THE FLORIDA EVIDENCE CODE AND THE SEPARATION OF POWERS DOCTRINE: HOW TO DISTINGUISH SUBSTANCE AND PROCEDURE NOW THAT IT MATTERS

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I. INTRODUCTION

Over the course of nearly three decades, the Florida Evidence Code[1] has stood as a success story in the sometimes uneasy relationship between the courts and the legislature. The Florida Legislature enacted the code in 1976,[2] and since then has passed changes that, until recently, were adopted by the Florida Supreme Court without controversy as rules of procedure.[3] Thus, there was never any need for a court to consider the question of whether a given change was substantive or procedural: so long as the Florida Supreme Court adopted the change, it simply did not matter.

This cooperative arrangement between the courthouse and the statehouse appears at an end. In 2000, the Supreme Court, for the first time ever, declined to adopt a change to the Florida Evidence Code as a rule of procedure.[4] The new provision, Florida

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1. Fla. Stat. § 90.101–90.958 (2003).

2. 1976 Fla. Laws ch. 76-237, § 8 (noting enactment in 1976 with the intent that the code take effect on July 1, 1977).

3. *See e.g. In re Fla. Evid. Code*, 675 So. 2d 584 (Fla. 1996) (noting that both current and previous amendments' adoption is only "to the extent that they concern court procedure"); *In re Fla. Evid. Code*, 638 So. 2d 920 (Fla. 1993); *In re Amend. of Fla. Evid. Code*, 497 So. 2d 239 (Fla. 1981) (adopting additional amendments); *Fla. Bar re Amend. of Fla. Evid. Code*, 404 So. 2d 743 (Fla. 1981) (adopting amendments to the Code); *In re Fla. Evid. Code*, 376 So. 2d 1167 (Fla. 1979) (clarifying effective date of adoption); *In re Fla. Evid. Code*, 372 So. 2d 1369 (Fla. 1970) (adopting the Code temporarily).

4. *In re Amends. to the Fla. Evid. Code*, 782 So. 2d 339 (Fla. 2000).

Statutes § 90.803(22), would have allowed for the admission of former testimony, in a different proceeding, if a "person with a similar interest had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."[5] Recently, the First District Court of Appeal took the next step, holding that the revision was procedural, rather than substantive, and therefore unconstitutional pursuant to Article V of the Florida Constitution.[6] Also in 2002, the Code and Rules of Evidence Committee of the Florida Bar asked the Florida Supreme Court not to adopt another change by the Legislature, this time to Florida Statutes § 90.404(2), as a rule of procedure.[7] Although the Supreme Court ultimately did adopt the new provision, Justice Pariente's dissent suggests that the constitutionality of this change is still open to debate.[8]

These events of the last two years have breathed life into the dormant question of what constitutes a substantive evidence code provision versus one that acts as a procedural rule. Although the Supreme Court ultimately declined to address the specific issue of whether Florida Statutes § 90.803(22) was substantive or procedural, the fact that the Court has signaled its unwillingness to uncritically adopt evidence code changes as rules of procedure, coupled with the Legislature's recent willingness to advance some policy goal by manipulating the Code's provisions, suggests that this issue will almost certainly arise again in the near future.[9] When it does, the Supreme Court may find its own precedents inadequate to the task of drawing the line between substance and procedure, to the extent such an exercise is possible, and will

5. Fla. Stat. § 90.803(22).

6. *Grabau v. Dept. of Health*, 816 So. 2d 701, 708–709 (Fla. 1st Dist. App. 2002).

7. *In re Amends. to the Fla. Evid. Code*, 825 So. 2d 339, 340–341 (Fla. 2002).

8. *Id.* at 341 (Pariente, J., concurring in part and dissenting in part).

9. In fact, the 2004 Florida legislative session saw the prefiling of a bill in the House of Representatives by the Public Safety and Crime Prevention Committee, jointly with Representative Gustavo Barreiro, proposing an amendment to Article V of the Florida Constitution eliminating the Supreme Court's current authority to adopt rules of practice and procedure. *See* Fla. H. 1741, 2004 Reg. Sess. (Mar. 8, 2004); Fla. S. 2378, 2004 Reg. Sess. (Feb. 27, 2004). These proposals would create a judicial conference for the creation of rules of procedure and, more important, would allow the Legislature to amend or repeal rules of practice and procedure in all courts by general law. *Id.* These proposed changes ostensibly arose out of a series of rules that contradicted legislative enactments, and jury instructions that had failed to keep pace with statutory law. Gary Blankenship, *House Committees Question Procedural Rules*, Fla. Bar News 22 (Feb. 15, 2004).

likely look elsewhere in crafting an analytical framework. The purpose of this Article is to analyze the various constructs developed to distinguish between substance and procedure in other jurisdictions, with regard to both rules of evidence and other legal issues.[10] The shortcomings in these frameworks lead to a discussion of federal caselaw addressing the substance/procedure distinction, but once again the very different constitutional concerns that underscore the reasoning of the federal courts render this attempt to analogize inadequate.[11] Finally, this Article proposes a hybrid approach, addressing the question of whether a rule of evidence is substantive or procedural based upon the policy goals advanced by the rule.[12]

II. SUBSTANCE VERSUS PROCEDURE IN FLORIDA LAW: AN OVERVIEW

The genesis of the substance-versus-procedure dichotomy under Florida law, along with its significance to the evidence code, lies in the separation of powers demarcated in the Florida Constitution.[13] In contrast with the federal system,[14] the Florida Legislature holds the authority to create substantive law, and the Florida Constitution specifically reserves to the Florida Supreme Court the right to regulate procedure within its courts.[15] The Court's powers are not without limitation, however. Article V, § 2 provides the Legislature with the authority to veto or repeal, but not amend or supersede,[16] a rule enacted by the Court.[17] Against this backdrop, Florida courts have addressed the constitutional question of whether a legislative enactment encroaches upon the powers reserved to the Supreme Court by Article V.

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10. *Infra* pt. III.

11. *Infra* pts. IV & V.

12. *Infra* pt. VI.

13. *See* Fla. Const. art. II, § 3 (prohibiting members of one branch of government from exercising "any powers appertaining to either of the other branches unless expressly provided herein").

14. *Infra* pt. IV.

15. Fla. Const. art. V, § 2.

16. *But see supra* n. 9 (describing legislation which would expand the legislature's authority to amend or repeal rules of procedure).

17. *See also* Fla. Stat. § 25.371 (2003) (providing that Supreme Court rules concerning practice and procedure supersede conflicting statutes).

As a starting point, many Florida courts have cited Justice Adkins's 1972 concurring opinion in *In re Florida Rules of Criminal Procedure*.[18] Based upon an extensive review of cases in Florida as well as other jurisdictions, Adkins concluded as follows:

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.[19]

Turning to substantive law, he reasoned that "substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property."[20]

These simple guidelines have provided the framework for later Florida jurisprudence on the substance/procedure distinction.[21] In the context of the Evidence Code, however, Adkins's analysis seems inadequate, because this area of the law necessarily involves the interplay of "the machinery of the judicial process" and "the primary rights of individuals."[22] Moreover, Justice Ad-

18. 272 So. 2d 65 (Fla. 1972).

19. *Id*. at 66 (Adkins, J., concurring).

20. *Id.*

21. *See e.g. Hall v. State*, 823 So. 2d 757, 763 (Fla. 2002) (relying in part on Justice Adkins's concurrence in reviewing constitutionality of Criminal Punishment Code sentencing guidelines); *Caple v. Tuttle's Design-Build, Inc.*, 753 So. 2d 49, 54 (Fla. 2000) (addressing constitutionality of foreclosure procedures in Florida Statutes § 702.10(2)); *Haven Fed. Sav. & Loan Assn. v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991) (holding, in partial reliance on Adkins's reasoning, that provision for severance of claims in foreclosure actions under Florida Statutes § 702.01 is procedural and, therefore, unconstitutional to the extent it is inconsistent with Florida Rule of Civil Procedure 1.270(b)); *Hart v. State*, 405 So. 2d 1048, 1049 (Fla. 4th Dist. App. 1981) (applying Adkins's analysis to the constitutionality of a statute prohibiting bail on appeal in certain circumstances).

Beyond the Adkins concurrence, courts have relied upon *State v. Garcia,* 229 So. 2d 236 (Fla. 1969), and *Benyard v. Wainwright*, 322 So. 2d 473 (Fla. 1975), in discerning the line between substance and procedure. In *Garcia*, Justice Adkins wrote the court's opinion, holding that Florida Rule of Criminal Procedure 3.260, which allowed a defendant to waive in writing the right to trial by jury, was procedural and therefore superseded an analogous statute, Florida Statutes § 919.23(2), addressing the same right. *Garcia*, 229 So. 2d at 239. In *Benyard*, the Supreme Court addressed a conflict between the sentencing guidelines found in Florida Rules of Criminal Procedure 3.722 and Florida Statutes § 921.16 and ruled that the manner of sentencing was a matter of substantive law. *Benyard*, 322 So. 2d at 475.

22. *See e.g. State v. D.R.*, 518 A.2d 1122, 1130 (N.J. Super. App. Div. 1986) (character-

kins's reasoning provides the labels by which one might distinguish substance and procedure, but provides no predictive apparatus for determining how those labels might be applied to specific laws. In a way this is understandable, insofar as the substance/procedure analysis must necessarily be performed on a case-by-case basis, and the same rule or piece of legislation might reasonably be viewed as substantive or procedural by two different individuals.[23] Given these difficulties, a Florida court seeking to apply Justice Adkins's framework to the law of evidence may choose to look outside Florida jurisprudence for the means of distinguishing substance and procedure. A review of the wide array of treatments given to the problem, both by other states and by the federal courts, demonstrates the complexity inherent in framing the issue and reaching a sound resolution.

III. SUBSTANCE VERSUS PROCEDURE: OTHER JURISDICTIONS

Not surprisingly, other states have wrestled with the substance/procedure distinction as it pertains to their evidence codes or rules of evidence. Many of their courts derive their rulemaking authority from constitutional mandates similar to that held by the Florida courts, and perhaps, have addressed the same sorts of issues regarding their rules of evidence. A review of these jurisdictions' attempts to work through this problem reveals significant limitations in one's ability to analogize with the Florida constitutional question, however. The problem is that other state courts have developed a series of tests, driven largely by context and the specific nature of the question presented, to arrive at

izing evidence law as a "hybrid" of both substance and procedure), *rev'd on other grounds*, 537 A.2d 667 (N.J. 1988); *cf. Hall v. State*, 539 So. 2d 1338, 1364 (Miss. 1989) (recognizing that "[t]o attempt to clearly separate rules into 'substantive' and 'procedural' is a quagmire, as futile as the search for 'proprietary' and 'governmental' in an attempt to decide sovereign immunity for cities"); *Dannehl v. Dept. of Motor Veh.*, 529 N.W.2d 100, 107 (Neb. App. 1995) (noting that "[s]ome courts have recognized that procedural rules may affect substantive rights, and where a procedural rule, such as a new rule of evidence, has a substantial impact on a party's rights, the distinction between procedural and substantive rules breaks down" (internal quotations omitted)).

23. *See e.g.* James W. Moore & Helen I. Bendix, *Congress, Evidence & Rulemaking*, 84 Yale L.J. 9, 12 (1974) (arguing that all evidence rules are procedural, even though they "have a substantial effect in reaching an adjudication").

widely varying conclusions regarding whether virtually identical rules of evidence are substantive or procedural.

A. The Answer Depends on the Question

This Article raises the issue of how the Florida Supreme Court should go about discerning the distinction between substantive and procedural evidentiary law when the answer affects the constitutionality of a statutory evidence provision that the Supreme Court declines to adopt as a rule of procedure. Thus, a review of the reasoning employed by courts in other jurisdictions must be tempered by the recognition that these courts may draw the line in different ways, depending on the context in which the question is presented.[24] When these courts are not addressing the substance/procedure question as a matter of separation of powers, the distinctions drawn may not be applicable to the problem faced by the Florida courts.

Perhaps the most common scenario in which state courts consider the distinction between substance and procedure involves the assertion that the application of a post-conduct change in the law violates the Ex Post Facto Clause of the state and federal constitutions. The Ex Post Facto Clause of the United States Constitution[25] extends to "[e]very law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender."[26] Notwithstanding the breadth of this standard, state courts seem far more likely to treat a rule of evidence as procedural when to hold otherwise would render its application unconstitutional under the Ex Post Facto Clause, sometimes going to extreme lengths to draw distinctions justifying their reasoning.[27] For instance, courts may draw a distinction between a change in the law that makes a type of evidence admissible and a

24. *See* Thomas Fitzgerald Green, *To What Extent May Courts under the Rule-making Power Prescribe Rules of Evidence*, 26 A.B.A. J. 482, 483 (1940) ("The answer to the question, 'What is procedure?' depends upon the answer to another question, 'Why do you want to know?'").

25. U.S. Const. art. I, § 10.

26. *Calder v. Bull*, 3 U.S. 386, 390 (1798) (emphasis omitted).

27. *But see Morris v. Pacific Electric Ry. Co.*, 43 P.2d 276, 277 (Cal. 1935) (following similar reasoning that a legislature may not deprive parties of substantive rights under pretense of altering rules of procedure); *Murphy v. City of Alameda*, 14 Cal. Rptr. 2d 329, 333 (Cal. App. 4th Dist. 1993) (following similar reasoning).

change that affects the admissibility of the underlying facts themselves.[28] Such changes in the rules that affect the type of evidence offered are deemed procedural, and thus not violative of the ex post facto proscription.[29]

The tendency of courts faced with constitutional challenges based on the Ex Post Facto Clause to treat virtually all rules of evidence as procedural,[30] renders these cases unsuitable as persuasive authority for Florida courts wrestling with a separation of powers problem. If all rules of evidence are procedural, then Florida has no need to enact an evidence code—the Florida Constitution gives the Supreme Court the authority to create its own rules of procedure, and the Legislature is left with the limited authority to amend or repeal these rules.[31] Most legal scholars would agree that the analysis is not so simple and that the law of evidence contains both substantive and procedural components.[32] In fact, it was this very observation that led Florida to design its present

28. An example of this distinction may be found in *Smith v. State*, 722 S.W.2d 853 (Ark. 1987). The *Smith* court faced a challenge, based on the state and federal Ex Post Facto clauses, to the use of electronically intercepted evidence at trial. *Id*. at 854. Such evidence would not have been admissible at the time the crime was allegedly committed, but was admitted at trial based on a statutory change enacted in the interim. *Id*. The Arkansas Supreme Court reasoned, "The change in the law in this case did not make any *fact* admissible to prove the crime alleged which would not have been admissible at the time of the crime. Rather, it made admissible *testimony* which would not have been admissible at the time of the crime." *Id*. at 857 (emphasis in original).

29. *See e.g. In the Matter of W.D.*, 709 P.2d 1037, 1043 n. 2 (Okla. 1985) (noting with approval a lower-court holding that "the law of evidence in effect at the time of trial controls and not the law of evidence in effect at the time of the commission of the offense" (citing *Taylor v. State*, 640 P.2d 554, 556 (Okla. Crim. App. 1982))); *Musgrove v. State*, 82 S.W.3d 34, 39 (Tex. App. 4th Dist. 2002) (holding that change in rule of evidence allowing certain testimony regarding juror misconduct did not violate state or federal Ex Post Facto clauses because "[t]he rules of evidence are procedural provisions").

30. *See e.g. Musgrove*, 82 S.W.3d at 39 (calling rules of evidence "procedural provisions").

31. *See supra* nn. 15, 17, and accompanying text (describing Florida's separation of powers on this matter).

32. *See e.g.* William L. Earl, *The Rulemaking Power of the Florida Supreme Court: The Twilight Zone between Substance and Procedure*, 24 Fla. L. Rev. 87, 87 (1971) (dealing generally with the Florida constitutional question of the respective roles of the judicial and legislative branches in rulemaking); Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rulemaking*, 55 Mich. L. Rev. 623, 635 (1957) (reasoning that "what may be considered procedural for one purpose may be considered substantive for another"); Benjamin Kaplan & Warren J. Greene, *The Legislature's Relation to Judicial Rulemaking: An Appraisal of* Winberry v. Salisbury, 65 Harv. L. Rev. 234, 250 (1951) (observing overlap between functions of judiciary and legislature that complicates separation of powers analysis).

arrangement of creating an evidence code that would be adopted as rules of procedure by the Supreme Court.[33]

Moreover, the reasoning behind many of the ex post facto cases runs contrary to the principles set forth in other cases addressing the substance/procedure distinction. For instance, in *Wyatt v. State*,[34] the Maryland Court of Appeals held that a change in Maryland's statutory law, which allowed the admission into evidence of a defendant's refusal to take a breathalyzer test, did not violate the Ex Post Facto clauses of the United States and Maryland Constitutions.[35] The court based its reasoning, in part, on the premise that the statute "'did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused.'"[36]

The problem with this analysis is that it contradicts caselaw developed in other contexts that distinguishes substance from procedure based on whether it affects the conduct of the litigant prior to trial.[37] Here, the Maryland Legislature had previously barred the admission of evidence regarding a defendant's failure to take a breathalyzer to prove guilt,[38] and a defendant might

33. A 1976 Florida legislative staff analysis contains the following observation:

> A problem arises in codifying rules of evidence when the distinction between substantive and procedural law is sought to be honored. Rules of Evidence are often necessarily a blend of substance and procedure. Thus a potential conflict involving the separation of powers between the Legislature, which makes substantive law, and the Supreme Court, which adopts rules of procedure governing Florida's judiciary, exists in promulgating the code. It is contemplated that this conflict will be avoided by the Supreme Court utilizing its rulemaking power to adopt the code as Supreme Court rules. This would vitiate any constitutional challenge to provisions of the code as being outside the power of the Legislature as well as serve to judicially sanction its work product.

Fla. Sen. Doc., *Staff Analysis for Senate Judiciary—Criminal Committee of CS/SB 754*, 5 (1976) (copy on file with *Stetson Law Review*).

34. 817 A.2d 901 (Md. Spec. App. 2003).

35. *Id*. at 910.

36. *Id*. (quoting *State v. Stevens*, 757 S.W.2d 229, 231 (Mo. App. 1988)).

37. *See e.g. Opinion of the Justices (Prior Sexual Assault Evidence)*, 688 A.2d 1006, 1012 (N.H. 1997) (noting test for classification as substance or procedure "'looks to whether a person's in-court conduct or out-of-court conduct has been changed'" (quoting Dorene M. Sinda, Student Author, *Rules of Evidence: An Exercise of Constitutional Power by the Michigan Supreme Court*, 4 Det. C. L. Rev. 1063, 1080 (1980))).

38. There is some question whether this is what the Maryland Legislature actually meant to accomplish. The original text, in effect at the time of the alleged offense, stated, "No inference or presumption concerning either guilt or innocence arises because of refusal

conceivably decide whether to take a breathalyzer test based on this rule. Thus, by the standard that categorizes a law as substantive if it affects out-of-court behavior, the law was substantive and should not have been applied retroactively. The fact that it was not so treated illustrates the dangers of relying on Ex Post Facto Clause jurisprudence to define the parameters of substance and procedure in the context of a separation of powers problem such as that faced by the Florida courts.

Another area in which courts regularly address the distinction between substance and procedure is conflict of laws. Once again, perhaps out of a preference for employing their own, familiar rules, courts tend to characterize rules of evidence as procedural, thereby avoiding the need for interpreting another jurisdiction's evidence law.[39] The starting point for any conflict of laws problem involves a determination of the forum state's conflict of laws rules, which to varying degrees provide guidance regarding the extent to which rules of evidence should be treated as substantive or procedural.[40] The *Restatement (Second) of Conflict of Laws*, for example, provides with certain exceptions that the admissibility of evidence is generally determined by the law of the forum.[41] The three exceptions expressly addressed in this Re-

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to submit [to a breathalyzer test]. The fact of refusal to submit is admissible in evidence at the trial." Md. Cts. & Jud. Proc. Ann. § 10-309(a)(2) (1999) (available at WL, MD-STMANN 99 database). Maryland's appellate courts had interpreted this language as permitting admission of such evidence only when it was relevant to a material issue other than the guilt of the accused. *Wyatt*, 817 A.2d at 905 (citing *Krauss v. State*, 587 A.2d 1102, 1106 (Md. 1991)). Subsequent to the *Krauss* decision, the Maryland Legislature amended the statute, with the express purpose of "repealing a prohibition against an inference or presumption concerning guilt or innocence arising because of a person's refusal to submit to a certain test for alcohol . . . and generally relating to evidence of a person's refusal to submit to a certain test for alcohol . . . in prosecutions of certain alcohol . . . related driving offenses." Preamble to Maryland House Bill 338 and Maryland Senate Bill 4, 415th Sess. (2001). Based on the language of the original statute, it is not at all clear that the Legislature intended to bar evidence of failure to take a breath–alcohol test, and acted to amend the statute based only on the erroneous interpretation imposed by the appellate court.

39. *See e.g. Abalene Pest Control Serv., Inc. v. Orkin Exterminating Co., Inc.*, 395 S.E.2d 867, 869 (Ga. App. 1990) (quoting *Hamilton v. Metro. Life Ins. Co.*, 32 S.E.2d 540, 544 (Ga. App. 1944), in characterizing rules of evidence, methods of burden shifting, and presumptions arising from facts as procedural and not substantive).

40. *See Dallas County v. Union Assurance Co.*, 286 F.2d 388, 393 n. 7 (5th Cir. 1961) (noting differences between substantive and procedural evidence rules against the backdrop of conflict of laws principles).

41. *Restatement (Second) of Conflict of Laws* § 138 (1971).

statement are the parol evidence rule,[42] privileges,[43] and the statute of frauds.[44] Courts that do not rely on this Restatement have likewise treated rules of evidence as procedural on the basis that they affect remedial issues rather than substance.[45]

Most cases in which courts have grappled with whether a rule of evidence is substantive or procedural for conflict of law purposes have dealt with the issue of privilege.[46] Although the Restatement provides its own mechanism for determining whether to apply a privilege,[47] the comments to this section go on to list four factors that bear on admissibility: "(1) the number and nature of the contacts that the state of the forum has with the parties and with the transaction involved, (2) the relative materiality of the evidence that is sought to be excluded, (3) the kind of privilege involved, and (4) fairness to the parties."[48] All of these factors seem to suggest consideration of whether the recognition of the privilege by a given jurisdiction creates a substantive right inuring to one of the parties, which would trump a conflicting rule of procedure. Caselaw reveals a spectrum of "tests" by which to discern how one should classify a privilege in a particular context.[49] Some jurisdictions have applied the Restatement analysis in con-

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42. *Id.* at § 140.

43. *Id.* at § 139.

44. *Id.* at § 141.

45. *See e.g. Aetna Casualty & Surety Co. v. Westinghouse Elec. Co.*, 337 S.E.2d 390, 395 (Ga. App. 1985) (noting "[t]he rule of *lex fori* controls all matters affecting only the remedy, such as rules of evidence, methods of shifting the burden of proof, and the presumptions arising from given states of fact" (citations and internal quotations omitted)); *Restatement (First) of Conflict of Laws* § 597 (1934) (providing, generally, that all evidentiary questions are governed by law of forum).

46. *See e.g. Gonzalez v. State*, 45 S.W.3d 101, 105–106 (Tex. Crim. App. 2001) (distinguishing privileges from other evidence rules and declaring privileges to be substantive).

47. *Restatement (Second) of Conflict of Laws* § 139 includes the following:

> (1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.
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> (2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.

48. *Id*. at cmt. d.

49. *See generally Fitzgerald v. Austin*, 715 So. 2d 795, 797 (Ala. Civ. App. 1997); *Brandman v. Cross & Brown Co. of Fla., Inc.*, 479 N.Y.S.2d 435, 436–437 (N.Y. Sup. 1984); *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 646 (Tex. 1995).

cluding that privileges should be treated as substantive,[50] while others have suggested that a privilege is procedural at one point in litigation and substantive in another,[51] or that it is substantive only if it affects the outcome of the litigation.[52] The lack of consensus among the various jurisdictions in addressing this narrow issue suggests that cases involving conflict of laws issues may not serve as a steady guide for a Florida court facing a horizontal separation of powers problem.

With both the cases construing the constitutionality of an evidentiary rule's application under the Ex Post Facto Clause and the cases involving conflict of laws issues, the underlying policy considerations make analogy to the situation facing the Florida Supreme Court inappropriate.[53] Most courts recognize an obligation to construe a statutory provision as constitutional if possible.[54] In light of this principle, it seems that a court will be more

50. *See e.g. Ford Motor Co.*, 904 S.W.2d at 646–647 (applying Michigan attorney-client privilege rules in Texas case because the privileged communication took place in Michigan); *Gonzalez*, 45 S.W.3d at 103–106 (examining application of Texas or California clergy-penitent rules).

51. *See e.g. Brandman*, 479 N.Y.S.2d at 436–437 (noting that the attorney-client privilege has both substantive and procedural elements).

52. *Id*. at 437*; see also Fitzgerald*, 715 So. 2d at 798 (quoting *Etheredge v. Genie Indus., Inc.*, 632 So. 2d 1324, 1326 (Ala. 1994) (quoting in turn from Eugene F. Scoles & Peter Hay, *Conflict of Laws* § 3.8 (2d ed., West 1992), in reasoning that, in conflict of laws context generally, law is substantive only to the extent it affects the litigation's outcome).

53. *See* Edmund M. Morgan, *Rules of Evidence—Substantive or Procedural?* 10 Vand. L. Rev. 467 (1957) (arguing that conflict of laws principles are inapplicable to issue of distinguishing substantive or procedural evidence rules because constitutional bases for assertion of this authority are different).

54. *See e.g. Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135, 141 (Ind. 1999) (quoting *A Woman's Choice–East Side Women's Clinic v. Newman*, 671 N.E.2d 104, 111 (Ind. 1996) (Dickson, J., concurring) in noting "courts have an overriding obligation to construe our statutes in such a way as to render them constitutional if reasonably possible"); *Federal Land Bank of Wichita v. Bott*, 732 P.2d 710, 714 (Kan. 1987) (quoting *Barnes v. Kan. Dept. of Revenue*, 714 P.2d 975, 979 (Kan. 1986), in saying that "'it is the court's duty to uphold the statute under attack, if possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done'" (citation omitted)); *City of Belmont v. Miss. State Tax Commn.*, 860 So. 2d 289, 307 (Miss. 2003) (quoting *Lodon v. Miss. Pub. Svc. Commn.*, 279 So. 2d 636, 640 (Miss. 1973), in pointing out that, "[i]f possible, a court should construe statutes so as to render them constitutional rather than unconstitutional if the statute under attack does not clearly and apparently conflict with organic law after first resolving all doubts in favor of validity"); *Brown v. Township of Old Bridge*, 725 A.2d 1154, 1167–68 (N.J. Super. App. Div. 1999) (quoting *D.J.L. v. Armour Pharm. Co.*, 704 A.2d 104, 111 (N.J. Super. 1997), in holding, "Where reasonable minds might differ as to the constitutionality of the means devised by the lawmakers to serve a public purpose, the courts should respectfully defer").

likely to construe a statute as constitutional within a particular context; in this case, when retroactive application is the issue. No such limiting doctrine should apply when the question relates to separation of powers concerns. With regard to conflict of laws issues, most courts would harbor a preference, conscious or otherwise, for the application of their own rules, including rules of evidence.[55] Thus, in both contexts, courts seem far more likely to treat rules of evidence as procedural, and to rely on reasoning that does not necessarily apply to a separation of powers problem.

B. An Array of Tests

Even after one winnows out cases, such as those discussed above, that address the substantive nature of evidentiary rules in other contexts, one encounters a wide array of analytical frameworks employed by the states to classify rules as substantive or procedural.[56] Before delving into the various vehicles for discerning substance from procedure, one should consider the diverse sources of rulemaking authority under which the various state courts operate. Previously, this Article discussed the Florida Supreme Court's inherent constitutional authority to create rules of practice and procedure, subject to the Legislature's right to veto or repeal.[57] Not all supreme courts are conferred this luxury. Although some constitutions, like Florida's, place rulemaking authority in the judicial branch,[58] they also grant the legislative branch the ability not only to veto rules, but also to modify or to

55. *Abalene Pest Control*, 395 S.E.2d at 869.

56. *See Fitzgerald*, 715 So. 2d at 798 (using an outcome-based approach to determine whether an evidence rule is procedural); *Abalene Pest Control*, 345 S.E.2d at 869. (holding that all evidence rules are procedural); *Ellegood v. Am. States Ins. Co.*, 638 N.E.2d 1193, 1196 (Ill. App. 2d Dist. 1994) (using the effect on the parties to determine whether an evidence rule is procedural); *McDougall v. Schanz*, 597 N.W.2d 148, 156 (Mich. 1999) (using a test involving court administration to determine whether an evidence rule is procedural); *Ryan v. Gold Cross Svcs., Inc.*, 903 P.2d 423, 425 (Utah 1995) (using legislative policy to determine the constitutionality of the statute at issue).

57. *See supra* nn. 10–11 and accompanying text.

58. *See e.g.* Ariz. Const. art. 6, § 5(5) (1960); Mich. Const. art. 6, § 5 (giving Supreme Court rulemaking authority in matters of practice and procedure); Ohio Const. art. IV, § 5(B); W. Va. Const. art. VIII, § 3 (conferring authority upon supreme court of appeals "to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law").

amend them.[59] Still other courts enact rules based on a statutory delegation of this power by their respective legislatures.[60]

One could certainly make the case that the source of a court's rulemaking authority may influence the way in which it draws the line between substance and procedure. Where legislative delegation is the source of a court's power to create rules of procedure and of evidence, that court's determination of its authority as to a particular rule may be less relevant. After all, the legislature could presumably disagree with the court's conclusion, and modify the terms of the authority it has delegated in response. Similar concerns arise where a legislature effectively shares the court's rulemaking authority through constitutional empowerment to amend or modify court rules. Thus, the same sorts of considerations that limit the utility of borrowing substance/procedure classifications in cases involving ex post facto concerns, or a conflict of laws problem, complicate attempts to analogize with the reasoning of courts whose constitutional rulemaking mandate is less complete than that conferred in Florida.

Subject to that caveat, there appear to be at least five different frameworks employed by the various state courts to discern whether a rule of evidence is procedural.[61] Perhaps the simplest is the common, blanket assumption that *all* rules of evidence are procedural, without further explanation.[62] This canon seems most

59. *See e.g.* Utah Const. art. VIII, § 4 (granting Utah Supreme Court power to adopt procedural and evidentiary rules, subject to right of legislature to amend such rules by two-thirds vote); *cf.* N.J. Stat. Ann. § 2A:84A-36 (2004) (providing that some rules are included within the statute, while others are filed with the legislature by the New Jersey Supreme Court, and become law unless disapproved by a joint resolution signed by the Governor).

60. *See e.g.* Ark. Code Ann. § 16-11-301 (2003) (delegating right to prescribe rules of practice and procedure to state Supreme Court); Tex. H. 13, 69th Leg., Reg. Sess. § 1-4 (Aug. 26, 1985) (delegating same right to Texas Supreme Court); Vermont. Stat. Ann. tit. 12, § 1 (2003) (delegating same right to Vermont Supreme Court).

61. *Supra* n. 56 (introducing the frameworks).

62. *See e.g. State v. Buonafede*, 814 P.2d 1381, 1384 (Ariz. 1991) (holding that judicially-adopted rules of evidence are procedural and do not establish substantive rights); *Readenour v. Marion Power Shovel*, 719 P.2d 1058, 1060–1061 (Ariz. 1986) (determining that "[r]ules of evidence are promulgated under our constitutional grant of power and are ordinarily considered procedural in nature") (internal citation omitted); *Devore v. Liberty Mutual Ins. Co.*, 570 S.E.2d 87, 88–89 (Ga. App. 2002) (reasoning that amendment to rule of evidence "does not affect or impair vested substantive rights"); *Abalene Pest Control*, 395 S.E.2d at 869 (holding that "'[r]ules of evidence . . . are matters affecting the remedy or procedure'" (quoting *Hamilton*, 32 S.E.2d at 544)); *Schuttler v. Ruark*, 588 N.E.2d 478, 482 (Ill. App. 2d Dist. 1992) (noting that "[r]ules of evidence, discovery, and privilege are pro-

likely to be applied in situations, such as those discussed above, in which the courts are faced with ex post facto or conflict of laws problems.[63] Other courts have rested the distinction upon whether the subject evidentiary provision is a statement of legislative or public policy.[64] Still other tribunals have reasoned that a rule of evidence is procedural only to the extent it affects matters of court administration,[65] while others take an outcome-based approach.[66] Another seemingly unlikely approach to the problem is to define as substantive those laws that make a person a party to a lawsuit, while procedural rules are those meant only to facili-

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cedural rules"); *State ex rel. Hodges v. Fitzpatrick*, 342 N.W.2d 870, 873 (Iowa App. 1983) (treating statute governing blood tests in paternity proceedings as rule of evidence, and hence procedural); *Tharpe v. Commonwealth*, 40 S.W.3d 356, 368 (Ky. 2000) (applying precedent retrospectively "because it only affects a rule of evidence, which is procedural, not substantive, in nature"); *State v. Lambert*, 1993 WL 79273 at *2 (Ohio App. 2d Dist. Mar. 16, 1993) (reasoning that authority to promulgate rules of evidence flows from constitutional authority to promulgate rules of procedure); *Musgrove*, 82 S.W.3d at 39 (declaring, "The rules of evidence are procedural provisions"); *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1313 n. 2 (Utah App. 1991) (holding that parol evidence rule is actually a rule of evidence, and hence procedural); *Ray v. Group Health Assn., Inc.*, 1993 WL 946004 at *1 (Va. Cir. Mar. 12, 1993) (stating that "rules of evidence are procedural rather than substantive"); *Buckley v. Holstedt*, 672 P.2d 829, 834 (Wyo. 1983) (observing that, "Generally, the rules of evidence are procedural and not substantive").

63. *See supra* pt. III.A.

64. *See e.g. McDougall*, 597 N.W.2d at 156 (holding statutory evidence rule unconstitutional only when there exists "no clear legislative policy reflecting considerations other than judicial dispatch of litigation . . . ." (quoting *Kirby v. Larson*, 256 N.W.2d 400, 406 (Mich. 1977) (citation omitted))); *Opinion of the Justices*, 688 A.2d at 1012 (identifying that one test of classifying something as substance or procedure is "whether there exists a general public policy concerning a particular issue" (quoting Sinda, *supra* n. 37, at 1081)); *Ryan*, 903 P.2d at 425 (upholding constitutionality of seat belt rule, which appellant contended was procedural and therefore unconstitutional, because it "represent[ed] a pronouncement of legislative policy around negligence and public safety"); *but see State v. Sypult*, 800 S.W.2d 402, 407 (Ark. 1990) (Turner, J., concurring) (arguing that "it is not sufficient to say simply that we will defer to legislative enactment on all 'matters of public policy'; in fact, all enactments of the General Assembly become matters of 'public policy'").

65. *See e.g. McDougall*, 597 N.W.2d at 156 (reasoning that rules of court should yield to legislatively-derived law when court rule has "as its basis something other than court administration" (quoting Joiner & Miller, 55 Mich. L. Rev. at 635 (1957))), *cf. Opinion of the Justices*, 688 A.2d at 1012 (noting that "[a] third test, characterized as 'the most popular test to distinguish substance and procedure,' defines 'the rights and duties which people live by as substantive, whereas procedure defines the method by which those rights are enforced'" (quoting Sinda, *supra* n. 37, at 1082)).

66. *Cf. Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945) (applying outcome-determinative approach to constitutional question regarding application of statute of limitations); *Fitzgerald*, 715 So. 2d at 798 (using an outcome-based approach to determine whether a law is substantive or procedural).

tate a lawsuit.[67] Finally, some jurisdictions treat a rule of evidence as substantive only if it affects the outcome of the litigation in the eyes of the reviewing court.[68]

Returning to the original problem presented by this Article, we find that most of these tests are not well suited to the issue of whether a Florida Evidence Code provision is substantive or procedural. If, as some courts have ruled, all rules of evidence are procedural, Florida's system of enacting a statutory evidence code makes no sense, and any provision not adopted as a rule of procedure by the Florida Supreme Court would be unconstitutional.[69] Deferring to the Legislature on matters deemed statements of legislative policy only leaves open the question of who decides what constitutes "legislative policy." Could the Legislature attempt to amend the hearsay rule in a certain category of case (as it has done in Florida),[70] and include in the bill's preamble some statement of public policy that would insulate the bill from constitutional scrutiny?[71] Although it is the Legislature's province to address matters of public policy, simply treating this as a litmus test, without considering the rule's impact upon the fair administration of justice, seems inadequate.

On the other hand, treating rules of evidence as procedural only if they relate to court administration seems too narrow. Rules such as Florida Statutes § 90.105, dealing with the court's duty to determine preliminary evidentiary questions,[72] fall

67. *See e.g. Ellegood*, 638 N.E.2d at 1196 (determining that "[a] rule must be considered substantive where it makes one a party to a suit, whereas a rule must be considered procedural where it merely facilitates suit against a party") (citing *Royal Imperial Group, Inc. v. Joseph Blumberg & Assocs., Inc.*, 608 N.E.2d 178, 180 (Ill. App. 1st Dist. 1992)).

68. *See supra* n. 52 (describing this reasoning in conflict of laws setting).

69. *See supra* nn. 13–17 and accompanying text (describing separation of powers in Florida, particular in regard to rules of procedure).

70. *See supra* nn. 3–4 and accompanying text (citing Florida Supreme Court actions regarding the Evidence Code).

71. *See e.g.* Fla. H.B. 89, Reg. Sess. 2004 (Oct. 30, 1993) (purporting to create an omnibus hearsay exclusion identical to that found at Federal Rule of Evidence 803(24)). In its original preamble, the bill states that one of its policy goals is preventing domestic violence. *Id*. One is left to wonder if this would be enough to insulate the bill from constitutional scrutiny if it became law but was rejected as a rule of procedure by the Florida Supreme Court.

72. This part of the Evidence Code says that,

(1) Except as provided in subsection (2), the court shall determine preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence.

squarely within this definition. Most of the Evidence Code, however, goes beyond mere court administration, but it falls short of being a legislative pronouncement of public policy that might be readily categorized as procedural. The "court administration" test is inadequate to address these gray areas.

The final two tests mentioned above are particularly ill-suited to analyzing the constitutionality of a rule of evidence. It is difficult, if not impossible, to envision a situation in which a rule of evidence makes one a party to a lawsuit, and so by this test all rules of evidence are likely procedural. The "outcome-based" test,[73] in the context of evidence law, is likewise inappropriate. Presumably, any admissible evidence must satisfy the basic test of relevancy, meaning it must "tend[ ] to prove or disprove a material fact."[74] As such, must it not also, as a matter of logic, affect the outcome of the trial?[75] Although the outcome-based test may have utility in the context of the ex post facto analysis, it has no application to the constitutional evidence law question facing a Florida court.[76]

The foregoing illustrates the difficulty of attempting simply to transplant a test used by another jurisdiction for distinguishing substantive and procedural evidence law. The tests enunciated are, by and large, driven by the context in which the issue is presented (Ex Post Facto Clause, conflict of laws, etc.), which often includes precedent and policy concerns that have no bearing on

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(2) When the relevancy of evidence depends upon the existence of a preliminary fact, the court shall admit the proffered evidence when there is prima facie evidence sufficient to support a finding of the preliminary fact. If prima facie evidence is not introduced to support a finding of the preliminary fact, the court may admit the proffered evidence subject to the subsequent introduction of prima facie evidence of the preliminary fact.

(3) Hearings on the admissibility of confessions shall be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be similarly conducted when the interests of justice require or when an accused is a witness, if he or she so requests.

Fla. Stat. § 90.105.

73. *See supra* n. 66 and accompanying text (describing the "outcome-based" test).

74. Fla. Stat. § 90.401.

75. *But see* Mason Ladd, *Uniform Evidence Rules in the Federal Courts*, 49 Va. L. Rev. 692, 709 (1963) (arguing that rules of evidence are not outcome determinative because no one can predict what effect particular evidence will have or even if it will be believed).

76. *See id.* at 693 (discussing argument that, under the Rules Enabling Act, a procedural rule's application would face a constitutional challenge if it determines the outcome of a diversity case).

the issue facing the Florida Supreme Court. Another approach might entail looking at how other jurisdictions have drawn the line between substance and procedure with regard to specific rules of evidence. As illustrated below, this approach also has its difficulties.

C. Specific Rules of Evidence

An analysis of how other courts discern whether specific rules are substantive or procedural founders on the fact that the analysis turns as much on the context in which the question is presented as on the purpose of the rule itself.

Take, for example, judicial treatment of the so-called rape shield law.[77] It seems clear that this rule carries implications both

77. As recorded in the Federal Rules of Evidence, the rule states as follows:
(a) Evidence generally inadmissible.
The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
(2) Evidence offered to prove any alleged victim's sexual predisposition.
(b) Exceptions.--
(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;
(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
(C) evidence the exclusion of which would violate the constitutional rights of the defendant.
(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.
(c) Procedure to determine admissibility.--
(1) A party intending to offer evidence under subdivision (b) must–
(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause[,] requires a different time for filing or permits filing during trial; and
(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The

with regard to public policy and to the administration of justice.[78] On the one hand, the rule excludes what might otherwise be relevant evidence, at least within the meaning of Federal Rule of Evidence 402,[79] to protect the rape victim.[80] On the other hand, the rape shield rule is meant to further the administration of justice by excluding evidence that might "'distort the deliberative process and skew a trial's outcome.'"[81]

Despite the dual nature of the rape shield law, courts appear to lose sight of the substantive facet of the rule when faced with an ex post facto challenge.[82] In some of these situations, courts apply the "procedural" label even when the evidence provision at issue is statutory and, at least arguably, raises a separation of powers question to the extent it intrudes on the judiciary's rulemaking power.[83] As we have seen previously, the sweep of what a

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> motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

Fed. R. Evid. 412.

78. *See e.g. State v. Martin*, 44 P.3d 805, 814 (Utah 2002) (recognizing that Utah Rule of Evidence 412 "provides both substantive and procedural restraints against the introduction of evidence concerning an alleged victim's past sexual acts").

79. Fed. R. Evid. 402 (describing general admissibility of all relevant evidence).

80. At least one court has taken the position that the rape shield rule also works to the defendant's benefit, in that it "gives a defendant access for the first time to far more probative evidence: specific prior sexual conduct with third persons." *Winfield v. Commonwealth*, 301 S.E.2d 15, 20 (Va. 1983).

81. *Martin*, 44 P.3d at 814 (quoting *State v. Dibello*, 780 P.2d 1221, 1229 (Utah 1989)).

82. *See e.g. Turley v. State*, 356 So. 2d 1238, 1243–1244 (Ala. Crim. App. 1978) (holding a rape shield law procedural for purpose of ex post facto analysis); *Pilcher v. Commonwealth*, 583 S.E.2d 70, 75 (Va. App. 2003) (same).

83. *Pilcher*, 583 S.E.2d at 74–75. Note that Virginia's constitutional delegation of rulemaking authority to its supreme court, which governed the *Pilcher* decision, is atypically narrow. The Virginia Constitution includes the following provision:

> The Supreme Court shall have the authority to make rules governing the course of appeals and the practice and procedure to be used in the courts of the Commonwealth, but such rules shall not be in conflict with the general law as the same shall, from time to time, be established by the General Assembly.

Va. Const. art. VI, § 5. The Virginia General Assembly, in turn, has regulated by statute the procedures for adoption of rule amendments, and reserved to itself the power to modify or annul any rules adopted or amended by the Virginia Supreme Court. Va. Code Ann. § 8.01-3 (1984). *See also* Va. Code Ann. § 30-153 (2004) (giving responsibility to Virginia Code Commission to draft rules of evidence for introduction in General Assembly with recommendations from Virginia Supreme Court). The Court's rulemaking power is further circumscribed in the general district courts and juvenile and domestic relations district courts, wherein it may formulate rules only after consultation with the chairs of the House and Senate Courts of Justice Committees and a committee of the Judicial Conference of Virginia for District Courts. Va. Code Ann. § 16.1-69.32 (2004).

court considers procedural is broadest when it is addressing a criminal defendant's ex post facto argument.

Turning to witness competency issues, various courts disagree over whether these are matters of substance or procedure. If the question simply has to do with "competence," courts seem in agreement that this is a matter of procedure.[84] This accord breaks down, however, once the question enters the gray area between issues of witness competence and witness qualification to testify. If the legislature intrudes upon the rules of evidence addressing expert witness qualification, at least some courts will treat the statute as substantive, and hence constitutional, so long as it advances a public policy goal such as tort reform.[85] Not all courts have adopted this reasoning, instead taking the position that any attempt by the legislature to dictate expert qualifications violates the separation of powers doctrine.[86] Similarly, at least one court has construed what was presented as a procedural question of witness competence as, in fact, a substantive matter of privilege within the purview of the legislature.[87] In sum, although it appears that witness competence presents a matter of procedure,

84. *See e.g. Johnson v. Porter*, 471 N.E.2d 484, 487 (Ohio 1984) (holding a "dead man's statute" procedural and thus abrogated by evidentiary rule addressing witness competence).

85. *See e.g. McDougall*, 597 N.W.2d at 153. The Michigan Supreme Court recognized a conflict between Michigan Rules of Evidence 702, on expert witness testimony in general, and Michigan Compiled Laws § 600.2169, which set forth expert witness qualifications in medical malpractice cases. The Michigan Supreme Court reasoned that the statute did "not involve the mere dispatch of judicial business," but instead

> reflect[ed] a careful legislative balancing of policy considerations about the importance of the medical profession to the people of Michigan, the economic viability of medical specialists, the social costs of "defensive medicine," the availability and affordability of medical care and health insurance, the allocation of risks, the costs of malpractice insurance, and manifold other factors, including, no doubt, political factors. . . .

Id. at 158 (quoting with approval from dissent in lower court in *McDougall v. Eliuk*, 554 N.W.2d 56, 64 (Mich. App. 1996) (Taylor, J., dissenting)).

86. *See e.g. Mayhorn v. Logan Med. Found.*, 454 S.E.2d 87, 94 (W. Va. 1994) (holding that statute governing expert witness qualifications in medical malpractice cases unconstitutionally intruded on court's rulemaking power).

87. *State v. Almonte*, 644 A.2d 295, 300–301 (R.I. 1994). At issue in the *Almonte* case was whether a court could order the disclosure of medical records that would otherwise have been privileged under a newly enacted state law regarding confidentiality of medical information. *Id*. at 296–297. Despite the fact that the statute spoke of a health care provider's competence to testify, the Rhode Island Supreme Court deemed the new statute a privilege, but then struck it down as overbroad. *Id.* at 298–299.

the question may draw in matters of public policy or privilege that render it, at least to some degree, substantive.

Although most jurisdictions treat privileges as substantive, this conclusion is not unanimous, and those in the majority have based their conclusions on varying reasons.[88] Perhaps the simplest scenario in which privilege is treated as substantive involves situations in which the state's rules of evidence are drafted, as with the federal rules,[89] in a way that reserves to the legislature or the common law the right to create a privilege.[90] Courts have also observed that a privilege, to be constitutional, must advance some public interest that justifies the exclusion of otherwise relevant evidence.[91] Also, as we have seen, the treatment of privilege as substantive may be driven by context, particularly when presented as a conflict of laws question.[92]

At the same time, at least one court has deemed a statutory privilege procedural, and therefore, an unconstitutional intrusion on the judiciary's rulemaking authority. In *Ammerman v. Hubbard Broadcasting, Inc.*,[93] the New Mexico Supreme Court considered the constitutionality of a statutory journalist's privilege.[94]

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88. *See e.g. Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 555–556 n. 2. (2d Cir. 1967) (examining differing approaches and citing numerous cases and articles from around the country to show the diversity of opinion on the question).

89. *See infra* n. 129 and accompanying text (discussing interaction between various federal evidence rules and state laws).

90. *See e.g. State v. Smorgala*, 553 N.E.2d 672, 675–676 (Ohio 1990) (noting that the Ohio Supreme Court drafted Ohio Rule of Evidence 501, governing privilege, in a way that defers to statutes enacted by the state Legislature or principles of common law, and in so doing "followed the congressional approach because it believed the law of privilege could be considered substantive and therefore beyond the court's constitutional rulemaking authority").

91. *See e.g. Johnson v. State*, 926 S.W.2d 334, 338 (Tex. Crim. App. 1996) (observing that "privileges are more readily accepted when a public interest is being advanced"). The *Johnson* court relied, in part, upon the opinion of the United States Supreme Court in *Trammel v. United States*, 445 U.S. 40 (1980), wherein the Court explained that privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Id.* at 338 (quoting *Trammel v. U.S.*, 445 U.S. 40, 50 (1980) (citation omitted)).

92. *See e.g. Ford Motor Co.*, 904 S.W.2d at 647 (granting writ of mandamus to prevent disclosure of materials protected by Michigan's law of attorney-client privilege); *Brandman*, 479 N.Y.S.2d at 436–437 (reasoning that attorney-client privilege contains elements of both substance and procedure, then applying an outcome-determinative test in resolving conflict of laws issue "to limit the effect of forum shopping").

93. 551 P.2d 1354 (N.M. 1976).

94. *Id*. at 1355–1356. The Court examined New Mexico Statutes Annotated § 20-1-

The Court began its analysis by observing that "[t]here can be no real question about rules of privilege being rules of evidence."[95] It then cited a number of treatises[96] before arriving at the conclusion that all rules of evidence are procedural "in that they are a part of the judicial machinery administered by the courts for determining the facts upon which the substantive rights of the litigant rest and are resolved."[97] Thus, while acknowledging "that authorities . . . are not always in accord" regarding the dichotomy between substance and procedure, and backtracking somewhat in characterizing the rules of evidence as "very largely, if not entirely, procedural,"[98] the New Mexico Supreme Court determined that the journalist's privilege was procedural, and therefore, unconstitutional because the Court had not adopted it.[99]

12.1, which at the time read as follows:

> A. Unless disclosure be essential to prevent injustice, no journalist or newscaster, or working associates of a journalist or newscaster, shall be required to disclose before any proceeding or authority, either:
>
> (1) The source of any published or unpublished information obtained in the gathering, receiving or processing of information for any medium of communication to the public; or
>
> (2) any unpublished information obtained or prepared in gathering, receiving or processing of information for any medium of communication to the public.

Id. (quoting New Mexico Statutes Annotated § 20-1-12.1 (Michie 1953), which is now codified unchanged at New Mexico Statutes Annotated § 38-6-7 (2004)).

95. *Ammerman*, 551 P.2d at 1356.

96. Featured prominently among these was the oft-cited Edmund M. Morgan, *Rules of Evidence—Substantive or Procedural?* 10 Vand. L. Rev. 467 (1957). Professor Morgan argues that all rules of evidence are procedural because they have an impact on the effective administration of justice. *Id*. at 468. As set forth in more detail in the following sections, this Author believes Professor Morgan's conclusion in this regard is too narrow, insofar as it fails to give proper weight to the fact that virtually any rule of evidence has elements that are both substantive and procedural, and a court's task in considering the constitutionality of a rule of evidence necessarily involves weighing these components. *See also* Moore & Bendix, *supra* n. 23, at 11–12 (arguing that all evidence rules are procedural although they may "have a substantial effect in reaching an adjudication").

97. *Ammerman*, 551 P.2d at 1357.

98. *Id*.

99. *Id*. at 1359. This conclusion was driven, in no small part, by the manner in which the New Mexico Supreme Court itself drafted the rule of evidence dealing with privilege. Unlike its federal counterpart, the New Mexico rule limited privileges to those "required by constitution, and . . . as provided in these rules or in other rules adopted by the supreme court . . . ." N.M. Stat. Ann. § 20-4-501 (Supp. 1975) (now listed unchanged at New Mexico Rule of Evidence 11-501 (2004)). By the plain language of the rule, there is no provision for statutory privileges unless they are adopted by the New Mexico Supreme Court, which this one was not. *Ammerman*, 551 P.2d at 1359. Left unanswered is the question of whether the Court would have been forced to consider the constitutionality of its own rule of privilege if it had instead concluded the journalist's privilege was substantive.

So where does this leave us? It seems clear that when the question of whether a rule of evidence is substantive or procedural is not based on a horizontal separation-of-powers problem, for instance in disputes involving an ex post facto or conflict of laws question, the answers provided by the various courts offer little guidance with regard to the specific issues faced in Florida.[100] Likewise, the various "tests" employed to distinguish substance from procedure rely on considerations that are ill-suited to evidence law or the issue of separation of powers.[101] Nor can Florida courts rely on the reasoning applied by other state courts to specific rules of evidence, given that their conclusions fall all across the spectrum between substance and procedure.[102]

In light of these shortcomings, more persuasive precedent may lie in the jurisprudence of the federal courts, to which Florida courts have long turned for guidance in interpreting evidence law. However, there are serious shortcomings in applying the federal approach to Florida law.

IV. THE FEDERAL MODEL

Florida courts have often looked to their federal counterparts in construing analogous evidence law provisions.[103] In applying this policy to the analysis of the substance/procedure distinction in the context of evidence law, it is worth noting at the outset that

100. *Supra* pt. III.A.

101. *Supra* pt. III.B.

102. The foregoing discussion is by no means meant to present an exhaustive review of the types of evidence rules that raise questions regarding whether they are substantive or procedural. For instance, presumptions are frequently the subject of this analysis with the outcome turning, in part, upon whether one is discussing a burden-shifting rebuttable presumption (generally substantive) or a vanishing presumption once rebutting testimony is introduced (more likely procedural). *See* Ladd, *supra* n. 75, at 698 (discussing this distinction in detail).

103. *See e.g. Moore v. State*, 452 So. 2d 559, 562 (Fla. 1984) (commenting that "[b]ecause section 90.801(2)(a) was patterned after Federal Rule of Evidence 801(d)(1), we should construe the former in accordance with federal court decisions interpreting the latter"); *First Union Bank v. Turney*, 824 So. 2d 172, 184 n. 10 (Fla. 1st Dist. App. 2001) (observing that "[t]he United States Supreme Court's interpretation of Rule 104(a) is persuasive authority as to the proper interpretation of § 90.105(1)"); *State v. Famiglietti*, 817 So. 2d 901, 905–906 (Fla. 3d Dist. App. 2002) (relying on United States Supreme Court interpretation of psychotherapist-patient privilege in federal context); *but see R. U. v. Dept. of Children & Families*, 782 So. 2d 1024, 1024–1025 (Fla. 4th Dist. App. 2001) (declining to follow federal court decisions allowing hearsay testimony that was otherwise deemed reliable because Florida Evidence Code lacked catch-all hearsay exception found in federal rules).

the federal courts face a much different separation-of-powers problem than that confronting their Florida counterparts. There is a wide divergence between the constitutional powers conferred upon the legislative and judicial branches by the Florida and United States constitutions, largely because the federal analysis is based on concerns of vertical federalism, rather than the horizontal federalism issues that animate the Florida debate.[104] Unlike the Florida Constitution, the United States Constitution expressly reserves to the legislative branch—Congress—the right to regulate practice and procedure in federal courts.[105] In turn, through the Rules Enabling Act,[106] Congress delegates to the United States Supreme Court the authority to create rules of procedure and of evidence.[107] Both of these sets of rules are created by advisory committees to the Supreme Court and, to an even greater extent than in Florida, are subject to modification by the legislative branch.[108] In addition, the Supreme Court's rulemaking authority is subject to a limitation not facing the state courts, to the extent that the *Erie* doctrine[109] prevents the creation of a rule of evidence unless it could be rationally

104. For a brief discussion of the tension within and between the concepts of vertical and horizontal federalism, see W. William Hodes, *Congressional Federalism and the Judicial Power: Horizontal and Vertical Tension Merge*, 32 Ind. L. Rev. 155 (1998).

105. U.S. Const. art. I, § 8, cl. 18 (Necessary and Proper Clause); U.S. Const. art. III, § 1 (granting Congress power to establish federal court system); *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (asserting that the Constitution grants Congress power to make practice and pleading rules and to regulate matters that fall somewhere between substance and procedure); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941) (stating that "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to . . . federal courts authority to make rules . . . .").

106. 28 U.S.C. § 2072 (2000).

107. The Rules Enabling Act describes the Court's power as follows:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Id.

108. *See Dickerson v. U.S.*, 530 U.S. 428, 437 (2000) (holding that "Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution").

109. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 72–73 (1938).

rule of evidence unless it could be rationally characterized as procedural.[110]

This limitation on the ability to analogize with the federal model has been recognized by the Florida Supreme Court in other, related contexts. The Court addressed, in *Allen v. Butterworth*,[111] the issue of whether the Death Penalty Reform Act (DPRA)[112] violated the doctrine of separation of powers by intruding on the judicial branch's power to adopt rules for practice and procedure.[113] The State, in defending the constitutionality of the DPRA, analogized to the federal Antiterrorism and Effective Death Penalty Act (AEDPA)[114] which, *inter alia*, imposed a one-year statute of limitations on habeas corpus actions.[115] The Court rejected this argument, reasoning that the bases for legislative and judicial authority in the state and federal systems were materially different:

> [T]here are significant distinctions between the balance of power in the federal system and the balance of power in this state. Although the federal constitution grants the United States Supreme Court limited original jurisdiction, article III, section 2 provides that the appellate jurisdiction of the United States Supreme Court is derived from the authority of Congress. In contrast, the original and appellate jurisdiction of the courts of Florida is derived entirely from article V of the Florida Constitution. . . . [T]he United States Supreme Court promulgates the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure pursuant to the authority conferred to it by Congress under the Rules Enabling Act.[116]

The *Allen* Court went on to reason that, because Congress has the authority to implement and amend the federal procedural rules, while the Florida Constitution grants the Florida Supreme Court the exclusive authority to adopt rules of procedure, "the

110. *See Hanna*, 380 U.S. at 464–473 (examining *Erie* and the Rules Enabling Act).
111. 756 So. 2d 52 (Fla. 2000).
112. 2000 Fla. Laws ch. 2000-3.
113. *Allen*, 756 So. 2d at 54.
114. Pub. L. No. 104-132, 110 Stat. 1214 (1996).
115. *Allen*, 756 So. 2d at 62–64.
116. *Id*. at 63.

separation of powers argument raised in the present case would never be an issue in the federal system."[117]

The distinction raised by the Court in *Allen* highlights an irony of sorts. In the federal system, rulemaking authority lies in the legislative branch, which in turn has delegated it to the judicial branch and subsequently taken little active role in the creation of rules of evidence.[118] In Florida, on the other hand, the constitution expressly vests the authority to create rules of procedure (and inferentially rules of evidence) in the judicial branch,[119] and yet evidence law in Florida is embodied in statute.[120] Thus, federal courts do not face the same sort of horizontal federalism concerns as those created by the Florida constitutional scheme, in that Congress's rulemaking power far exceeds that of the Florida Legislature.

Despite this contrast, federal caselaw has much to say on the subject of whether a rule is substantive or procedural, including rules of evidence.[121] This body of law arises from the requirement that a federal court, sitting in diversity, apply the substantive law of the forum state.[122] Like Florida caselaw dealing with the substance/procedure distinction, federal cases treating the issue are concerned with separation of powers and the limitations imposed by the constitutional and statutory framework within which they operate.[123] Unlike Florida cases, however, the separation of powers concerns in the federal cases are vertical, in the sense that they address the relationship between the federal and state systems.[124] The Florida cases, as discussed above, apply the substance/procedure analysis as a horizontal problem, specifically the allocation of powers among the branches of the state government.[125]

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117. *Id.*

118. *See Hanna*, 380 U.S. at 472–473 (quoting *Lumberman's Mut. Cas. Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963)).

119. Fla. Const. art. V, § 2(a).

120. *See In re Amends. to the Fla. Evid. Code*, 782 So. 2d at 341–342 (discussing statutory evidence law in Florida).

121. *E.g. Hanna*, 380 U.S. at 460.

122. *Erie*, 304 U.S. at 72–73.

123. *E.g. Hanna*, 380 U.S. at 463–464 (holding adoption of certain rules of civil procedure violated neither Congressional mandate nor constitutional bounds).

124. *E.g. id*. at 464–466 (commenting on tension between substantive state law and procedural federal law).

125. *Supra* nn. 3, 21, and accompanying text (discussing Florida cases dealing with

Before applying the reasoning of the federal courts on this issue to the question of whether a Florida evidence code provision is substantive or procedural, one should ask whether there is anything about the separation of powers concerns being addressed by the federal court, when compared with those in the Florida state court context, that would make such an analogy inappropriate. As discussed, both federal and Florida courts recognize, as a fundamental principle, the constitutional and statutory limitations placed on the rulemaking powers of the legislative and judicial branches.[126] The federal courts have recognized additional policy concerns in *Hanna v. Plumer*[127] and its progeny, particularly the avoidance of forum-shopping and the inequitable administration of the laws in state and federal courts.[128] Although these concerns are inapplicable in the Florida state law context, they also are not the sort of inconsistent policy considerations that would prevent the application of federal law regarding the substance/procedure dichotomy in the state court context. Consequently, a Florida court seeking to categorize an evidentiary rule as substantive or procedural may attempt to rely upon the holdings of federal courts, sitting in diversity, that have addressed these issues.

One pitfall in trying to analogize with federal caselaw addressing the issue of whether a rule of evidence is substantive is that the rules interpreted by the federal courts frequently make this distinction expressly. The Federal Rules of Evidence, in contrast to the Florida rules, explicitly provide that matters of privilege,[129] competence of witnesses,[130] and presumptions[131] are all governed by the law of the forum state.[132] Likewise, a federal court will defer to state law regarding the burden of proof or sufficiency of the evidence in a diversity case.[133] On the other hand,

allocation of power questions).

126. *Supra* nn. 105–117.

127. 380 U.S. 460.

128. *Id*. at 467–468.

129. Fed. R. Evid. 501; *see also* 28 U.S.C. § 2074(b) (1988) (providing that a change in privilege rules is not effective unless approved by Congress); *but see R. Evid. U.S. Cts. & Mags.*, 56 F.R.D. 183, 230–232 (1972) (Douglas, J., dissenting) (arguing that privileges, in context of trial, are procedural).

130. Fed. R. Evid. 601.

131. Fed. R. Evid. 302.

132. *Supra* nn. 109–110, 121–125, and accompanying text (discussing *Erie* doctrine and the principle that substantive state law governs in diversity cases).

133. *Frazier v. Boyle*, 206 F.R.D. 480, 490–492 (E.D. Wis. 2002).

federal courts sitting in diversity will generally follow federal hearsay rules,[134] as well as federal rules regarding impermissible inference stacking.[135] This relatively simple approach is subject, however, to a caveat: "there are circumstances in which a question of admissibility of evidence is so intertwined with a state substantive rule that the state rule . . . will be followed in order to give full effect to the state's substantive policy."[136] For example, when the legislature carves out an exception to the hearsay rule as part of a medical malpractice reform scheme, such a measure will be treated as substantive.[137]

Taking at face value the policy considerations advanced in *Hanna,* specifically the avoidance of forum-shopping and the inequitable administration of the laws,[138] one might assume that federal courts would treat matters of expert witness qualification as issues of substantive law, given that differing standards in state and federal court might encourage forum shopping. Such an assumption would be incorrect. Although the United States Supreme Court declined to address this issue when it first enunciated the *Daubert* standard,[139] other federal cases have squarely come down on the side of treating expert witness qualification as a matter of procedure governed by the Federal Rules of Evidence.[140] These holdings are consistent with the generally recognized reasoning that Congress used its power to amend or delete

134. *See Ricciardi v. Children's Hosp. Med. Ctr.*, 811 F.2d 18, 21 (1st Cir. 1987) (deciding that Federal Rule of Evidence 803(6), rather than Massachusetts statute, governed admissibility of business records).

135. *Prickett v. U.S.*, 111 F. Supp. 2d 1191, 1196–1197 (M.D. Ala. 2000), *aff'd*, 268 F.3d 1066 (11th Cir. 2001).

136. *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1168 n. 6 (5th Cir. 1979) (quoting Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2405, 326–327 (1st ed., West 1971)); *accord Daigle v. Me. Med. Ctr., Inc.*, 14 F.3d 684, 689–690 (1st Cir. 1994) (affirming application of Maine Health Act's evidentiary provisions rather than federal hearsay rule); *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 666 (9th Cir. 2003) (stating that "state evidence rules that are 'intimately bound up' with the state's substantive decision making must be given full effect by federal courts sitting in diversity"), *cert. denied*, 124 S. Ct. 222 (2003); *Pasternak v. Achorn*, 680 F. Supp. 447, 447–448 (D. Me. 1988) (treating evidence of seatbelt use, based on state law provisions, as substantive).

137. *Daigle*, 147 F.3d at 689. Note, however, that federal courts are not unanimous in deferring to state substantive law when it overlaps and is inconsistent with the Federal Rules of Evidence. *See* Brian H. Redmond, *Federal Rules of Evidence or State Evidentiary Rules As Applicable in Diversity Cases,* 84 A.L.R. Fed. 283, 297–299 (1987).

138. *Hanna*, 380 U.S. at 467–468.

139. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 n. 6 (1993).

140. *E.g. Forrestal v. Magendantz*, 848 F.2d 303, 305 (1st Cir. 1988).

evidentiary rules it thought impinged on substantive state policies, and by leaving the courts with the power to regulate an issue[141]—such as the reliability of an expert's opinions[142]—Congress had determined such matters to be procedural.[143]

In sum, although there are distinctions between the policies underlying the federal and Florida substance/procedure analyses, and some differences in the text of rules that bear on the result of such an inquiry, on the surface it appears that federal caselaw on this issue may provide some guidance by which a Florida court could discern whether an unadopted evidence statute is an impermissible rule of procedure. At its most basic, the federal analysis would break categories of evidence law into matters of substance or procedure. Matters of privilege, presumptions, witness competence, and burdens of proof would stand as issues of substantive law that the legislature is free to modify at will. Most, if not all, of the remaining evidence code would be treated as procedural—and constitutional—only to the extent it has been adopted by the Florida Supreme Court as a rule.

There would, based on federal precedent,[144] be situations in which the Legislature could constitutionally impinge on an area of procedure when such rules were intertwined with substantive law. For instance, the current statutory law provides for the admissibility of certified records from a state agency, which is an abrogation of the hearsay rule that advances the substantive policy interest of preventing the disruption of state agency functions by having employees subpoenaed to testify as records custodi-

141. The issue of expert witness qualification is addressed in rule 702, which allows expert testimony only from "a witness qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Although this does not expressly answer the question of which standard a court should use in evaluating expert witness qualification, it strongly suggests that in federal court this is an issue to be governed by federal procedural law rather than that of the forum state.

142. Note, however, that when one couches the question as one of the *reliability* of expert opinion, rather than *qualification* of the expert, the Supreme Court has treated the question as falling within the Federal Rules of Evidence. *E.g. Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999). The Court reasoned in *Kumho* that "the relevant reliability concerns may focus upon personal knowledge or experience [of the expert]." *Id.* Thus, one probably cannot, as a practical matter, separate the question of expert witness qualification from that of reliability of the opinion offered by the expert witness.

143. *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 245 (1st Cir. 1985).

144. *Supra* nn. 136–137 and accompanying text (discussing the federal analysis of situations when procedural rules intertwine with substantive law).

ans.[145] Although, relying again on federal precedent, the Legislature likely could not create such an exception to the hearsay rule without its adoption as a rule of procedure by the Florida Supreme Court, this kind of exception could survive constitutional scrutiny to the extent that it is integral to the implementation of a substantive law and does not otherwise run afoul of the Florida Constitution.[146]

Returning to the dispute referenced at the beginning of this Article regarding Florida Statutes § 90.803(22), the application of federal caselaw would almost certainly result in the Florida Supreme Court deeming this provision an unconstitutional intrusion upon the Court's rulemaking power. It wades into the law of hearsay, long considered a matter of procedure by the federal courts,[147] without being part of some broader statutory scheme meant to advance some substantive policy. As such, there can be little doubt that Justice Lewis would have been correct, if he had been applying the federal substance/procedure standard, when he reasoned that § 90.803(22), "although well intentioned, is an unacceptable 'rule of procedure' . . . and is, in its entirety, ineffectual."[148]

But is it really that simple? Can a Florida court take a rule of construction that calls for review of federal caselaw to interpret an analogous Florida Evidence Code provision and use that rule to answer what is essentially a question of the constitutional limitations on the power of the courts and the legislature? The answer to both of these questions is probably "no," for the reasons set forth below, and so federal evidence law, which may be useful in construing the meaning and application of some Florida evidence rules, cannot define them as substantive or procedural for the purpose of resolving the constitutional separation-of-powers

145. *E.g.* Fla. Stat. § 475.10 (2003) (providing that records of Florida Real Estate Commission that are certified and authenticated "shall be prima facie evidence thereof in all the courts of this state").

146. For instance, such a provision may not be available in a criminal case because of the application of the confrontation clause. *See e.g. State v. Abreu*, 837 So. 2d 400, 406 (Fla. 2003) (holding that application of Florida Statutes § 90.803(22) to allow admission of prior testimony in criminal case violated confrontation clause).

147. *See e.g. Monarch Ins. Co. of Ohio v. Spach*, 281 F.2d 401, 408–409 (5th Cir. 1960) (discussing admissibility of ex parte comment and noting long treatment of rules of evidence as procedure rather than substance).

148. *In re Amends. to the Fla. Evid. Code*, 782 So. 2d at 342 (Lewis, J., specially concurring).

purpose of resolving the constitutional separation-of-powers issue before the Florida courts.

V. LIMITATIONS ON THE FEDERAL ANALOGY

Although federal caselaw provides a useful guide in determining whether certain categories of evidence rules are substantive or procedural, there are limitations on the utility of this approach. First and foremost, the derivative nature of federal judicial rulemaking authority sets up a somewhat simpler, and much different, problem than that faced by the Florida courts. Federal courts derive their rulemaking authority from Congress, which in turn has specifically delineated which categories of evidence rules are treated as part of the substantive law of the forum state.[149] Therefore, a federal court faces only the determination of whether an evidence rule is substantive or procedural in the narrow group of situations in which a state rule is intertwined with state substantive law such that it may trump procedural rules of evidence in federal court.[150]

In contrast, Florida courts derive their rulemaking authority directly from the Florida Constitution, so they lack the structural reasons that underscore the federal courts' partial reliance on the legislative branch to ascertain the scope of their authority.[151] Moreover, because Florida's evidence rules are embodied in statutory form, there is no reason to delineate expressly those matters that are substantive or procedural.

The differences in the relationship between the judicial and legislative branches in Florida, when compared with the federal model, also complicate the use of the federal criterion based upon whether an evidentiary rule is "intertwined" with substantive law. When a federal court applies a state evidentiary rule that is rolled into substantive law, it is applying the general principle that a federal court sitting in diversity will refer to state rules of decision as they apply to a claim before the court.[152] It is also

149. *Supra* nn. 129–135 and accompanying text.
150. *Supra* nn. 136–137 and accompanying text.
151. *Supra* nn. 13–17 and accompanying text.
152. *Erie*, 304 U.S. at 78; *Wray v. Gregory*, 61 F.3d 1414, 1417 (9th Cir. 1995).

seeking to avoid the possibility that removal to federal court will change the outcome of a diversity case.[153]

These considerations have little or no application in the state court context, and extracting a federal test that asks whether the evidentiary rule is intertwined with substantive law presents its own pitfalls when applied by a state court considering a state statute that impacts evidence law. As an example, again consider § 90.803(22).[154] The First District Court of Appeal has already determined that this statute is an unconstitutional rule of procedure that was never adopted by the Florida Supreme Court.[155] Using the federal "intertwined" analysis, the Legislature could arguably cure this defect by rolling § 90.803(22) into a body of legislation narrowly directed to product liability or medical malpractice reform.[156] Although it is not settled that such an approach would succeed, it at least illustrates the limitations of trying to categorize an evidence rule as substantive or procedural based upon whether it plays some role in advancing a substantive state law policy.

This is not to say that analyzing substance versus procedure, based upon the function of the rule being considered, is the wrong approach. Rather, it shows that the federal analysis, for reasons intrinsic to the diversity jurisdiction problem it faces, approaches the issue from the opposite direction than that a Florida court should take in analyzing whether a rule of evidence is substantive or procedural. A federal court sitting in diversity, because it must apply the substantive law of the forum state, devotes most of its analysis to whether the evidence law in question should be considered part of the state's substantive law and will generally apply such a "substantive" evidence rule even when it clearly impacts the mode and method of presenting evidence in federal court.[157] In contrast, the Florida Constitution appears to create a

153. *Guar. Trust Co.*, 326 U.S. at 109; *see Owens Generator Co. v. H.J. Heinz Co.*, 23 F.R.D. 121, 123 (N.D. Cal. 1958) (noting that, under *Guaranty Trust*, a procedural matter in state court may be considered a substantive matter in federal court).

154. *See supra* pt. I (describing the provision and its rejection by Florida courts).

155. *Grabau*, 816 So. 2d at 709.

156. In fact, there are rules of evidence, addressing issues such as the introduction of hearsay evidence, that have been woven into statutory frameworks outside the Evidence Code. *See infra* nn. 177–180 and accompanying text (discussing situations where laws outside the Evidence Code include provisions affecting the Code).

157. *See supra* nn. 136–137 and accompanying text.

specific mandate for the courts not to apply a legislative enactment that infringes on the Florida Supreme Court's authority in the area of practice and procedure.[158] Thus, rather than asking whether a law that impacts the rules of evidence is intertwined with the Legislature's attempt to advance a substantive policy by statute, the Court should ask whether, regardless of the law's substantive goals, it encroaches on the Court's rulemaking authority.

In so doing, Florida courts should go beyond labels and general descriptions such as those repeated from Judge Adkins's concurrence.[159] Instead, the court should discern whether a rule of evidence is substantive or procedural based upon whether the function it serves advances the policy goals that underscore the rules of evidence themselves, rather than a public policy goal that has little or nothing to do with the purpose of the Evidence Code. Thus framed, the issue forces us to define with precision the values embodied in the rules of evidence.

VI. A FUNCTIONAL APPROACH TO THE SUBSTANCE/PROCEDURE DISTINCTION

The above analyses illustrate the limitations of both existing Florida jurisprudence on the distinction between substance and procedure, and the problems with trying to analogize from the reasoning applied by state and federal courts in making this distinction with regard to rules of evidence. The Florida analysis leaves one with little more than an "I know it when I see it"[160] approach, while the myriad state court responses to the substance/procedure question, based on the circumstances under which the question is raised and the various state constitutional bases for rulemaking authority, fall short of the mark. Moreover, differences in the express language of the federal and Florida evidence rules, and different separation of powers concerns addressed by the federal courts, limit the utility of analogy with fed-

158. *See supra* nn. 13–17 and accompanying text.

159. *See supra* nn. 18–21 and accompanying text.

160. *See e.g. Miller v. Cal.*, 413 U.S. 15, 39 (1973) (Douglas, J., dissenting) (noting the failure of attempts to set national standards for defining obscenity, and quoting Justice Stewart's famous concurrence in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), in which Justice Stewart said of "hard-core" pornography, "Perhaps I could never succeed in [defining it] intelligibly . . . [b]ut I know it when I see it . . . .").

eral caselaw on this point. Thus, neither existing Florida jurisprudence on the substance/procedure distinction nor the reasoning of other courts provides a workable foundation for a Florida state court considering the constitutionality of a change to the Evidence Code that has not been adopted as a rule of procedure.

The federal rules do, however, provide some guidance in this exercise not found in the Florida Rules of Evidence. Federal Rule of Evidence 102 governs the construal of rules of evidence:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.[161]

Although Florida has no analogous rule, its caselaw recognizes the same goal.[162] Other jurisdictions likewise recognize these principles as the purpose of their respective rules of evidence.[163]

Note that the first portion of the rule essentially tracks the definitions of "procedure" acknowledged long before Judge Adkins's concurrence, reciting concerns pertaining to the fair administration of justice.[164] There is more, however. The rule goes on to enumerate concerns related to the law of evidence that go beyond simply administrative values, and adds goals related to the ascertainment of the truth and, by implication, the reliability of the evidence presented. Thus, while all courts recognize a right to create rules of evidence flowing from a constitutional or statutory empowerment to create rules of procedure, the purpose of the

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161. Fed. R. Evid. 102.

162. *Westerheide v. State,* 831 So. 2d. 93, 102 (Fla. 2002) (stating that "[t]he purpose of the rules of evidence is to promote the ascertainment of the truth"); *accord Ulrich v. Coast Dental Services, Inc.*, 739 So. 2d. 142, 143 (Fla. 5th Dist. App. 1999) (making essentially the same statement and extending that purpose to discovery as well); Fla. Sen. Doc., *supra* n. 33, at 1) (observing, with regard to the bill creating the Florida Evidence Code, that it "should also have the beneficial effect on litigants in our courts of facilitating the truth finding process so that justice may be better served").

163. *See e.g.* Md. Evid. Code Ann. § 5-102 (2004) (stating purpose of evidence rules is "that the truth may be ascertained and proceedings justly determined"); *People v. Fuller*, 788 P.2d 741, 746 (Colo. 1990) (noting that admitting evidence meeting guarantees of trustworthiness "served the general purposes of the rules of evidence and the interests of justice").

164. *Supra* nn. 18–23 and accompanying text.

rules of evidence goes beyond any of the definitions or tests derived to categorize a rule as procedural.[165]

Applying the language in Rule 102 to our analysis, one should conclude that a rule of evidence is procedural to the extent it furthers the administration of justice, and ancillary to that standard, it is primarily directed to the ascertainment of the truth. By this standard, any rule whose primary function is to promote the core values of the evidence code—to ensure the trustworthiness of what is presented and further the ascertainment of the truth—would fall within the judicial branch's constitutional mandate to create rules of practice and procedure. On the other hand, those rules that are meant to advance public policy goals not directly related to these functions would be substantive.[166]

In some situations, this functional approach would present little complication in its application. For instance, the hearsay rule and its exceptions are driven primarily by concern over the reliability of certain out-of-court statements.[167] If the court has the authority to make procedural rules that ensure the trustwor-

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165. Joiner & Miller, *supra* n. 32, at 625 (enunciating a test that comes very close to the one suggested by these considerations).

166. A more sophisticated, and concomitantly more difficult to apply, approach is suggested by D. Michael Risinger in *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions,"* 30 U.C.L.A. L. Rev. 189 (1982). Risinger identifies four overlapping categories of rules: (1) pure substantive (elements of a cause of action, for example)); (2) pure procedural (everything necessary to the dispute resolution mechanism); (3) procedural rules stemming from substantive decisions (rules that make procedures less efficient to protect some value of greater importance); and (4) substantive rules enacted for procedural reasons (for example, the statute of frauds, which serves to further the administration of justice by eliminating certain categories of claims). *Id.* at 206. A Florida court applying this framework would likely find its constitutional authority limited to the second category only. Clearly, the legislature may enact purely substantive laws, and the judiciary holds the right to decide matters of procedure. The fourth category seems within the ambit of the legislature, which could conceivably eliminate types of claims or make them more difficult to litigate to promote a public policy of furthering the justice system. What of the third category, however? Here, one could argue that both the legislature and the judiciary have a stake: the former by making a public policy decision to promote a value, and the latter because we are talking about tinkering with the judicial mechanisms embodied in the procedural rules. As with the analysis suggested in this Article, Risinger probably leaves one applying a balancing test in which rules fall into the gray area between substance and procedure.

167. One author suggests the following:

> It is hard to see how any of the hearsay exceptions could be classified as substantive law under the *Erie* doctrine, because they relate only to the kinds of evidence admissible to prove a point. They have nothing to do with the consequences of the point, if proved, as it relates to the obligations and duties of the parties.

Ladd, *supra* n. 75, at 709.

thiness of what is presented at trial, the hearsay rule certainly falls within this mandate.[168]

Therefore, if the Legislature creates a change to the hearsay rule that is not adopted as a rule of procedure by the Florida Supreme Court, such a change would likely be unconstitutional.[169] On the other hand, there is no issue of trustworthiness or the ability to ascertain the truth advanced by rules of privilege protecting certain relationships.[170] The decision to protect one relationship over another, therefore, lies outside the rulemaking authority of the court, and such a change could constitutionally be enacted by the Legislature without subsequent adoption by the Court.[171]

Not all rules will lend themselves to such straightforward analysis. For instance, the subsequent remedial measure rule[172] advances a policy goal, insofar as it encourages potential defendants to remedy dangerous or defective conditions without fear that their actions will be used against them as evidence of fault in

168. *See Conner v. State*, 748 So. 2d 950, 956 (Fla. 1999) (noting that hearsay may be admitted under "firmly rooted" exception to rule because such exceptions allow inference of reliability); *Garcia*, 659 So. 2d at 391 (noting that legislative purpose for stringent hearsay exception requirements in Florida Statutes § 90.803(23) included "need for reliable out-of-court statements").

169. Note that, by this reasoning, Florida Statutes § 90.803(22), which has already been ruled unconstitutional in criminal cases because it violates the confrontation clause, would also be unconstitutional because it is a rule of procedure that has not been adopted by the Supreme Court. *See In re Amends. to the Fla. Evid. Code*, 782 So. 2d at 342, 343 (Lewis, J., specially concurring) (asserting the Court's consistent action to avoid confusion regarding constitutionality of the evidence code).

170. *See e.g. Westerheide*, 831 So. 2d at 102 (observing that "[t]he purpose of the rules of evidence is the ascertainment of truth. . . . However, in certain circumstances the Legislature judges the protection of an interest or relationship to be sufficiently important to society to justify the sacrifice of facts which might be needed for the administration of justice."); *State v. Pinder*, 678 So. 2d 410, 415 (Fla. 4th Dist. App. 1996) (noting that "the objective of most evidentiary rules is to enhance the truth-seeking process"); *McCormick on Evidence* § 72 (John Williams Strong, ed., 4th ed., West 1992) (asserting that rules of privilege shielding potential sources of evidence foster relationships deemed socially valuable); Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 Geo. L.J. 1781, 1785 (1994) (reasoning that privilege "principally serves goals extrinsic to fact-finding accuracy").

171. At least one scholarly article has come close to articulating a substantially similar test. *See* Joiner & Miller, *supra* n. 32, at 635 (setting forth test as turning upon "whether a given rule of evidence is a device with which to promote the adequate, simple, prompt, and inexpensive administration of justice in the conduct of a trial or whether the rule, having nothing to do with procedure, is grounded upon a declaration of general public policy").

172. Fla. Stat. § 90.407.

a trial.[173] At the same time, the rule touches upon concerns of reliability, or perhaps more accurately relevance, because one's actions after an event giving rise to litigation may have little bearing on what one knew or should have known in the exercise of reasonable care before the event took place.[174] In such cases, a Florida court must necessarily engage in a balancing test to ascertain the primary purpose of the rule in question, and deem it substantive if this primary purpose falls outside the lodestars of reliability and trustworthiness that guide the application of the rules of evidence.[175] In the case of the subsequent remedial measure rule, these policies would probably be treated as secondary, to the extent they are addressed elsewhere in Florida Statutes §§ 90.401–90.403,[176] and so the subsequent remedial measure rule should be considered substantive.

Another potential collision between substance and procedure occurs when the Legislature enacts laws, found elsewhere in the Florida Statutes, that impact the application of the rules of evidence. In such situations, a constitutional question is raised where the non-evidence code statute purports to relax, or eliminate altogether, an exclusionary evidence provision such as the hearsay rule.[177] In evaluating those portions of the otherwise sub-

173. *See Seaboard Air Line Ry. Co. v. Parks*, 104 So. 587, 588 (Fla. 1925) (adopting subsequent remedial measures rule because "'[t]o declare the evidence competent is to offer an inducement to omit the use of such care as the new information may suggest, and to deter persons from doing what the new experience informs them may be done to prevent accidents'" (quoting *Terre Haute & I. R. Co. v. Clem*, 23 N.E. 965, 966 (Ind. 1890))); *Walt Disney World Co. v. Blalock*, 640 So. 2d 1156, 1158–1159 (Fla. 1994) (declaring "[e]vidence of subsequent remedial measures is inadmissible, of course, as a matter of sound public policy").

174. *Cf. Glanzberg v. Kauffman*, 788 So. 2d 252, 254 (Fla. 4th Dist. App. 2000) (agreeing with appellant that "logically, evidence of subsequent similar incidents cannot be probative of any prior knowledge on the defendant's part").

175. Dudley notes this dual nature of many evidence rules in commenting that evidence law serves many purposes, and most rules serve the goal of promoting accuracy, as well as some other goal. Dudley, *supra* n. 170, at 1796–1798.

176. Fla. Stat. § 90.401–90.403 (providing general rules for admissibility of evidence, including the probative value of the evidence as compared to the danger of unfair prejudice).

177. *See e.g.* Fla. Stat. § 316.066(4) (creating privilege for statements made to officer investigating motor vehicle accident by persons involved in crash); Fla. Stat. § 394.9155 (setting forth specific applications of privilege and hearsay rules in context of civil commitment proceedings for sexually violent predators); Fla. Stat. § 501.207(7) (allowing admission of hearsay under certain circumstances in enforcement action under the Deceptive and Unfair Trade Practices Act); Fla. Stat. § 560.125(8) (allowing hearsay evidence in hearing to determine admissibility of confession or admission of violation of statute requir-

stantive statute that purport to create their own body of evidence rules, the court must, if possible, construe the statute in such a way that it is constitutional.[178] If there is no conflict between the statute and the rule of evidence, there is no constitutional issue.[179] On the other hand, when a law not specifically identified as a rule of evidence impinges on the core of values protected by the rules of evidence, but which has not been adopted as a rule of procedure, it would be unconstitutional unless adopted by the Florida Supreme Court as a rule of procedure.[180]

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ing registration of money transmitting business).

178. *See State v. Gale Distribs.*, 349 So. 2d 150, 153 (Fla. 1977) (committing the Court to the "duty, if reasonably possible, to resolve all doubts as to the validity of a statute in favor of its constitutionality and to construe it so as not to conflict with the Constitution"); *State v. N. Fla. Women's Health & Counseling Service*, 852 So. 2d 254, 269 (Fla. 1st Dist. App. 2001) (quoting and following *Gale*, 349 So. 2d at 153).

179. An example of the legislature's attempt to address precisely this concern may be found in Florida Statutes § 501.207(7). There, the legislature set forth a generic hearsay exception—along the lines of Federal Rule of Evidence 807—in Florida's Deceptive and Unfair Trade Practices Act, allowing the admission of such evidence so long as it carries with it "circumstantial guarantees of trustworthiness." Fla. Stat. § 501.207(7). The provision goes on to state that, for this hearsay exception to apply, the trier of fact must determine that "[t]he general purpose of the Florida Rules of Evidence and the interests of justice will be best served by the admission of such statement into evidence." Fla. Stat. § 501.207(7)(c).

180. One could argue that, when the legislature has overstepped its authority by embedding a procedural rule of evidence in an otherwise substantive statute, the Supreme Court should not base its constitutional analysis upon conflict with a provision of the evidence code, but instead should rule that the provision is unconstitutional because it conflicts with the rule allowing the admission of relevant evidence. This was precisely the argument raised by Judge Altenbernd in the Second District Court of Appeal in *State v. Veilleux*, 859 So. 2d 1224, 1231–1232 (Fla. 2d Dist. App. 2003) (Altenbernd, C.J., dissenting). In *Veilleux*, the appellate court addressed the applicability, in a forgery case, of Florida Statutes § 316.650(9), which bars the admission of traffic citations in any trial. The majority ultimately upheld the application of the statute, notwithstanding the observation that it might be procedural, on the basis of supreme court authority holding that a procedural statutory provision that did not conflict with a court-promulgated rule was not unconstitutional. *Id*. at 1228–1229 (citing *Looney v. State*, 803 So. 2d 656, 675–676 (Fla. 2001)). In his dissent, however, Judge Altenbernd argued that § 316.650(9) created a procedural rule that excludes evidence otherwise inadmissible under Chapter 90. *Id*. at 1231. The legislature overstepped its authority in creating such a rule, Altenbernd argued, and so the trial court was not bound by the statute until such time as it was adopted by the Supreme Court as a rule of procedure. *Id*. This Author avers that Altenbernd's is the better reasoned opinion, because the Florida Constitution does not draw the majority's distinction that would allow the legislature to create rules of procedure so long as they do not expressly conflict with a rule of procedure. Moreover, *any* statutory rule that excludes evidence conflicts with Florida Statutes § 90.402 and so, even by the majority's own reasoning, is unconstitutional.

Returning to the issue that began this discussion: How would the functional approach outlined above impact the constitutionality of § 90.803(22)? As a hearsay rule exception, the new provision clearly impacts issues of trustworthiness and the ascertainment of the truth. Moreover, it does not seem tied to the advancement of any particular public policy goal—at least not in any direct sense. Therefore, the new rule should properly be treated as a matter of procedure, and concomitantly without adoption as a rule of procedure by the Florida Supreme Court, § 90.803(22) is unconstitutional.

VII. CONCLUSION

For the first time since enacting the Florida Evidence Code nearly three decades ago, the Florida Legislature has passed, and the Governor has signed into law, evidence provisions that the Florida Supreme Court has declined to adopt as procedural rules.[181] Moreover, it appears that more such statutes will find their way into the Code,[182] thereby raising for the first time the question of whether the evolving statutory evidence scheme is constitutional. In light of the recent nature of this problem, Florida lacks any sort of precedent on point regarding the Evidence Code, and its existing caselaw addressing the distinction between substance and procedure is inadequate in the context of the rules of evidence. Moreover, the jurisprudence of other states fails to provide a tool that can be "cut and pasted" into Florida law as a means of addressing the problem. Although federal courts have decades of experience wrestling with separation of powers concerns as applied to the rules of evidence, their reasoning can only provide a starting point when, not if, the Supreme Court—either the Florida or United States Supreme Court—is forced to take up this issue in Florida. Ultimately, the Court's analysis must rest on the application of the core values advanced by the rules of evidence, rather than labels transplanted from federal law or the reasoning of the courts of Florida's sister states.

181. *Supra* nn. 4–18 and accompanying text.

182. *See* Fla. S. 90, 2003 Sess. (Mar. 4, 2003) (available at http://www.flsenate.gov; *select* Session, *select* 2003, *select* S0090 (accessed Apr. 26, 2004)) (creating a parent-child privilege). This bill made it through both chambers of the Florida Legislature in the 2003 session, after several prior, unsuccessful attempts, only to be vetoed by Governor Jeb Bush on June 26, 2003. *Id*.