspect of the constitutional scheme"); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 287 (1992) (arguing that "federal courts can make common law only in reference to a federal statute"); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 46–47 (1985) (arguing that a federal common law rule of decision is permissible if it can be "derived from conventional textual interpretation" of federal constitutional, treaty, or statutory law; if it is "necessary in order to preserve or effectuate some other federal policy that can be derived from the specific intentions of the draftsmen of an authoritative federal text"; or if there is evidence "that lawmaking power with respect to [the] issue has been delegated to federal courts in a reasonably circumscribed manner"); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 766–67 (1989) (arguing that all federal common law is illegitimate under the Rules of Decision Act); Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 646–47 (2006) (proposing that a court should choose to develop a rule of federal common law if "(1) states would be tempted to favor through their laws either themselves or their own citizens and (2) other compelling reasons . . . exist"); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 805 (1989) (arguing that "there are no fundamental constraints on the fashioning of federal rules of decision"). I have relied most heavily on Professor Field's analysis because it is one of the most permissive; if a general severability doctrine is invalid under her reading of *Erie*, it is also invalid under others that are more demanding.

225. Hanna v. Plumer, 380 U.S. 460, 468 (1965); *see also* Adam N. Steinman, *What is the* Erie *Doctrine? (And What Does it Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 265–67 (2008) (discussing *Erie*'s "twin aims" of discouraging forum shopping and avoiding inequitable administration of the laws).

226. *See* Field, *supra* note 26, at 953–62 (discussing these categories); *see also* Richard D. Freer, Erie*'s Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1107 (1989) (explaining that the Court has left unclear how *Erie*'s "twin aims are to be applied and how, if at all, [Byrd v. Blue Ridge Rural Elec. Coop.] continues to fit into the vertical choice of law equation").

227. Field, *supra* note 26, at 886–87 (internal quotation omitted).

228. *See Ayotte*, 546 U.S. at 328–30 (citing only case law in establishing the guidelines).

This omission does not end the analysis, however. Under a slightly more permissive approach to *Erie*, we might conclude that *Ayotte* is legitimate as long as it is possible to trace the decision's stated rationales to one or more authorizing texts. Begin, then, by considering those rationales: The first guideline was that federal courts should "try not to nullify more of a legislature's work than is necessary,"[229] and was based on the concern that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people."[230] The second guideline was that federal courts should "restrain [themselves] from 'rewrit[ing] state law to conform it to constitutional requirements' even as [they] strive to salvage it,"[231] and was based on the notion that judicial remedies must "not entail [the] quintessentially legislative work" of statutory revision.[232] The final guideline was that federal courts should determine whether to sever by asking whether the "legislature [would] have preferred what is left of its statute to no statute at all,"[233] and was premised on the idea that a "court cannot 'use its remedial powers to circumvent the intent of the legislature.'"[234]

With these in view, and considering that *Ayotte* involved a state statute, several potential authorizing texts emerge. We could view the first rationale as a way of tethering its corresponding guideline to state level majoritarianism, as protected by the Tenth Amendment[235] or perhaps the Guarantee Clause.[236] We could view the second as a way of tethering its corresponding guideline to inherent limits on the remedial powers of federal courts. Severance, in other words, would be inappropriate under Article III where it requires federal courts to make complex statutory revisions not suited to the judicial function.[237] Finally, we could view the third as having its basis in federalism. Under this view, severance consistent with legislative intent would be appropriate as a way of honoring the intent of a state

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229. *Id.* at 329.

230. *Id.* (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion)) (internal quotation marks omitted).

231. *Id.* (quoting Virginia v. Am. Booksellers Ass'n., 484 U.S. 383, 397 (1988)).

232. *Id.*

233. *Id.* at 330.

234. *Id.* (quoting *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part)).

235. *See* U.S. CONST. amend. X (reserving to the states those powers that are not delegated to the United States or prohibited to the states by the Constitution); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1199–201 (1991) (discussing the Tenth Amendment's "popular sovereignty motif"); Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 913 (2008) (arguing that the Tenth Amendment refers to the "people's right . . . to reserve certain powers to the control of local majorities who may at their discretion assign them into the hands of their state governments").

236. *See* U.S. CONST. art. IV, § 4 (guaranteeing a "Republican Form of Government" to every state); *cf.* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 762 (1994) (arguing that the Guarantee Clause "reaffirms . . . the centrality of popular majority rule").

237. *See* U.S. CONST. art. III, § 2 (granting federal courts only "the judicial Power").

legislature as a component part of a state government whose authority the Tenth Amendment protects from federal encroachment.[238]

Most of these possibilities, however, do not hold up under scrutiny. Start with state majoritarianism and its corresponding textual embodiments. Here, two problems emerge: First, an attempt to serve that principle by means of a federal doctrine is largely self-defeating, for the doctrine inevitably displaces many state law severability rules that have been developed by popularly elected judges.[239] Second, the Guarantee Clause is simply a poor candidate for an authorizing text. The argument under the Clause would have to be that the Clause protects state-level majoritarianism; that state common laws that, for example, disfavor severance are anti-majoritarian because they yield excessive judicial interference with popular enactments; and that the Clause therefore calls for a federal override of such state common laws to assure to states a "Republican Form of Government." The argument's limitations are severe and numerous: The majoritarian interpretation of the Clause is contested.[240] The Court has historically held the Clause to be nonjusticiable.[241] And it is doubtful that state laws on severance could interfere with state majoritarianism so significantly as to necessitate a federal response, particularly given that most state doctrines reflect a majoritarian preference in favor of severance, and have been developed by popularly elected judges.[242] Finally, the Guarantee Clause does not regulate such a fine detail about the manner of state governance.[243]

Now consider federalism and the Tenth Amendment. Here, too, there is a problem of paradox. Imagine that a federal court finds part of a state act to

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238. *See id.* amend. X (limiting federal powers to those that the Constitution has delegated to the United States).

239. Thirty-eight states use some form of popular election system to select judges. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1813 n.237 (2010) (reporting that twenty-two states elect their judges and sixteen states "use a combination of initial appointment and retention elections").

240. *See, e.g.*, G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787, 798–802 (1994) (arguing that the Republican Government mentioned in the Guarantee Clause does not refer to a majoritarian democracy).

241. Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051, 1084, 1089 (2010); *see also, e.g.*, Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 151 (1912) (holding Guarantee Clause claims to be nonjusticiable). *But see* New York v. United States, 505 U.S. 144, 184–85 (1992) (explaining that the Clause has been treated as nonjusticiable for a long time, but also suggesting that that rule may not be categorical).

242. *See* Dorf, *Facial Challenges to State and Federal Statutes*, *supra* note 3, at 285 (explaining that in "forty-eight states, whether by judicial decision, statute, or both, courts presume statutes to be severable," and that in the two remaining states there is a formal presumption against severance); Gluck, *supra* note 239, at 1813 n.237 (noting that twenty-two states elect their judges and sixteen states combine initial appointment with retention elections).

243. *See* Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEXAS L. REV. 807, 830 (2002) ("The drafting history and subsequent debate on the Guarantee Clause shows that it was designed to allow the states great flexibility to alter their optional characteristics.").

be unconstitutional, that severance would be inappropriate under the applicable state law test, and that the court nevertheless severs after determining that doing so is appropriate under *Ayotte*. One could argue that federalism and the Tenth Amendment support this result as a way of minimizing federal judicial interference with the operation of the valid parts of the state act, notwithstanding the contrary state law result. But severance on such reasoning could come only through a simultaneous refusal to honor the state law doctrine—paradoxically, the court would refuse to follow state law in the name of federalism. With federalism-inspired severance and state law pushing in opposite directions, federalism and its corresponding text hardly provide a persuasive authorization for the new doctrine.

Moreover, putting aside whether the textual embodiments of state-level majoritarianism and federalism are *capable* of authorizing *Ayotte*, it does not even appear that the Court had them in mind. To understand why, it is important to recognize that there was a disconnection between the type of statute under review and the case authority from which the Court drew the guidelines' supporting principles. In establishing each guideline, the Court simultaneously relied upon some cases involving state statutes, and others involving federal statutes, as if there were no difference.[244] By relying equally upon both types of precedent, the Court implied that the justification for the guidelines does not depend on the sovereign source of the statute under review. The Court's recent use of *Ayotte* in *National Federation of Independent Business* and *Free Enterprise Fund* to decide the severability of parts of federal statutes seems to confirm this view.[245] And yet, the ability of state majoritarianism and federalism to serve as justifying principles *does* depend on statutory source, as neither is implicated in federal review of federal legislation, where questions about vertical allocation of power are absent. The disconnection shows that the guidelines' justification must lie elsewhere.

This leaves Article III limits on the remedial powers of federal courts—referenced as the justification for the second *Ayotte* guideline[246]—as the last potential basis for a rule of federal common law on the severability of state enactments. Unlike federal guidelines that might displace state law in attempts to serve principles of state majoritarianism and federalism, this guideline does not undermine Article III limits in attempting to reinforce them. There is, therefore, no problem of paradox. Interpreting the second guideline as a reflection of Article III limits, moreover, resolves the puzzle

244. Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329–30.

245. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607–08, 2642 (2012) (citing *Ayotte* in determining the severability of a provision in the federal Patient Protection and Affordable Care Act); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3161 (2010) (citing *Ayotte* in determining the severability of part of the federal Sarbanes-Oxley Act). Like *Ayotte*, both of these decisions cited to a mix of precedent involving federal and state laws.

246. *Ayotte*, 546 U.S. at 329–30.

presented by *Ayotte*'s mix of citations[247]: Because the limits apply regardless of the state or federal nature of a statute under review,[248] precedent involving either federal or state statutes could provide support.[249] Indeed, one can fairly interpret both of the key cases that *Ayotte* cited under the second guideline as having themselves relied upon Article III limits, even though one reviewed a state statute and the other a federal statute.[250] Article III is therefore a good candidate to be the second guideline's authorizing enactment.

Article III, however, does not justify the other guidelines. Consider the arguments for such a justification. One might be that the first and third guidelines simply reflect a different type of Article III limit on judicial power—not a limit that *disfavors* severance where it would require judicial exercise of legislative powers, as with the second guideline, but rather a limit that *favors* severance where it would help the federal judiciary constrain the sweep of declaratory and injunctive remedies that frustrate the intent of state legislators and the will of the people who have elected them.[251] Article III constraints, on this view, can either preclude or require severance of state statutes, depending on the circumstances. Notice, however, what this argument does—it incorporates principles of state majoritarianism and

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247. *See supra* notes 207–11 and accompanying text.

248. *See, e.g.*, Rock Energy Coop. v. Village of Rockton, 614 F.3d 745, 747–50 (7th Cir. 2010) (holding that diversity jurisdiction was present but dismissing because the action was not ripe for review); Cleveland Hous. Renewal Project v. Deutsche Bank Trust Co., 621 F.3d 554, 560–61 (6th Cir. 2010) (holding that diversity jurisdiction was present and that the plaintiff had Article III standing).

249. The precise nature of the Article III prohibition morphs somewhat depending upon whether a federal or state statute is under review. Where a federal statute is involved, Article III operates in tandem with Article I to preclude the federal judiciary from exercising legislative powers and affirmatively to reserve those powers for Congress. *Compare* U.S. CONST. art. I, § 1 (allocating all legislative powers belong to Congress) *with id.* art. III, § 1 (vesting the judicial power in the Supreme Court and inferior courts established by Congress). Separation of powers, in other words, enters into the analysis, and the relevant constitutional limits are identifiable through a comparison of the scope of federal judicial and legislative powers. Where a state statute is involved, by contrast, the remedial limits must emerge from inherent, Article III limits on the federal judiciary because there is no question of intrusion upon the federal legislative domain. *See* Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988) (acknowledging Article III limits on the power of a federal court to change a state statute). Horizontal separation of powers ceases to be relevant, and the constitutional limits must be identifiable without reference to the powers of another federal branch. The contextually shifting nature of the limits and the means of their identification make it harder to conclude that the *Ayotte* Court had a specific constitutional enactment in mind as authorization for the second guideline. There is a good argument, however, that a morph of this kind is not significant enough to conclude that the second guideline lacks a supporting constitutional enactment. The shift from state to federal statutory review does not alter the fundamental inquiry, which is simply whether federal courts possess the power under Article III to engage in complex statutory revisions typically undertaken by legislatures.

250. *Cf. Am. Booksellers Ass'n*, 484 U.S. at 397 (noting that the Court cannot rewrite a state statute to make it constitutional); United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 479 (1995) (refusing to rewrite a federal statute in light of the Court's "obligation to avoid judicial legislation").

251. *Ayotte*, 546 U.S. at 329.

federalism into the Article III concept of judicial power. By doing so, it recreates the paradoxes that arose from attempts to serve textual embodiments of those very same principles in, respectively, the Guarantee Clause and Tenth Amendment. The paradox arises because the creation of mandatory federal guidelines in the name of these principles simultaneously undermines them. The guidelines undermine state majoritarianism by displacing many state law doctrines that have been developed by popularly elected state judges, and by limiting the significance of potential future developments in these doctrines, and they undermine federalism by displacing a traditional domain of state common law. Attempting to ground the principles in Article III does not ease the paradox.

Another possible interpretation also seems unpersuasive. Under this interpretation, the first and third guidelines reflect inherent limits on federal judicial power. The guidelines, in other words, favor severance not as a way to honor state majoritarianism and federalism that are incorporated into the Article III concept of judicial power, but rather because federal judicial power simply does not include the power to issue untailored equitable relief. The weakness of the argument is that it is inconsistent with the guidelines themselves. For if Article III mandates remedial tailoring, then Article III requires severance in every case of partial unconstitutionality in which severance is not prohibited—a view that *Ayotte* simply rejects. The first guideline is that courts should "*try* not to nullify more of a legislature's work than is necessary,"[252] not that they *must* tailor. And if Article III always requires or prohibits severance because of the nature of federal judicial power, then there is no room for the third guideline's instruction to sever only when doing so would be consistent with legislative intent.[253] We are left, therefore, with a precedent in which enacted text authorizes only a minority part of *Ayotte*'s announced decisional rule.

In summary, *Ayotte* operates in serious tension with the first requirement of *Erie*, at least as it has been traditionally understood. The Court did not point to any federal statute or constitutional provision as authorizing a federal common law for state statutes. For most of the guidelines, moreover, it is difficult even to imagine what such an enactment would be. The first guideline could conceivably have its basis in state-level majoritarianism, as embodied in the Tenth Amendment or perhaps the Guarantee Clause, but that principle weighs against a federal doctrine at least as much as it weighs in favor of it. Likewise, the third guideline could conceivably have its basis in federalism, as embodied in the Tenth Amendment, but federalism weighs against a federal rule that displaces state law. There is, however, a good argument that the Court relied upon Article III as the enacted authorization for the second guideline. But because Article III justifies only the second guideline, we are left with a situation in

252. *Id.* (emphasis added).
253. *Id.* at 330.

which enacted text supports only part of a multifaceted federal decisional rule. Part IV, below, discusses the implications of these conclusions for *Erie*. Part V in turn uses the Article III insight to propose an alternative approach to severability that reconciles *Ayotte*, *Erie*, and Article III.

2. The Question of Federal and State Interests.—Putting aside whether the new doctrine satisfies the first requirement of *Erie*, does it survive the second requirement? In other words, is a federal rule appropriate, given the extent of the federal need for it and the extent to which it would interfere with state interests?[254] Once again, the answer depends on the guideline under review. For the first and third guidelines, the answer is no, because every factor that courts typically consider as part of this inquiry weighs against those guidelines.[255] Those same factors also weigh against the second guideline, but that one holds a trump card because it furthers the supreme federal interest in honoring constitutional limits on federal judicial power.[256]

First consider forum shopping and inequitable administration of the law. *Ayotte* framed the guidelines specifically as limits on federal courts.[257] It did so in connection with the second guideline by referring to unique limits on federal courts' powers to engage in the types of statutory revisions that severance can entail.[258] It also did so with respect to the other guidelines by framing them as applicable to the Court itself, and by implication to other federal courts as well.[259] Notably, *Ayotte* never mentioned state courts.[260] By framing the doctrine in this manner, the decision has created the possibility that either of two different severability tests will apply in a challenge to a given state statute: In state court, a state test will apply because the constraints on federal courts that animate the guidelines will be inapplicable. In federal court, by contrast, *Ayotte*'s federal test will plainly apply. The availability of two severability doctrines could influence the choice of forum by generally encouraging defendants to pick the forum with the doctrine that most favors severance and by encouraging plaintiffs to pick the forum that is more hostile to it. To the extent that state and federal doctrines materially diverge, they could produce different severance outcomes depending only upon whether a federal or state court reviews a

254. *See supra* notes 185–87 and accompanying text.

255. *Cf.* Field, *supra* note 26, at 953–62 (summarizing the factors that the Court has applied in evaluating federal need).

256. *See infra* notes 273–74 and accompanying text.

257. *Ayotte*, 546 U.S. at 329–30.

258. *See id.* (discussing constitutional limits on the Court's power to engage in statutory revision).

259. *Id.*

260. *See Ayotte*, 546 U.S. at 329–31 (omitting any mention of the guidelines' applicability to state courts).

given statutory challenge. Thus, if anything, *Ayotte* encourages forum shopping and inequitable administration of the law.[261]

Other factors also fail to support, and even weigh against, *Ayotte*'s creation of federal guidelines. The Court has relied upon the participation of the United States as a party to litigation as a factor supporting a federal rule,[262] but the United States was not a party in *Ayotte*, and rarely would be in a case of that kind. The Court has suggested that the presence of well-developed state law can weigh against a federal rule,[263] but *Ayotte* developed a federal rule in spite of a significant body of severability precedent from New Hampshire and other state courts.[264]

The Court has further stated that the extent of need for national uniformity weighs in favor of federal common law,[265] but no such need appears to exist with respect to the severability of state statutes. To the extent that there is a federal legal interest in such enactments, it is with respect to their constitutionality. And as in *Ayotte*, substantive federal constitutional law will fulfill that interest by invalidating state statutes to the

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261. *See* Dorf, *Facial Challenges to State and Federal Statutes*, *supra* note 3, at 285 (suggesting that different approaches to severability in federal and state court encourage forum shopping); *see also* Gluck, *supra* note 17, at 1982–83 (discussing how differences in federal and state interpretive methodologies might encourage forum shopping). Even if it were appropriate to read *Ayotte* as dictating a severability test for state and federal courts alike, another problem would emerge: *Ayotte* would displace all state law severability doctrines, and state courts' broad and continuing tendency to apply their own state law tests would be unconstitutional. This displacement would occur because, as federal common law, the *Ayotte* guidelines constitute a form of federal law, backed by the Supremacy Clause. *See* Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964) (discussing the supreme status of federal common law).

262. *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 504–05 (1988) (explaining that contract "obligations to and rights of the United States" are governed by federal law); Clearfield Trust Co. v. United States, 318 U.S. 363, 366–67 (1943) (stating that federal law governs the rights and duties of the United States pertaining to the commercial paper it issues).

263. *E.g.*, De Sylva v. Ballentine, 351 U.S. 570, 580–81 (1956) (deciding the meaning of the word "children" for purposes of federal copyright law by reference to state law); United States v. Savin, 349 F.3d 27, 34 n.4 (2d Cir. 2003) (citing *De Sylva*); *see also* Field, *supra* note 26, at 958–59 (discussing the extent of state law's development on a given subject as a relevant factor for evaluating whether federal common law is appropriate).

264. *See, e.g.*, Associated Press v. New Hampshire, 888 A.2d 1236, 1255–56 (N.H. 2005) (holding that certain provisions of a state statute were severable); Claremont Sch. Dist. v. Governor, 744 A.2d 1107, 1112–13 (N.H. 1999) (holding that a state statute was severable in part); Heath v. Sears, Roebuck & Co., 464 A.2d 288, 297 (N.H. 1983) (holding that some provisions of a state products liability statute were not severable); Carson v. Maurer, 424 A.2d 825, 839 (N.H. 1980) (holding that the valid provisions of a state medical malpractice statute were not separable from the unconstitutional provisions); *see also* Dorf, *Facial Challenges to State and Federal Statutes*, *supra* note 3, at 285 (explaining that in "forty-eight states, whether by judicial decision, statute, or both, courts presume statutes to be severable" and that in the two remaining states there is a rebuttable presumption of nonseverability).

265. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421–27 (1964) (discussing whether state or federal law governs the question before the court); *see also* Field, *supra* note 26, at 953 (discussing need for national uniformity as a factor weighing in favor of a federal rule).

extent necessary.[266] What to do with the presumptively constitutional remainder of a state law—i.e., whether to keep it operational or start afresh—implicates purely state interests about how to carry out state legislative policies on matters of state or local concern. It is hard to imagine why federal uniformity on such matters would be necessary.

The Court has also suggested that there is a presumption in favor of the application of state law over federal common law,[267] but *Ayotte* seems to disregard that presumption. If anything, the liberality with which *Ayotte* developed a federal doctrine suggests a presumption in favor of federal common law over state law. This presumption seemingly permits federal courts to create rules of common law without reference to authorization from an enacted text, and without consideration of traditional concerns about the relative weight of federal and state interests.

Finally, the Court has stated that a need for a uniform rule within a state weighs against federal common law,[268] but *Ayotte* created a federal rule despite such a need: With respect to any given piece of legislation, state legislatures should be able to identify the severability test that will govern in the event of partial unconstitutionality so that statutory language can be drafted to guarantee or preclude severance under that test as desired. But because the *Ayotte* Court framed the guidelines specifically as limits on federal courts, and in doing so guaranteed that different severability laws will apply in state and federal court,[269] state legislatures may have a more difficult time anticipating whether constitutionally risky statutory provisions will prove severable. In theory, this uncertainty should simply influence the manner in which state legislation is drafted.[270] An enacting majority in favor of severance should draft in an effort to guarantee severance even under the state or federal doctrine that least favors that outcome. An enacting majority against severance, in contrast, should draft to ensure wholesale invalidation even under the state or federal doctrine that most favors severance. But busy drafters may simply fail to pay attention to vertical divergences in the doctrine.[271] Moreover, even assuming a legislature's attention to vertical

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266. *See* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 326–28 (explaining that the Court's abortion jurisprudence would prohibit some applications of the New Hampshire statute).

267. *See, e.g.*, Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966) (explaining that normally there must be a significant conflict between federal and state law to justify the use of federal common law); *see also* Field, *supra* note 26, at 961–62 (discussing a "mild" presumption in favor of application of state law).

268. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); *see also* Field, *supra* note 26, at 959–60 (discussing *Klaxon*'s identification of intrastate uniformity as a relevant factor in evaluating whether to create federal common law).

269. *See supra* note 258.

270. *Cf.* Gluck, *supra* note 17, at 1981–82 (discussing how federal common law rules of statutory interpretation might affect legislative drafting practices).

271. As an example of legislative inattention, a drafter of the Affordable Care Act has described the omission of a severability clause as an "oversight." Kevin Sack & Robert Pear, *Health Law Faces Threat of Undercut from Courts*, N.Y. TIMES, Nov. 26, 2010, http://www.nytimes.com

choice of law, the potential for the application of either of two separate tests necessarily complicates the task of drafting text and anticipating outcomes. To that extent, statutes may turn out to be severable or unseverable despite a contrary legislative intent.[272]

This uncertainty raises an intriguing comparison with *Swift*. By permitting federal diversity courts to announce federal general law on non-local matters in the absence of a governing state statute, *Swift* created the possibility that different substantive rules would apply depending upon whether litigation happens in federal or state court.[273] By announcing a rule of federal common law that applies to state statutes but operates only on federal courts, *Ayotte* creates the possibility of federal or state doctrine applying, dependent only upon the vertical choice of forum.[274] Both, therefore, are responsible for generating rule uncertainty. And yet the cause of the uncertainty differs. With *Swift*, the uncertainty arose in part because federal courts inconsistently took advantage of their ability to decline to apply state decisional law.[275] Uncertainty also arose because the Supremacy Clause did not confer upon "general" federal common law the status of supreme federal law,[276] which meant that general federal common law could not displace state law in state court to create a uniform rule even if it purported to do so. With *Ayotte*, by contrast, the Supremacy Clause confers the status of supreme federal law upon the severability guidelines as a form of federal common law.[277] The guidelines, however, do not displace state severability law in state court because, by their own terms,[278] they operate only upon federal courts.

The above considerations weigh against all three of the *Ayotte* guidelines. There is one supreme federal interest, however, that supports the second guideline: adherence to constitutional constraints on federal judicial

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/2010/11/27/us/politics/27health.html?pagewanted=all&_r=0. If Congress is capable of overlooking severability altogether, one can easily imagine how legislatures might neglect choice-of-law rules and other doctrinal nuances in the drafting process.

272. *See* Campbell, *supra* note 3, at 1521 (noting how courts occasionally ignore inseverability clauses, which are generally considered legislatures' explicit instructions on the matter).

273. *See* Field, *supra* note 26, at 899–900 (describing how *Swift* led federal and state courts at times to apply different substantive rules).

274. *See supra* notes 220–24 and accompanying text.

275. *See* Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1242 n.25 (1999) (noting that the *Erie* Court overruled *Swift* in part because "state courts' persistence in adhering to their own views of common law issues prevented uniformity[,] the absence of clear distinctions between issues of 'general law' and of 'local law' created yet another level of uncertainty," and the *Swift* doctrine "prevented uniformity in the administration of the state's laws").

276. Craig Green, Erie *and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661, 665 (2008).

277. *See* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 321, 329–30 (establishing guidelines that federal courts should use in determining the severability of a statute); *see also* Friendly, *supra* note 261, at 405 (discussing the supreme status of federal common law).

278. *See supra* notes 220–24 and accompanying text.

power. The second guideline serves this interest by discouraging severance that exceeds Article III limits.[279] A federal interest of this nature is sufficient under *Erie* to outweigh competing state interests in the application of their own laws,[280] and therefore justifies a refusal to apply them.

Once again, however, we have completed a step in the *Erie* analysis under which the new doctrine makes only partial sense. The overriding Article III interest supports the second guideline, but neither of the others. Indeed, if anything, Article III operates in tension with the other guidelines by precluding some types of severance that they would encourage.[281] And the risks of forum shopping and inequitable administration of law, in addition to several other factors, also weigh against those guidelines. We are thus left with a set of three guidelines, of which only one can draw support from any federal interest commonly recognized under *Erie*. The rest operate without a comparable supporting interest, and against a current of considerations that strongly favor the application of state law. As with the first stage of the *Erie* analysis, we must conclude that only a minority part of *Ayotte* is justifiable under traditional principles of judicial federalism.

C. Other Explanations

The new doctrine's tension with other severability precedents and *Erie* gives rise to questions about why the Court adopted it. Here, I consider two potential unstated explanations: (1) mistake and (2) the Roberts Court's stated preference for as-applied challenges. While the latter is an intriguing possibility, I conclude that it fails to alleviate the problems created by the new doctrine.

The first hypothesis is that the new doctrine is simply a mistake. The Court, in other words, did not mean to federalize the severability of state statutes, or at least did not recognize that doing so would directly conflict with the Stage 3 precedent. The primary evidence in support of this view is *Ayotte*'s failure even to acknowledge the prior doctrine—if the intent had been to federalize severability, then surely the Court would have stated as much.

There is substantial evidence, however, that the Court must have been aware of the old doctrine when it adopted the new. *Ayotte* cited to nearly twenty decisions dating back to 1875,[282] including multiple Stage 3 decisions, some of which explicitly framed the severability of state statutes

279. *See Ayotte*, 546 U.S. at 329–30 (discussing how it is not the federal judiciary's place to perform the legislative task of rewriting state law to conform to constitutional limits).

280. *See, e.g.*, Bauer, *supra* note 275, at 1248 ("[I]f the federal rule is a product of constitutional command, federal law will always prevail, since the Constitution is the supreme law of the land."); Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in its* Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 971 (1998) ("If the federal rule is one of constitutional law, it governs, period.").

281. *Ayotte*, 546 U.S. at 329–30.

282. *Ayotte*, 546 U.S. at 329–30.

as a matter of state law.[283] The question of remedy was the decision's sole focus.[284] A state statute was obviously under review. One of the attorneys mentioned at oral argument that New Hampshire had a law of severability.[285] And several briefs filed with the Court, including the Petitioner's, explicitly argued that severability was a matter of state law, and in turn argued for or against that relief under New Hampshire law.[286] Given this context, it is hard to believe that the Court was simply unaware of the post-*Erie* rule.[287] And the Court has not since suggested that *Ayotte* was in any way mistaken.

The second hypothesis is that the Court federalized the severability of state statutes to alleviate a tension between the Stage 3 precedent and the Court's stated preference for as-applied challenges. The story here goes like this: The Roberts Court has repeatedly expressed a preference for as-applied challenges over facial challenges.[288] The distinction between the two, and thus the justification for the preference, requires a liberal severability doctrine—if the law disfavors or prohibits severance, the result of a successful as-applied challenge will tend to mirror that of successful facial challenges by dictating total invalidation of the statute.[289] This follows from the so-called valid-rule requirement, which holds that partially invalid statutes cannot remain operative because litigants have a "right to be judged in accordance with a constitutionally valid rule of law."[290] By contrast, if

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283. *See id*. (citing Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985) and Dorchy v. Kansas, 264 U.S. 286, 289–90 (1924)) (discussing the role of state courts in ascertaining legislative intent and application of state law).

284. *Id.* at 323.

285. Transcript of Oral Argument at 26, *Ayotte*, 546 U.S. 320 (No. 04-1144).

286. *See* Brief for Petitioner at 43–46, *Ayotte*, 546 U.S. 320 (No. 04-1144) (citing Leavitt v. Jane L., 518 U.S. 137, 139 (1996) (per curiam), for the proposition that severability "is a state law issue," and arguing that the New Hampshire abortion statute's contested applications were severable under New Hampshire law); Brief *Amicus Curiae* of the Thomas More Society in Support of Petitioner at 3, 23–25, *Ayotte*, 546 U.S. 320 (No. 04-1144) (same). *But see* Brief for Amici Curiae New Hampshire State Rep. Terie Norelli & Over One Hundred Other State Legislators Supporting Respondents at 11–16, *Ayotte*, 546 U.S. 320 (No. 04-1144) (arguing the contested applications were not severable under New Hampshire law); Brief of *Amici Curiae* NARAL Pro-Choice America Foundation, et al., in Support of Respondents at 13, *Ayotte*, 546 U.S. 320 (No. 04-1144) (discussing a prohibition on judicial rewriting of statutes under New Hampshire law).

287. Stephen Gilles has suggested that *Ayotte* reflected a "compromise in which the liberal Justices agreed to follow the Court's normal remedial practices, and the conservative Justices agreed to let the lower courts apply the 'significant health risks' test as described and applied in *Stenberg*." Stephen G. Gilles, Roe*'s Life-or-Health Exception: Self-Defense or Relative-Safety?*, 85 NOTRE DAME L. REV. 525, 609 (2010). Political compromise of some sort may have indeed played a role in the decision, but my view is that *Ayotte*'s approach to remedy was not "normal," at least in view of the Court's historical approach to severability post-*Erie*. *See supra* subpart I(C).

288. *See, e.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449–50 (2008) (disfavoring facial challenges because they require speculation, run counter to judicial restraint, and threaten the democratic process); Gonzales v. Carhart, 550 U.S. 124, 167–68 (2007) (stating that the Court should never have considered facial attacks to the Partial-Birth Abortion Ban Act, but that the Act "is open to a proper as-applied challenge in a discrete case").

289. Metzger, *supra* note 3, at 887–88; Fallon, *supra* note 3, at 953.

290. Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3.

severance is easy to obtain, the result of successful as-applied challenges will often be partial invalidation, as the Court's preference intends. The Stage 3 choice-of-law rule, however, required courts to apply state law. Because the law of some states treats severance with disfavor, the Stage 3 rule created a risk that federal courts would have to declare statutes entirely void even in cases involving only as-applied challenges. To this extent, the Stage 3 rule worked against the Court's preference for tailored equitable relief. The hypothesis here is that the Court recognized this tension and adopted the new, liberal severability doctrine for state and federal statutes to ensure that its stated preference for as-applied challenges is a meaningful one. *Ayotte* buttressed the distinction between facial and as-applied challenges by increasing the likelihood that the latter will yield only partial, rather than wholesale, statutory invalidation.

Yet there are reasons to question whether this was the true rationale for the Court's decision. First, the Court did not clearly state a position on the relationship between as-applied challenges and severability under the Stage 3 rule. Second, *Ayotte* was a unanimous decision, but as Gillian Metzger has pointed out, the Justices are not all equally fond of the preference for as-applied challenges.[291] That being the case, it is doubtful that each Justice joined the majority opinion to protect the distinction between facial and as-applied challenges, and the preference is at most a partial explanation for the new general common law.

Moreover, even assuming that the second hypothesis identifies the actual rationale for the new general common law, that rationale seems to fail to resolve the new law's *Erie* problem. If the Court's preference for as-applied challenges is to justify a federal doctrine for state statutes, then the preference must itself have a basis in constitutional text and federal need. As with severability, however, it is difficult to identify what this basis could be. If the constitutional justification for preferring as-applied challenges to state statutes is federalism or deference to state-level majoritarianism, then we once again encounter the problem of paradox, for the Court is federalizing a traditional domain of state common law to ensure that federal courts do not interfere with state statutes. The irony is that the seemingly modest preference for as-applied challenges may have driven some members of the Court to wrest severability from the control of the states.

IV. Implications for *Erie*

The new general common law carries significant practical implications for litigants and legislators and significant doctrinal implications for *Erie*. I have already discussed the practical issues in arguing that the new doctrine

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291. *See* Metzger, *supra* note 191, at 798 (explaining that Justices Roberts, Kennedy, and Alito "seem most enamored of the facial/as-applied distinction, while others are often far more skeptical").

creates a risk of forum shopping, inequitable administration of the law, and legislative uncertainty about how to draft severable statutes.[292] In this Part, I discuss the new doctrine's implications for judicial federalism.

To begin, it should be apparent by now that there is a tension between the new doctrine and its stated rationales. *Ayotte* reads as an exercise of judicial restraint, as an attempt to ensure that the federal judiciary does not interfere with the will of popular majorities, encroach upon legislative prerogatives, or flout the intent of Congress or state legislatures. But this restraint is deceiving. The decision deprives states of control over the doctrine that will apply to their statutes in federal court and in turn limits their ability to control the severability of existing state statutes. *Ayotte*, moreover, imposes these limits under what is in operation an extremely robust view of the common lawmaking authority of federal courts. Under *Ayotte*, it seems that federal common law is permissible even beyond the authorization of enacted text, even when stare decisis suggests otherwise, even when state law has historically covered a given subject, and even when in excess of federal need. If *Ayotte* carries a broader commentary on judicial federalism, it is that federal courts can create and apply federal common law in place of state law with almost no restrictions. Insofar as the *Ayotte* Court intended to reinforce principles of federalism or judicial restraint, it did so in self-defeating fashion.[293]

Putting aside the implausible view that *Ayotte* somehow invalidates *Erie*, I see two possible conclusions to draw from this analysis: (1) *Ayotte* violates *Erie* or (2) *Ayotte* is a valid exercise of federal common lawmaking that simply reshapes our understanding of *Erie*. Choosing between these options is difficult because the parties' briefing did not present an *Erie* analysis, and it seems that the Court simply did not have the doctrine in mind.[294] Both views, however, have some merit.

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292. *See supra* section II(B)(2).

293. For this reason, suggestions of a recent decline or restriction of federal common law seem exaggerated. *Compare* Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 899–900 (1996) (arguing that Kamen v. Kemper Financial Services, Inc., 500 U.S. 90 (1991), and O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994), suggest a shift toward "restricting the federal common law making powers of the federal courts"), *and* Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 758 (2010) ("The relatively freewheeling era of federal judicial lawmaking (akin to that of a state common law court) to 'fill in the gaps' in a federal statutory regime, sanctioned by such eminent figures as Justice Jackson and Judge Friendly, is long gone."), *with* Merrill, *supra* note 224, at 15–16 ("[W]hile federalism, at least as it was understood in *Erie*, may be 'dead,' what might be called 'judicial federalism' lives on."). If anything, there seems to be a trend *toward* federalization, including by means of a more expansive federal common law. *See, e.g.*, Issacharoff & Sharkey, *supra* note 199, at 1420–28, 1432 (describing a partial federalization of the law of punitive damages and, more generally, a "discernable trend toward federalization"); Tidmarsh & Murray, *supra* note 224, at 586 ("If anything, federal common law is expanding."); Freer, *supra* note 226, at 1090 (arguing that *Erie* is suffering a "mid-life crisis" because "federal courts are simply ignoring *Erie* either overtly, by failing to recognize obvious vertical choice of law issues, or covertly, by stacking the deck against the application of state law").

294. *See generally* Brief for Petitioner, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006) (No. 04-1144) (arguing the New Hampshire Parental Notification Act is constitutional

First consider the possibility that *Ayotte* violates *Erie*. The argument here should be clear by now: Although *Ayotte*'s second guideline reflects Article III limits on judicial power, neither of the other two guidelines can claim justification in an authorizing text or balance of interests, and *Ayotte* is invalid as a result. The argument rests on the premise that the Court's approach to *Erie* has not evolved significantly away from the standard, two-pronged analysis I employed above.[295] It also, however, rests on the notion that *Erie* requires a form of tailoring in the creation of federal common law. On this view, a decision announcing multiple rules or guidelines is permissible only to the extent that each is grounded in enacted authorization and a balance of interests. Any portions not independently grounded in their own enacted texts and federal interests would be impermissible.

I have mixed thoughts about this possibility. On one hand, *Erie* seems to have retained its historical requirement that there be a federal need for a federal decisional rule.[296] In *American Electric Power Co. v. Connecticut*, the Court explained that *Erie* requires "federal courts [to] follow state decisions on matters of substantive law appropriately cognizable by the states," but also permits "federal decisional law in areas of national concern."[297] Thus, the general absence of a federal need for a federal severability doctrine for state statutes suggests, at the very least, serious tension between *Ayotte* and *Erie*. Similar tension also arises from *Ayotte*'s general failure to ground its doctrine in enacted statutory or constitutional authority. On the other hand, *Ayotte*'s unanimity suggests that it is a robust precedent from which the Court is not inclined to distance itself. The idea that *Ayotte* is "wrong," moreover, conflicts with the tradition of construing common law precedents in harmony. And the concept of *Erie* tailoring does not specifically arise in the case law.

The alternative possibility—that *Ayotte* and *Erie* are both valid precedents, and that *Ayotte* simply reshapes our understanding of *Erie*—has both strengths and a weakness. The strengths are that, as a matter of fact, both cases remain binding precedent, and that harmonization is a standard aim of common law interpretation. The weakness is, as explained above, the absence of any indication that the Court meant for *Ayotte* to be a commentary on *Erie*—the parties never made an *Erie* argument and the Court never discussed the decision. In this sense, it seems premature to draw specific doctrinal conclusions about *Erie* based upon *Ayotte*.

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with no mention of *Erie*); Brief for Respondents, *Ayotte*, 546 U.S. 320 (No. 04-1144) (arguing the Act is facially invalid with no mention of *Erie*).

295. *See supra* notes 185–93 and accompanying text.

296. *See* Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527, 2535 (2011) (explaining that, under the modern understanding of *Erie*, federal common law "addresses 'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands").

297. *Id.* (quoting Friendly, *supra* note 261, at 405, 422).

It does seem fair, however, to view *Ayotte* as evidence that the Court is not particularly sensitive to *Erie* even when state law is obviously under review and available to decide a substantive legal question. Post-*Erie*, severance had been a matter of state law,[298] and yet the Court saw no need to consider whether *Erie* permitted displacement of that law with a federal rule. There was no apparent consideration of state interests in the application of state law, or apparent sense of need to ground the federal guidelines in specific enacted authorization.

Assume, however, that we can fairly view *Ayotte* as a gloss on the *Erie* doctrine. What conclusions might we draw? Primarily, we could conclude that there is no such thing as *Erie* tailoring. As I have shown, Article III justified only the second *Ayotte* guideline, but the Court saw fit to announce the two others as well, and neither of those had a basis in enacted text.[299] This could suggest that modern *Erie* doctrine wholly permits a rule of federal common law with multiple components, even where enacted text authorizes only a minority of the components—the rest are permissible as outgrowths of or supplements to the authorized part. There is no need, in other words, to match the scope of a rule of federal common law with any enacted authorization. Indeed, rule components not tethered to enacted text need not even be logically required by those that are.

The absence of a tailoring requirement would also extend to *Erie* balancing. In *Ayotte*, a federal interest in honoring Article III limits on judicial power supported the second guideline, but no such interest supported the federal nature of the others. Moreover, all of the other traditional balancing factors seemed to favor the application of state law.[300] Thus, we might fairly conclude that a federal interest in even just part of a federal decisional rule is enough to justify the rule as a whole, even if the accompaniments do not serve the identified federal need, and even if forum shopping and inequitable administration of the law will result.

In summary, *Ayotte* is in serious tension with the standard account of *Erie*. The relationship between the decisions, however, is somewhat uncertain because of the absence of any discussion of *Erie* in *Ayotte*. *Ayotte* might be an aberrational violation of *Erie*, or it might simply demonstrate a contemporary approach to *Erie* that is quite permissive. According to the latter, enacted authorization and federal need for a single element in a federal decisional rule are enough to justify other decisional rules that displace state law even if the latter are not grounded in their own enacted texts, and even if the balance of federal and state interests strongly favors the application of state law. The result of this interpretation would be to allow federal courts to disregard state law and create federal decisional law with few limits, in a fashion that is in some ways reminiscent of the *Swift* era.

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298. *See supra* notes 139–42 and accompanying text.

299. *See supra* section III(B)(1).

300. *See supra* subpart III(B).

V. An Article III Solution

Parts III and IV argued that *Ayotte* was a largely unsupported creation of federal common law, but also suggested that part of the decision can be reconciled with the traditional account of *Erie*. Here, I discuss how the reconciliation might work.

First, briefly recall the Part II argument: *Ayotte*'s first and third guidelines have no basis in enacted statutory or constitutional text, and run against a balance of interests that favor the application of state law. The second guideline, however, reflects Article III limits on federal judicial power, and overcomes the balance of interests in favor of state law by serving a supreme federal interest in ensuring that severance does not transgress constitutional limits. In short, only *Ayotte*'s second guideline comports with traditional *Erie*.

I believe this analysis suggests a means of correcting the *Ayotte* atavism: Abandon the first and third guidelines on the basis of *Erie*, but retain the second and Stage 3's choice-of-law rule. In short, hold that the severability of a state statute is a matter of state law, but also subject that rule to an Article III override in the event that application of the relevant state doctrine would require the completion of a severance that exceeds the limits of federal judicial power. Where the override applies, a federal court would have a specific constitutional basis for and powerful federal interest in declining to apply state law,[301] and for refusing to sever, and *Erie* would be satisfied.

Support for this proposal exists in constitutional text, precedent, and other academic analyses. Begin with text. Article III vests in the federal courts only the "judicial Power of the United States."[302] Thus, we should expect that severance requiring an exercise of powers that are not "judicial" would violate Article III. Precisely what this means in an individual case is unclear, but the Court has suggested that the definition of "judicial power" reflects both "common understanding of what activities are appropriate to legislatures, to executives, and to courts,"[303] and "the power to act in the manner traditional for English and American courts."[304] We can identify the limits of the Article III grant, in other words, by examining governmental

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301. *See, e.g.*, Bauer, *supra* note 275, at 1248 ("[I]f the federal rule is the product of constitutional command, federal law will always prevail, since the Constitution is the supreme law of the land."); Rowe, *supra* note 280, at 970–71 ("If the federal rule is one of constitutional law, it governs, period.").

302. U.S. CONST. art. III, § 1.

303. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992).

304. Vieth v. Jubelirer, 541 U.S. 267, 278 (2004); *see also* Raines v. Byrd, 521 U.S. 811, 840 (1997) (Breyer, J., dissenting) (suggesting that Article III's judicial power is coterminous with the traditional concerns of the courts at Westminster); Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting) ("Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'").

functions commonly or historically understood to be judicial, and inferring that functions not within those understandings fall outside the Article III grant.

The Supreme Court has not elaborated extensively on the common or historical understanding of "judicial power," and many of the cases discussing the subject offer little insight for severability.[305] A few precedents, however, are illuminating. A plurality in *Vieth v. Jubelirer*, for example, explained that "judicial power" permits only actions that are "principled, rational, and based upon reasoned distinctions."[306] *Freytag v. Commissioner of Internal Revenue*[307] concluded that the power excludes the authority to make political decisions.[308] Justice Kennedy's concurrence in *Stewart Organization, Inc. v. Ricoh Corp.*[309] further proposed that while "interpreting and applying substantive law is the essence of the 'judicial power' created under Article III of the Constitution, that power does not encompass the making of substantive law."[310] In line with these views, *Ayotte* suggested that severance is inappropriate for courts where there is "murky constitutional text, or where line-drawing is inherently complex."[311] And *Wyoming v. Oklahoma*[312] suggested that severance is inappropriate where it would require a federal court to ascribe non-ordinary meaning to statutory language.[313] We might conclude, therefore, that state law at odds with these instructions would call for the use of powers that fall outside of the Article III grant and thereby necessitate an override.

Michael Dorf has discussed a similar limit.[314] In his view, federal courts at times hesitate to sever unconstitutional statutory applications because of

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305. *See, e.g.*, Stern v. Marshall, 131 S. Ct. 2594, 2598 (2011) (explaining that entering a final judgment on a common tort claim is a use of the judicial power of the United States); Brown v. Plata, 131 S. Ct. 1910, 1953 (2011) (Scalia, J., dissenting) (arguing that the judicial power extends to injunctions requiring "a single simple act," but not structural injunctions that turn judges into "long-term administrators of complex social institutions"); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995) (explaining that the judicial power is "one to render dispositive judgments"); Missouri v. Jenkins, 495 U.S. 33, 55 (1990) (explaining that a court order directing a local government body to levy its own taxes is "a judicial act within the power of a federal court"); Morrison v. Olson, 487 U.S. 654, 677 n.15 (1988) (explaining that judicial power "does not extend to duties that are more properly performed by the Executive Branch"); Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 816–17 & n.2 (1987) (Scalia, J., concurring in judgment) (explaining that judicial power "is the power to decide, in accordance with law, who should prevail in a case or controversy," and "does not generally include the power to prosecute crimes"); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

306. 541 U.S. at 278.

307. 501 U.S. 868 (1991).

308. *Id.* at 891.

309. 487 U.S. 22 (1988).

310. *Id.* at 38 (Scalia, J., dissenting).

311. 546 U.S. at 330.

312. 502 U.S. 437 (1992).

313. *Id.* at 459–61.

314. Dorf, *Fallback Law*, *supra* note 3, at 326–27.

concerns that doing so "will require them to engage in lawmaking."[315] Indeed, he argues that this was the Court's primary concern in *Ayotte* itself, and concludes that severance can create a "delegation problem" when it requires courts to create wholly new statutory provisions,[316] or completely change the meaning of existing text.[317] The source of these limits, he concludes, is a constitutional prohibition on judicial lawmaking.[318]

I agree with Professor Dorf in part. I certainly agree that limits on federal judicial power require limits on severability, and that severance would generally transgress those limits where it would require a federal court to create statutory text or radically alter the meaning of existing text. My position is simply that such limits may at times justify a refusal specifically to apply state law, and that *Ayotte* is in serious tension with the traditional account of *Erie* to the extent it was not grounded in them.

I also think it is useful, however, to view these limits as reflective of the bounds of "judicial power" in Article III, rather than as a "delegation problem,"[319] for the latter accurately describes the issue in only a subset of cases—i.e., those in which a federal court reviews a federal statute with a severance clause. It does not, for example, comfortably describe the issue when a federal court decides whether to sever part of a state statute, as classic delegation questions involve the transfer of federal legislative power to other branches of the federal government.[320] Where a federal court reviews a state statute, any delegation moves upward rather than horizontally, and thus implicates different constitutional values. Nor does delegation accurately describe the issue when a court must decide whether to sever in the absence of a severability clause. In such cases, there will have been no legislative attempt to transfer lawmaking power to the reviewing court, and yet the concerns about judicial lawmaking seem to retain their force.

A focus on the limits of judicial power rather than on delegation is not a trivial shift—it clarifies that an Article III override must be available regardless of the type of statute under review. Because Article III limits federal judicial power in actions challenging either federal or state statutes, an override of the outcome dictated by an applicable severability doctrine may be necessary in either context. And because Article III limits federal

315. *Id.* at 326.

316. *Id.* at 326–27.

317. *See* Dorf, *The Heterogeneity of Rights*, *supra* note 3, at 280–81.

318. Dorf, *Fallback Law*, *supra* note 3, at 326–27.

319. *See id.* (discussing the delegation problem).

320. *See, e.g.*, Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 413 (2008) (discussing how Article I imposes constraints on "Congress's ability to transfer legislative power to other branches"); John C. Yoo, *Rejoinder: Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305, 1332 (2002) ("Delegations, when they occur, run in only one direction, from Congress to either the executive branch or, in limited circumstances, to the courts.").

judicial power regardless of the content of a statute under review, an override may be necessary even where a statute does not contain a severability clause.

Scholars who have explored original intent with respect to the Article III concept of "judicial power" corroborate in general terms the propriety of a broadly available override. Unsurprisingly, there is disagreement about precisely what the original intent was, and what it suggests about the bounds of judicial power.[321] There is no disagreement, however, that original intent supports limits of some form. On the side favoring a more expansive reading of judicial power, William Eskridge has argued that the Founders were "functionalist in their orientation" toward separation of powers, "emphasizing checks and balances more than stringent separation of functions," and expected the judiciary "to strike down unconstitutional laws, trim back unjust and partial statutes, and make legislation more coherent with fundamental law."[322] In support of this view, Professor Eskridge has found that state courts of the Founding Era engaged in practices such as extending slightly the reach of some statutory text, and, more commonly, narrowing the breadth of other text through "minor judicial surgery."[323] He has also concluded from the record of the debate at the Philadelphia Convention that the "strongest hypothesis is that the delegates both assumed and accepted the traditional rules and canons of statutory interpretation" employed in the state cases.[324] From his review, the "ratifying debates support, perhaps strongly, the proposition that federal courts would have" powers to narrow the reach of statutes to the extent they were unconstitutional and, in other cases, possibly to extend textual reach as well.[325]

Even under this account, the Founders envisioned a judicial power of statutory revision with limits. Professor Eskridge agrees that the "Framers' understanding of separation of powers cautions against judges' naked substitution of their own policy preferences for those of the legislature,"[326] concludes that the originalist case for a judicial power to supplement

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321. For an analysis supporting a more expansive originalist conception of judicial power with respect to statutory interpretation, see William N. Eskridge, *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001). For more limited originalist accounts, see John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) and Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference With the Judiciary's Structural Role*, 53 STAN. L. REV. 1 (2000). For an analysis of original intent concerning judicial power to issue equitable remedies, see John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121 (1996).

322. Eskridge, *supra* note 321, at 994–95.

323. *Id.* at 1018–22.

324. *Id.* at 1036–37.

325. *Id.* at 1040–57.

326. *Id.* at 1039.

statutory text is weaker than the case for the power to narrow,[327] and finds, as noted above, that the revision power typically enabled only minor changes.[328] Historical analyses by other scholars suggest that the judicial power would permit revision only where principled and in accordance with canons of statutory interpretation,[329] or where faithful to legislative intent.[330] Although it is risky to draw firm conclusions about severability from these findings, it does seem safe to say that originalist accounts loosely align, even in their variety, with the notion of an Article III override. At most, those accounts would differ simply in their recommendations as to when the override should trigger, with the expansive accounts supporting a trigger that is less active.

My proposal is somewhat atypical insofar as it grounds the override in limits implicit in Article III's grant of judicial power. To the extent that the Court has found limits on such power, it has usually been by restricting the circumstances in which the power applies,[331] rather than by restricting the nature of the power itself. Doctrines such as standing, ripeness, and mootness, for example, elaborate on Article III's case-or-controversy requirement, but say little about the extent of a federal court's remedial powers once a case or controversy is present.[332] Similarly, Eleventh Amendment jurisprudence focuses on the circumstances in which federal judicial power may be used against states, rather than what that power enables where sovereign immunity has been abrogated or waived.[333] These tendencies reflect the text of the Constitution itself, which discusses federal judicial power by identifying the types of disputes to which it extends, rather than by explaining directly what it is.[334]

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327. *See, e.g.*, *id.* at 1057 ("If the ratifying debates are inconclusive as to any matter, it is the suppletive power. They are clear as to, and entirely supportive of, the ameliorative and voidance powers.").

328. *See id.* at 1018 (explaining that "judicial extensions of statutes were slight" in the cases Eskridge found); *id.* at 1022 (noting that "[m]inor judicial surgery was the norm").

329. *See, e.g.*, Molot, *supra* note 321, at 33–36 (explaining how Federalists eased Anti-Federalist concerns about judicial power over statutory interpretation by emphasizing that stare decisis and canons of construction would restrict the bounds of permissible interpretation).

330. *See, e.g.*, Manning, *supra* note 321, at 9.

331. *See, e.g.*, Summers v. Earth Island Inst., 129 S. Ct. 1142, 1148–49 (2009) (describing the doctrine of standing as one of several that limit the circumstances in which federal courts can exercise Article III power).

332. *See, e.g.*, Sprint Comms. Co. v. APCC Servs., Inc., 554 U.S. 269, 298–99 (2008) (Roberts, C.J., dissenting) (arguing that jurisdiction was absent because the respondents lacked standing).

333. *See, e.g.*, Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 267–68 (1997) (discussing the scope of Eleventh Amendment immunity).

334. U.S. CONST. art. III, §§ 1 & 2; U.S. CONST. amend. XI; *see also* Yoo, *supra* note 321, at 1146 ("Sections 2 and 3 of Article III do nothing to define . . . what the Constitution means by the 'judicial Power.' Indeed, Section 2 only describes the classes of cases upon which the federal courts may exercise their judicial power. Section 2[] . . . presumes that the judicial power already exists."); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1176–77 (1992) ("The Vesting Clause of Article III must be read as a grant of power; indeed, it appears to be the only *explicit* constitutional source of the federal judiciary's authority to act.") (emphasis in original).

There is certainly no reason, however, why limits on severability cannot be grounded in the grant of judicial power. Plainly, the use of the adjective "judicial" qualifies the type of power conferred upon the federal judiciary in Article III.[335] The various precedents cited above also show that the Court has been willing to rely upon that text at times to avoid certain operations even in actions that have satisfied the case-or-controversy requirement.[336] And accounts of original intent corroborate that Article III, Section 1 simultaneously limits and grants power to federal courts.

The advantages of my proposal are threefold. First, the proposal eliminates a glaring inconsistency in the precedent on whether the severability of state statutes is a matter of state law. By answering that question affirmatively, the proposal harmonizes with the long line of post-*Erie* decisions that *Ayotte* failed even to recognize. Second, the proposal would do better than *Ayotte* at serving *Ayotte*'s animating principles. It would better serve state-level majoritarianism by generally requiring the application of state laws, many of which have been developed by popularly elected judges, rather than decisional law uniformly developed by unelected federal judges. It would honor Article III limits just as effectively as *Ayotte* by making those limits the basis for the override. And it would better serve federalism by preserving an established domain of state law. Finally, the proposal would produce these benefits while harmonizing with the standard account of *Erie*—it would, in other words, displace competing state law only where enacted text and federal interest truly require that result. The Court's mistake in *Ayotte* was not its conclusion that severance can raise problems for Article III, but rather its conclusion that those potential problems justify wholesale federalization of severability doctrine, rather than a merely occasional override of state doctrines.

One limitation of the suggested Article III override is that the possibility of its application will reproduce at least some of the uncertainty created by *Ayotte*. Because the precise point at which the override applies will be unclear *ex ante*, litigants and legislators may have a difficult time anticipating whether state law will decide severance, and in turn whether any given state statute will be severable. The problem exists in part because the Supreme Court has in many ways left unclear the precise extent of federal courts' remedial powers, and, more specifically, the precise point at which severance is too nonjudicial for a court to perform. The problem, however, seems not to be as significant as the one that presently exists. First, as the default source of law under my proposal, state law would typically govern. This tendency would make it easier for legislators and litigants to predict the source of law. Second, judicial elaboration on the Article III override's trigger over time would enhance its predictability. The precedent discussed above provides some guidance on how that elaboration might proceed.

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335. U.S. CONST. art. III, § 1.

336. *See supra* notes 254–56.

VI. Conclusion

From the late nineteenth century to 2006, the Supreme Court's approach to the severability of state statutes evolved in a manner that increasingly framed the issue as one of state law. For the most part, this evolution tracked major American jurisprudential developments in the rise of positivism, the decision in *Erie*, and the merger of law and equity. But *Ayotte*, working in tandem with *National Federation of Independent Business* and *Free Enterprise Fund*, recently created a single federal rule of severability that applies in federal court regardless of the state or federal law nature of the statute under review. In many respects, this doctrine has effected an atavistic reversion to pre-*Erie* precedent in which the Court decided severability questions as a matter of general common law under the authority of *Swift v. Tyson*, the independent system of federal equity, and theory of a transcendent source of law. I have tried to show that this doctrine is unjustifiable historically, and a cause for vertical forum shopping and rule uncertainty. I have also argued that *Ayotte* is a setback for judicial federalism, and that the decision's tension with the traditional account of *Erie* raises uncertainty about whether *Ayotte* runs afoul of *Erie* or simply reshapes our understanding of *Erie*'s requirements. In these circumstances, we might justifiably wonder whether *Ayotte* has an *Erie* problem, or whether *Erie* instead has an *Ayotte* problem.