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# Response: There is No New General Common Law of Severability

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# Texas Law Review

## *See Also*

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### Response

#### There Is No New General Common Law of Severability

Kevin C. Walsh\*

Severability doctrine is in rough shape and has been for quite some time. But one long-settled feature of that doctrine is that the severability of a state law is a question of state law.<sup>1</sup> In *The New General Common Law of Severability*, however, Professor Ryan Scoville argues that the Supreme Court has recently—and wrongly—changed course.<sup>2</sup> This contention caps his detailed history of the development of the Supreme Court’s approach to the vertical choice of law issue in severability determinations.

Professor Scoville claims that the Supreme Court’s 2006 decision in *Ayotte v. Planned Parenthood of Northern New England* initiated a “broad federalization” of severability doctrine, a course change confirmed by subsequent Supreme Court decisions.<sup>3</sup> By departing from the rule that the severability of a state law is a question of state law, Scoville further contends, the Supreme Court has exceeded post-*Erie* limits on the appropriate scope of federal common lawmaking power.<sup>4</sup>

Professor Scoville’s rich rendering of changes in severability doctrine over time provides a wealth of insights into bygone judicial approaches to severability. But his criticisms of the Supreme Court’s purportedly new general common law of severability are misplaced insofar as they are

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1. See, e.g., *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) (per curiam) (“Severability is of course a matter of state law.”).

2. Ryan Scoville, *The New General Common Law of Severability*, 91 TEXAS L. REV. 543 (2013).

3. *Id.* at 571.

4. *Id.* at 593.

premised on the claim that the Supreme Court has changed the established vertical choice of law rule requiring federal courts to use state law in deciding whether a state law is severable. The Court has made no such change. *Ayotte* does set forth guidelines for federal courts' use of severability doctrine in crafting remedies for partially unconstitutional statutes. But those guidelines are consistent with the continued dependence of state-law severability on state law.

To deny Professor Scoville's specific claim of doctrinal discontinuity is not to dismiss the lack of judicial doctrinal rigor that he reveals with his thorough review of severability decisions past and present. Federal courts from the top of the federal judicial hierarchy to the bottom are all over the map in the authorities they use and the arguments they make about severability. But judicial sloppiness in implementing severability doctrine should be criticized as careless drift rather than unjustified innovation.

In this solicited response to *The New General Common Law of Severability*, I first offer an interpretation of *Ayotte* and subsequent Supreme Court decisions as continuous with existing doctrine instead of a departure from it. I then suggest that much of Scoville's evidence for a federalization of severability doctrine is better viewed as evidence of doctrinal looseness rather than of doctrinal change. I conclude by returning to the lessons of severability's doctrinal history, suggesting that the prehistory of severability doctrine may supply a better guide for how courts should deal with problems of partial unconstitutionality in the future.

## I.

To understand the role of severability doctrine in *Ayotte*, one must first understand more broadly what the Supreme Court did in the case. In a unanimous decision authored by Justice O'Connor, the Court overturned a decision that held a New Hampshire law facially unconstitutional.<sup>5</sup> That law, which prohibited physicians from performing an abortion on a minor without prior notification to a parent, had some exceptions and a judicial bypass.<sup>6</sup> But the statute did not have a general health exception.<sup>7</sup> The district court held that this omission rendered the statute facially unconstitutional.<sup>8</sup> The court therefore enjoined the statute's enforcement completely, and the First Circuit affirmed.<sup>9</sup> On review, the Supreme Court held that the lower courts should not have made such a sweeping ruling without first considering more targeted injunctive relief.<sup>10</sup>

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5. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–32 (2006).

6. *Id.* at 323–24.

7. *Id.* at 324.

8. *Planned Parenthood of N. New England v. Heed*, 296 F. Supp.2d 59, 65 (D.N.H. 2003).

9. *See id.* at 68; *Planned Parenthood of N. New England v. Heed*, 390 F.3d 53, 61 (1st Cir. 2004).

10. *Ayotte*, 546 U.S. at 331.

The Supreme Court's reasoning in reversing the holding of facial unconstitutionality is straightforward. The key move was the Court's observation that most applications of the statute would raise no constitutional difficulty.<sup>11</sup> That is because the absence of a health exception from a parental notification requirement would normally make no difference to the health of a minor seeking an abortion. As the Court saw it, a constitutional problem from the lack of a health exception in the statute would arise from the statute's potential enforcement only in those relatively rare circumstances, such as a medical emergency, in which the delay from seeking parental notification (or judicial bypass) would be harmful to the minor's health.<sup>12</sup> The Supreme Court then reasoned, quite sensibly, that the judicial solution should be tailored to the constitutional problem—in that case, a problem limited to enforcement of the statute in a narrow set of circumstances.<sup>13</sup> If targeted injunctive relief enjoining the enforcement of the statute in only those circumstances would be consistent with legislative intent, then that is what the district court should have ordered while leaving the state free to enforce the statute more generally.<sup>14</sup>

It is only at this point that severability doctrine enters into the remedial calculus in *Ayotte*. Specifically, the opinion reasons that severability doctrine requires a court weighing the issuance of a targeted injunction against enforcement in some circumstance but not others to ask: "Would the legislature have preferred what is left of its statute to no statute at all?"<sup>15</sup>

Justice O'Connor's opinion for the Court in *Ayotte* never suggests that the question of what the state legislature intended regarding severability is anything other than a question of state law. To the contrary, the opinion affirmatively indicates that the question of legislative intent is a question of state law. The opinion not only notes the presence of a severability clause in the New Hampshire law, but also observes that this could be countered by the challengers' contention "that New Hampshire legislators preferred no statute at all to a statute enjoined in the way we have described."<sup>16</sup> Neither of these considerations about state law would have been worth noting if the relevant question of legislative intent were *not* a question of state law. Because the answer to the question of legislative intent remained "open" under the Court's decision, the Court remanded "for the lower courts to determine legislative intent in the first instance."<sup>17</sup>

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11. *Id.*

12. *See id.* at 328, 331 (describing the factual basis as the following: "In some very small percentage of cases, pregnant minors, like adult women, need immediate abortions to avoid serious and often irreversible damage to their health.").

13. *Id.* at 328–29.

14. *Id.* at 329–31.

15. *Id.* at 330.

16. *Id.* at 331.

17. *Id.*

The Court's opinion in *Ayotte* did nothing to unsettle the expectation that the lower courts on remand should make the legislative intent determination in accordance with state law. As Professor Scoville notes, that is how the parties briefed the issue on remand.<sup>18</sup> And that is how the district court understood its task as well. The district court never ultimately decided the severability question because an election intervened and the newly constituted legislature repealed the parental notification law. But in deciding a different issue, the district court explained that the Supreme Court had "remanded the case to have the lower court *divine the intent of the New Hampshire legislature* and to fashion a remedy accordingly."<sup>19</sup>

In sum, although Professor Scoville rejects a reading under which "*Ayotte* did not in fact establish a severability test,"<sup>20</sup> that is the best reading of the case. Justice O'Connor's opinion for the Court left the question of severability to be decided on remand and did nothing to modify the rule that the severability of a state law is a question to be decided on the basis of state law.

Nor do any post-*Ayotte* decisions by the Supreme Court register doctrinal change in this area. Professor Scoville describes the Court's decision in *Randall v. Sorrell* as "adopting *Ayotte*'s method of deciding severance without following state law."<sup>21</sup> But Justice Breyer's opinion in *Randall* makes no mention of *Ayotte* and even cites a state severability statute.<sup>22</sup> Professor Scoville discounts the state law citation because it appears at the end of a string cite after two Supreme Court cases.<sup>23</sup> But the first Supreme Court precedent in the string cite sets forth the same standard as the state severability statute cited by the Court.<sup>24</sup> And the other Supreme Court precedent in the string cite says that severability is "essentially an inquiry into legislative intent."<sup>25</sup> Finally, if Justice Breyer thought that severability was to be determined based on federal common law rather than state law, it is hard to explain why the citation to the state statute is in his *Randall* opinion at all.

Professor Scoville also enlists the Supreme Court's decisions in *Free Enterprise v. Public Co. Accounting Oversight Board* and *National*

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18. Scoville, *supra* note 2, at 589.

19. *Planned Parenthood of N. New England v. Ayotte*, 571 F. Supp. 2d 265, 273 (D.N.H. 2008) (emphasis added).

20. Scoville, *supra* note 2, at 570.

21. *Id.* at 571.

22. *Randall v. Sorrell*, 548 U.S. 230, 262 (2006).

23. Scoville, *supra* note 2, at 571 n.190.

24. *Randall*, 548 U.S. at 262. Compare *Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932) ("[T]he invalid part may be dropped if what is left is fully operative as law."), with VT. STAT. ANN. tit. 1, § 215 (2003) ("If any provision of an act is invalid, or if any application thereof to any person or circumstance is invalid, the invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.")

25. *Randall*, 548 U.S. at 262 (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999)).

*Federation of Independent Business v. Sebelius* in support of his claim that there is a new general common law of severability.<sup>26</sup> Those cases both dealt with the severability of a federal statute, and are thus of limited utility. But Professor Scoville rightly observes that opinions in both of these federal-law cases cite a portion of the *Ayotte* opinion that the foregoing analysis has not addressed. That is the Court's statement in *Ayotte* that "[w]e prefer . . . to sever [a partially unconstitutional statute's] problematic portions while leaving the remainder intact . . ." <sup>27</sup> This expression of a general preference in favor of severability could be viewed as a federal severance guideline of sorts. But there is no reason to take it as licensing the federalization of state-statute severability determinations. The statement appears in a preface to the Court's actual analysis.<sup>28</sup> And that analysis not only employs the principle that legislative intent is "the touchstone," but also makes clear that the relevant intent is the intent of the state legislature.<sup>29</sup>

Professor Scoville argues that the *Ayotte* Court's statement of a general preference favoring severability is significant because "whether to sever the unconstitutional applications of the New Hampshire statute was the central question on remand."<sup>30</sup> But the opinion provides no indication that the lower courts were to take the statement of a general preference for severability as authoritative in ascertaining the intent of the New Hampshire legislature. The Court's expressions of a general preference for severing as one way of tailoring the solution to the problem sets up the requirement for the lower courts to consider partial invalidation before wholesale. As it is best read, *Ayotte* instructs that courts should sever *if* they can, but the determination of *whether* they can depends on legislative intent.

While I deny that the Court "federalized the severability of state statutes" in *Ayotte*, I acknowledge that the decision could be said to have "created federal severance guidelines for state statutes in federal court."<sup>31</sup> But those guidelines do not relate to the vertical choice of law issue. They are directives about when to undertake a severability inquiry (*viz.*, before rendering a statute completely unenforceable) and about what severability depends upon (*viz.*, legislative intent). These guidelines do not purport to render state law irrelevant to the determination of the severability of state laws. Indeed, it is the dependence of severability on legislative intent that makes the severability of state law a question of state law.

It is certainly possible for courts to interpret *Ayotte*'s statement of a general preference for severability as requiring a thumb on the scale in favor of severability when weighing a state legislature's intent regarding the

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26. Scoville, *supra* note 2, at 546–47.

27. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006).

28. *Id.*

29. *Id.* at 330.

30. Scoville, *supra* note 2, at 570.

31. *Id.* at 547.

severability of state law. But because such an interpretation fits neither the context for the statement in *Ayotte* nor the general doctrinal context, that interpretation should be rejected.

## II.

Although there is no new general common law of severability, the ad hoc nature of most severability determinations lends some plausibility to Professor Scoville's interpretation of *Ayotte* and subsequent cases. But the better takeaway from cases that seem to depart from the established approach in this area is that courts (including the Supreme Court) are sometimes imprecise or loose in their citation and decision practices regarding severability.

It is not uncommon for federal court severability decisions to include an indiscriminate mish-mash of authorities, lumping together cases deciding the severability of a state law with cases deciding the severability of a federal law. *Ayotte* itself illustrates the mixing of authorities that one occasionally sees in judicial discussions of severability. Consider, for example, the Court's statement that "[a]fter finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?"<sup>32</sup> This statement is followed by a lengthy string cite that refers to seven Supreme Court cases spanning from 1879 to 2005. Four of these cases involved the severability of a federal law,<sup>33</sup> two involved the severability of a state law,<sup>34</sup> and one involved the severability of an Executive Order.<sup>35</sup> But one should not make doctrinal hay from these disparate straws. One should infer, perhaps, only that severability depends on legislative intent, not that the Court was attempting to formulate a definitive test for severability or trying to provide guidance about the source of law to use in determining the severability of a state law.

Even when one limits one's focus to a single case, the extent to which the Supreme Court believed a particular severability determination to rest on federal law or state law can be unclear. For example, Professor Scoville describes the Supreme Court's 1932 decision in *Champlin Refining Co. v. Corporation Commission of Oklahoma* as a pre-*Erie* case that decided whether a state statute was severable without reliance on the applicable state law test.<sup>36</sup> And that description appears accurate. A look at *Champlin Refining* does not reveal any Supreme Court citations of Oklahoma

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

33. *United States v. Booker* 543 U.S. 220, 245 (2005); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *The Employers' Liability Cases*, 207 U.S. 463, 501 (1908); *Trade-Mark Cases*, 100 U.S. 82, 98–99 (1879).

34. *Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932); *Allen v. Louisiana*, 103 U.S. 80, 83–84 (1881).

35. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999).

36. Scoville, *supra* note 2, at 571.

severability precedents. But in a 1992 decision about the severability of an Oklahoma law, the Supreme Court described *Champlin Refining* as a decision “inquiring into severability under Oklahoma law . . . .”<sup>37</sup>

In this area of the law, then, it is unsurprising to see a federal court citing *Ayotte* in deciding the severability of a state law.<sup>38</sup> Nor is it significant that some courts cite *Ayotte* alongside citations of state-court precedents about the severability of state law.<sup>39</sup> This sort of mixture need not be viewed as a sign of “broad federalization,”<sup>40</sup> but rather should be viewed as a sign of doctrinal looseness generally.

Professor Scoville argues that this intermixing (whether deliberate or not) matters because federal severance guidelines “materially differ from a number of state doctrines.”<sup>41</sup> To be sure, the verbal formulations of some state-law severability doctrines differ from how the Supreme Court has formulated its approach to federal-law severability in recent years. But these verbal formulations would lead to different outcomes only if the verbal formulations actually guided the severability determinations.

Professor Scoville offers a stylized example to suggest that different formulations *could* lead to different outcomes. But even under the conditions set forth in that example, it is far from clear that the different verbal formulations of doctrine *would* lead to different outcomes. Scoville’s illustrative example has the following features: the hypothetical statute has three operative provisions; there is no severability clause; only one of the three provisions is unconstitutional; and there is legislative history that makes clear that the legislature would have passed the statute without that unconstitutional provision. Scoville argues that this statute would be severable under the approach he finds in *Ayotte*, but that the statute would likely not be severable in Tennessee and South Carolina. That is because Tennessee requires “fairly clear” evidence favoring severance from the plain text of the statute, and South Carolina “has a presumption against severance in the absence of a statutory severability clause.”<sup>42</sup> I am less confident about what would happen in those states. Courts in both Tennessee and South Carolina have severed provisions from statutes upon concluding that is what the legislature would have wanted, either notwithstanding the absence of a severability clause or without noting the presence or absence of such a clause.<sup>43</sup> Such decisions do not prove that the verbal formulations of each

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37. *Wyoming v. Oklahoma*, 502 U.S. 437, 460 (1992).

38. See sources cited in Scoville, *supra* note 2, at 571–72 n.192.

39. See sources cited in *id.* at 572 n.193.

40. *Id.* at 571.

41. *Id.* at 572.

42. *Id.* at 573.

43. See *Thomas v. Cooper River Park*, 471 S.E.2d 170, 171 (S.C. 1996) (finding a statutory provision separable without any mention of a severability clause); *Thayer v. S.C. Tax Comm’n*, 413 S.E.2d 810, 814–15 (S.C. 1992) (per curiam) (same); *Nolichucky Sand Co. v. Huddleston*, 896 S.W.2d 782, 791 (Tenn. Ct. App. 1994) (“A long line of Tennessee Supreme Court decisions

state's doctrine are necessarily irrelevant, but they do suggest that they are less constraining in application than might appear from the words themselves. The question is one of judgment, I suppose. My own impression from reviewing numerous severability decisions of both state and federal courts is that—in this particular area of the law, at least—the verbal formulations do not much matter.<sup>44</sup>

Suppose, though, that the verbal formulation of a state's severability law were to be crystal clear in leaving no wiggle room to avoid inseverability in a certain class of cases. What then? Suppose, for example, that a state's highest court were to hold that severability is not an available judicial tool for saving a partially unconstitutional state statute that violates the dormant Commerce Clause through differential treatment of in-state and out-of-state businesses in separate provisions.<sup>45</sup> Now suppose that a federal court confronts just such a statute at a later time. Would *Ayotte* or any other Supreme Court decision post-dating the establishment of the rule that the severability of a state law is a question of state law really authorize the federal court to ignore the rule of state severability law established by the state's highest court? For all the reasons given up to this point, I think the answer has to be an emphatic no. According to Professor Scoville's analysis, however, the answer is a regretful yes. We disagree.

### III.

Whether or not *Ayotte* marked a change, there is little doubt from Professor Scoville's detailed history of approaches to vertical choice of law in severability doctrine that the Supreme Court has not been very self-conscious about shaping that specific part of severability doctrine. Moreover, Professor Scoville properly observes that the Court has not explained most of its doctrinal shifts regarding severability doctrine more generally, and he rightly endorses David Gans' observation that "[s]everability doctrine's strictures are routinely ignored."<sup>46</sup> These critical observations—unfortunately—echo the critical observations in Robert

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support[s] our conclusion that elision [i.e. severance] is appropriate under the circumstances of the case at bar, even without a severability clause . . . .")

44. Cf. Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 101–02 (1937) (“The only general conclusion which can be drawn from the above analysis of what the Supreme Court has both said and done in solving the problem of separable applications is that the Court avails itself of one formula or another in order to justify results which seem to it to be desirable for other reasons.”).

45. Cf. *American Petroleum Inst. v. S.C. Dep't of Revenue*, 677 S.E.2d 16, 20 (S.C. 2009) (holding that severability is unavailable to remedy violations of the state constitution's one-subject rule).

46. See Scoville, *supra* note 2 at 546 (quoting David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 651 (2008)).

Stern's seminal history of severability doctrine from seven-and-a-half decades ago.<sup>47</sup>

It is a real problem that thoughtful analysts continue to find severability doctrine unsusceptible of principled application after all this time. But while the history of severability doctrine is unedifying, its prehistory holds out the promise of a better approach to partial unconstitutionality. As Professor Scoville points out, severability doctrine based on legislative intent took shape in the mid-to-late 1800s.<sup>48</sup> But courts were dealing with the problem of partial unconstitutionality for decades before that. I have described that older approach elsewhere, and note it here as an alternative to modern severability doctrine.<sup>49</sup> That is because the main lesson to draw from the history of severability doctrine may be that courts should give up trying to use it and scholars should give up trying to fix it. Perhaps, instead, we should move forward using a reconstructed version of the original approach to partial unconstitutionality.

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47. See Stern, *supra* note 44, at 76-77 (explaining that severability doctrine “has been embroidered by the Supreme Court with negative and positive presumptions, and with conflicting rules, some of which are applied in some cases and some in others—usually without any explicit recognition that they conflict”).

48. See Scoville, *supra* note 2 at 545 n.10 (describing nineteenth-century decisions which emphasized legislative intent).

49. See Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 755–68 (2010) (describing how courts dealt with partial unconstitutionality before the rise of the modern legislative-intent-based approach).