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The *Havel* Anomaly

by Kathleen J. St. John

In *Havel v. Villa St. Joseph*,¹ the Court held that R.C. 2315.21(B), which requires the trial court, upon motion of “any” party, to bifurcate the trial when both compensatory and punitive damages are sought, does not violate the Ohio Constitution’s provision giving the Court supremacy over procedural matters, because bifurcation is a matter of substantive, not procedural, law. The Court reached this conclusion not based on the application of any standard test for distinguishing substantive and procedural laws, but by looking to the legislature’s intent in creating the law.

In other words, a procedural law is substantive if the legislature says it is.

The curiousness of this decision led me to investigate and retrace the steps of the *Havel* majority to see from whence came such a counterintuitive ruling. I conclude that the majority’s rationale in *Havel* is unsustainable as a test for future decisions, and that the holding in *Havel* is likely, at some point, to be severely limited or overruled.

I. The Framework: The Modern Courts Amendment To The Ohio Constitution Gives The Supreme Court Sovereignty Over Procedural Rules.

The Ohio Constitution gives the Ohio Supreme Court exclusive authority to promulgate rules governing matters of procedure in the Ohio courts. In this respect, Article IV, Section 5(B) of the Ohio Constitution, commonly referred to as the Modern Courts Amendment, provides as follows:

“The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which 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.”²

Pursuant to this Constitutional provision, the Ohio Supreme Court has promulgated the Rules of Civil Procedure and Rules of Evidence. When statutes come in conflict with those rules, the Supreme Court and intermediate appellate courts of Ohio have not hesitated to strike down those statutory provisions as being unconstitutional.

Typically when this issue arises in civil cases, the focus is on whether the statute conflicts with the rule. In *Rockey v. 84 Lumber Co.*,³ for instance, the Court held that R.C. 2309.01, which precluded a tort action plaintiff from specifying in the complaint the amount of damages sought, was unconstitutional as it conflicted with Civ. R. 8(A)’s requirement that the complaint contain “a demand for judgment for the relief to which [the plaintiff] deems himself entitled.” The issue, in other words, was not whether the statutory requirement addressed a matter of procedure – the Court naturally assumed that it did – but whether the procedure set forth in the statute was in conflict with the Court rule such that the statutory procedure must give way to that created by the Court.

Havel, on the other hand, focused on an additional inquiry. Granted, in *Havel*, the Court first addressed whether R.C. 2315.21(B)’s mandatory bifurcation requirement conflicted with Civ.

R. 42(B)'s discretionary bifurcation procedure – and determined that the two procedures did in fact conflict. But the issue on which the Court's decision turned was whether bifurcation – an apparent matter of procedure – was in fact a matter of substantive law.

Although, in context, this issue was technically one of first impression, two prior Ohio Supreme Court precedents strongly supported the conclusion that bifurcation is a matter of procedure. The most obvious of these was *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*,⁴ where the Court struck down H.B. 350 as violating the one subject rule. The bill contained a bifurcation provision nearly identical to the current R.C. 2315.21(B); and while the Court did not address the constitutionality of that provision, it described that provision as “govern[ing] the procedural matter of bifurcating tort actions into compensatory and punitive damage stages.”⁵

The other highly relevant precedent was *Dir. of Highways v. Kleines*,⁶ which involved two statutes that required the consent of the parties before a trial court could consolidate land appropriation actions. The Court in *Kleines* overturned these statutes as being in conflict with Civ. R. 42(A), which gave trial courts discretion to consolidate cases, regardless of whether the parties consented.

The majority in *Havel* did not mention *Kleines*⁷ and distinguished *Sheward* as not addressing the substantive/procedural distinction.⁸ But before turning to the majority's analysis in *Havel*, it is useful to review several cases involving this distinction in other contexts.

II. The Substantive/Procedural Distinction.

The distinction between substantive and

procedural law is significant in a variety of contexts.

When federal courts sit in diversity, for instance, the *Erie*⁹ doctrine requires the federal court to apply state law to substantive matters, and federal law to matters of procedure, “at least where no conflicting state rule ‘would substantially affect... primary decisions respecting human conduct.’”¹⁰ The federal courts acknowledge that “the line between substance and procedure is neither static nor easily drawn.”¹¹

Nevertheless, most federal courts that have addressed the conflict between state bifurcation statutes and Fed. R. Civ. P. 42(b) have concluded that bifurcation is a procedural issue, governed by federal law.¹² As one federal court stated, “[a] rule governing bifurcation is a clear example of a rule of adjudication, with virtually no impact upon primary conduct”¹³ -- and, hence, clearly a procedural law.

Indeed, prior to *Havel*, the federal district courts in Ohio that were expressly presented with the substantive/procedural distinction in this context rejected the argument that Ohio's bifurcation statute controlled as substantive law.¹⁴ As expressed by one judge for the U.S. District Court in the Southern District of Ohio:

1. The Ohio General Assembly cannot control procedure in federal courts. As a matter of the Supremacy Clause, that authority belongs to the Congress of the United States and to the courts themselves when acting within the Rules Enabling Act.
2. It does not matter that the right is characterized as ‘substantial’ by the General Assembly. If ‘a rule really regulates procedure, -- the judicial process for enforcing rights and duties recognized by substantive law and for justly administering

remedy and redress for disregard or infraction of them,’ then the federal procedural law, including the Federal Rules of Civil Procedure... will apply regardless of the basis of jurisdiction.... Without doubt, whether to bifurcate a case... [is a] procedural matter[.]”¹⁵

And, in fact, prior to the Supreme Court's decision in *Havel*, all but one of the intermediate Ohio appellate courts had followed this line of reasoning and concluded what seems to be obvious – that bifurcation is a matter of procedure, not substantive law.¹⁶

The distinction between substantive and procedural laws also arises when a federal cause of action proceeds in state court. In such cases, state law governs procedural issues unless the state procedures impose an unnecessary burden on a federally created right – in which case the federal Supremacy Clause demands that federal law applies.

Just five years prior to its ruling in *Havel*, the Ohio Supreme Court had occasion to address the substantive/procedural distinction in this latter context. In *Norfolk Southern Railway Co. v. Bogle*,¹⁷ the issue was whether applying the tort reform “*prima facie* filing” requirements of R.C. 2307.92 and R.C. 2307.93 to asbestos claims arising out of the Federal Employers' Liability Act (“FELA”) or the Locomotive Boiler Inspection Act (“LBIA”) violated the Supremacy Clause of the United States Constitution, such that the state statutes were preempted. The statutes in question required, *inter alia*, that persons bringing asbestos claims based on non-malignant conditions submit a report containing medical findings and include a demonstration “that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial

contributing factor to the medical condition.”¹⁸ Failure to file such a report resulted in an administrative dismissal, rendering the case inactive unless and until the claimant moved to reinstate the case by making the *prima facie* showing as specified in the statutes.¹⁹

In finding that the state statutory requirements were merely procedural, the Court invoked classic articulations of the distinction between substantive and procedural law:

“In *Jones v. Erie RR. Co.* (1922), 106 Ohio St. 408, 412..., we stated that substantive laws or rules are those that ‘relate[] to rights and duties which give rise to a cause of action.’ By contrast, procedural rules concern ‘the machinery for carrying on the suit.’ *Id.* A review of the statutes reveals that they do not grant a right or impose a duty

that ‘give[s] rise to a cause of action.’ *Id.* Instead, the impact of these statutes is to establish a procedural prioritization of the asbestos-related cases on the court’s docket. Nothing more. Simply put, these statutes create a procedure to prioritize the administration and resolution of a cause of action that already exists. No new substantive burdens are placed on claimants....”²⁰

In short, the Court found, “the provisions of the statutes... pertain to the machinery for carrying on a suit” and were “therefore procedural in nature, not substantive.”²¹

Yet another context in which the substantive/procedural distinction arises is in determining whether a new law may be applied retroactively without offending Article II, Section 28 of the Ohio Constitution.²² In this

context, the Court has struggled a bit, occasionally overruling a decision it later deems to be misguided.

An example of this pattern can be found in the line of cases beginning with *Viers v. Dunlap*.²³ In *Viers*, the issue was whether the new comparative negligence statute, R.C. 2315.19, could be applied to an accident that occurred prior to the statute’s effective date. Prior cases had established that the Constitutional provision prohibiting retroactive laws applied only to substantive, but not remedial, laws. The issue thus turned on whether the new statute was substantive or procedural. In holding that it was substantive, the Court explained:

“Similarly groundless is appellees’ argument that R.C. 2315.19 is merely remedial. Although semantic formulations can be devised to understate the obvious,

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it is patently clear that the statute markedly affects substantive rights. Where before a defendant was shielded from liability by a plaintiff's contributory negligence, this defendant no longer enjoys such protection. Where before a plaintiff who was contributorily negligent was denied recovery, he is now – as long as his misfeasance is not the predominant cause of his injury – entitled to damages. To characterize... such a fundamental change in the law as affecting only trial procedure and the mode by which a remedy is effected defies logic.

Substantive rights exist in counterpoise to procedural rights and include all privileges and obligations arising from the legal nature of transactions and relationships but separate from the means of effectuating those privileges and enforcing those obligations.²⁴

One year later, the Court reversed itself on this issue, and determined that the new comparative negligence statute applied to *all* negligence actions tried after the statute's date, even if the cause of action arose under the prior law. In *Wilfong v. Batdorf*,²⁵ the Court overruled *Viers* and held that:

R.C. 2315 is remedial. It does not alter a defendant's liability for his negligent acts, but merely changes the way a court is required to weigh a plaintiff's negligence. A concept of partial recovery based upon the degree of a plaintiff's negligence has been substituted for the previous bar to any recovery by the plaintiff.²⁶

Of course, the new statute in question still altered the liability potential between the plaintiff and the defendant,

such that the plaintiff was now able to recover damages when he previously could not, and the defendant could now be held liable (albeit for a lesser amount) when she previously would have been exonerated due to the plaintiff's contributory negligence. One suspects that the holding in *Wilfong* was rooted in sympathy for the plaintiff who happened to have been injured at the wrong moment in time. But sympathy – for either side in a tort action – should not govern the analysis as to whether a law is substantive or procedural.

The Supreme Court ultimately overruled *Wilfong*, in *Van Fossen v. Babcock & Wilcox Company*.²⁷ In *Van Fossen*, the Court held that a statute is substantive when it “impairs or takes away vested rights,... affects an accrued substantive right,... imposes new or additional burdens, duties, obligations or liabilities as to a past transaction,... creates a new right out of an act which gave no right and imposed no obligation when it occurred,... [or] gives rise to or takes away the right to sue or defend actions at law[.]”²⁸ By contrast, a law is remedial when it “affect[s] only the remedy provided.” Laws that “relate to procedures are ordinarily remedial in nature... including rules of practice, courses of procedure and methods of review,... but not the rights themselves.”²⁹

Before turning to the Court's analysis in *Havel*, a final note about the substantive/procedural distinction is this. It has been stated that, “[p]ut roughly, substantive rules control conduct outside the courtroom, and procedural rules control behavior within the courtroom.”³⁰

Although this statement might unduly simplify the analysis so as not to apply to all situations, it has the beauty – if not the wisdom – of clarity. It is consistent with how we think about the substantive/procedural dichotomy. And, as applied to the bifurcation statute, it makes

perfect sense. Bifurcation is a process that governs how the case will be tried. It pertains, using the test articulated test in *Norfolk S. Ry. Co.*, to the machinery for carrying on a suit, and is thus procedural, not substantive.

This is not, however, what the Court concluded in *Havel*.

III. The *Havel* Decision.

Havel was a wrongful death/medical malpractice case arising out of decubitus ulcers suffered by Mr. Havel while recovering from hip surgery at the defendants' nursing home. As the complaint sought both compensatory and punitive damages, the defendants moved, pursuant to R.C. 2315.21(B), to bifurcate the trial into two stages. The first stage would cover the defendants' liability for compensatory damages; the second, assuming liability was found, would cover the issue of punitive damages.

The trial court denied the motion and the Eighth District Court of Appeals affirmed.³¹ The Eighth District found R.C. 2315.21(B), which makes bifurcation mandatory upon motion of “any” party, to conflict with Civ. R. 42(B), which grants the trial court the discretion to hold separate trials “in furtherance of convenience or to avoid prejudice, or when separate trials are conducive to expedition and economy.” The Eighth District found that these two provisions conflicted, and rejected the defendants' argument that the statute took precedence because it addressed a substantive right. Instead, “[a]pplying the Ohio Supreme Court's analysis in *Norfolk S. RR Co.*,” the court found that the statute was procedural as it “clearly and unambiguously specifies ‘the machinery for carrying on the suit’ by telling courts the ‘procedural

prioritization' for determining compensatory and punitive damages at trial" and by "tell[ing] courts what evidence a jury may consider, and when – another area governed by the Civil and Evidence Rules."³²

Because the Eighth District's decision conflicted with the Tenth District Court of Appeals' decision in *Hanners v. Ho Wah Genting Wire & Cable SDNBHD*,³³ the court certified the conflict to the Ohio Supreme Court.

The Supreme Court majority in *Havel* first determined that R.C. 2315.21(B) and Civ. R. 42(B) did, indeed, conflict. It turned, then, to the issue of whether the statute addressed a matter of substantive or procedural law. Substantive law, the Court said, was "that body of law which creates, defines and regulates the rights of the parties," whereas procedural law "prescribes the methods of enforcement of rights or obtaining remedies."³⁴ From these definitions, the Court decided that the critical inquiry in determining whether a statute was substantive or procedural was whether the statute created a "right."

The Court then reviewed several cases that addressed the issue of whether a statute created an enforceable right in the criminal context. The first of these – *State v. Hughes*³⁵ – involved a statute that gave the prosecution a right that did not exist at common law to present a bill of exceptions in a criminal action to the Court of Appeals or the Ohio Supreme Court. The Court held that the subsequently promulgated App. R. 4(B), which gave the prosecution an automatic right to appeal, expanded upon the right created in the statute, and thus conflicted with Article IV, Section 3 of the Ohio Constitution

by "abridg[ing] the right of appellate courts to exercise their discretion in allowing such appeals."

The next case, *State v. Rahman*,³⁶ held that, even though the Rules of Evidence properly controlled whether a spouse was *competent* to testify in a criminal trial, a statute that granted the criminal defendant the right to exclude privileged spousal testimony was not in conflict with the evidentiary rule, as it concerned the criminal defendant's substantive right to exclude privileged testimony from the trier of fact's hearing. Indeed, in *Rahman*, the Court noted that Evid. R. 501 states that the issue of privilege is governed, *inter alia*, by statutes enacted by the General Assembly.³⁷

Finally, the majority in *Havel* cited *State v. Greer*,³⁸ in which the Court addressed the interplay between a statute that allowed a criminal defendant to exercise 12 peremptory challenges and Crim. R. 24(C) which limited parties to six peremptory challenges each. The Court, in *Greer*, found that whereas the right to have peremptory challenges was a substantive right, the numerical limit imposed by Crim. R. 24(C) was procedural, and thus prevailed over the statutory provision granting the greater number of peremptory challenges.

Essentially, the majority in *Havel* looked to the foregoing criminal cases as proof that some statutes addressing procedure confer a substantive right.

The Court in *Havel* next endeavored to distinguish the holding in *Norfolk S. Ry. Co.* -- which held the *prima facie* filing requirements for asbestos cases to be procedural – from the bifurcation statute. The Court decided that while the

prima facie filing requirements merely "established a procedural prioritization of the asbestos-related cases on the court's docket," the bifurcation statute "does more than set forth the procedure for bifurcation in a tort action" because "it makes bifurcation mandatory."³⁹ The Court analogized the bifurcation statute to the enactment of the comparative fault statute in *Viers* – finding that, just as, in *Viers*, where the new law gave the plaintiff a right to recover, even if he was contributorily negligent, when he could not have done so before, the mandatory bifurcation statute created a new right – *mandatory* bifurcation – that did not exist prior to the statute creating it.⁴⁰

From there, the Court went on to conclude that "[b]y eliminating judicial discretion, R.C. 2315.21(B) creates a concomitant right to bifurcation."⁴¹ In other words, whereas before the defendant had to ask for bifurcation, the defendant could now *demand* it.

Finally, the Court turned to the legislative history, as expressed in the un-codified language of S.B. 80, to find further evidence that the statute created a substantive right to bifurcation. Here, the Court availed itself of some language in its prior decision of *State ex rel. Loyd v. Lovelady*,⁴² which it pronounced as involving a "similar situation" to the case at bar.⁴³

Lovelady concerned a statute that allowed a putative father to seek relief from a child support order many years later, by, *inter alia*, providing a recent DNA test result proving him not to be the child's father. The statute made this relief-from-judgment mandatory upon satisfaction of the statute's

requirements. The issue was whether this statute was unconstitutional as conflicting with Civ. R. 60(B). In enacting this statute, the General Assembly had expressed the intent that these provisions operate “[n]otwithstanding the provisions to the contrary in Civil Rule 60(B).” The Supreme Court, in holding the statute enforceable, found that it created a substantive right. It did so by first looking to the statutory language to determine the legislature’s intent; and reasoned that, “[i]f the legislature intended the enactment to be substantive, then no intrusion on this court’s exclusive authority over procedural matters has occurred.”⁴⁴ The Court also found that, when legislative intent was not apparent on the face of the statute, the Court could properly look to the legislative history. Examining that, the Court found that the legislature intended the statute to create a substantive right to address a potential injustice – *i.e.*, the injustice of having to pay child support when science could definitively prove that the payor was not the father.⁴⁵

The Court in *Lovelady* concluded that “although [the statutes in question] are necessarily packaged in procedural wrapping, it is clear...

that the General Assembly intended to create a substantive right to address a potential injustice.”⁴⁶

Latching onto the *Lovelady* analysis, the Court in *Havel* found that R.C. 2315.21(B) also involves a situation where a statute “packaged in procedural wrapping” was intended by the legislature to create a substantive right.⁴⁷ Digging into the un-codified portions of S.B. 80, the Court found that the bifurcation statute was intended to address a “potential injustice” because mandatory bifurcation was designed to “ensure that evidence of misconduct is not inappropriately considered by the jury in its determination of liability and compensatory damages.”⁴⁸

In a closing flourish, the majority added that it was rejecting the dicta in *Sheward*, which described the former version of R.C. 2315.21(B) as governing a procedural matter. *Sheward*, the Court said, “never considered the bifurcation question we confront in this case.”⁴⁹ In other words, while *Sheward* had made the common sense observation that bifurcation is procedural, the Court’s analysis in *Havel* had now proved that observation wrong.

But, is it so?

IV. Is *Havel* An Anomaly?

Distilled to its essence, *Havel* stands for two things. First, in determining whether a statute addresses matters of substance or procedure, the Court will look to whether the statute creates a “right.” If it creates a right, then it is substantive, even if that right involves something that is otherwise unmistakably a matter of procedure. Second, in determining whether the statute creates a right, the Court will look to the legislative intent, as expressed on the face of the statute or in the legislative history. If the legislature evinces an intent to create a right, even if that right involves something that is otherwise unmistakably procedural, the statute is substantive, and the Court rule in conflict with it must give way.

The *Havel* analysis is questionable on both points. While it is true that substantive law “creates, defines and regulates the rights of the parties” while procedural law “prescribes methods of enforcement of rights,” determining whether a law is substantive or procedural by asking whether it creates a right shifts the focus away from the classic understanding of what constitutes procedure. The Ohio Supreme Court has long recognized that procedure is “the machinery for carrying on the suit”⁵⁰ and has applied that definition as recently as the *Norfolk S. Ry.* case in 2007. For the Court to now

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reject that definition, on the grounds that the statute makes the procedure mandatory and that the legislature intended to create a substantive right, turns the analysis on its head.

Under *Havel*, there is no limit to the legislature's ability to transform a matter of procedure into a substantive right. All it need do is make the procedure mandatory and articulate an intent to rectify some injustice it perceives on behalf of its favored constituency. Rules of pleading, rules of evidence, matters as mundane as the order in which witnesses may be called at trial, can all be deemed "substantive" should the legislature divine a need to put a finger on the scales of justice to help a particular constituency.

But how can the *Havel* rationale be reconciled with the Modern Courts Amendment? The Ohio Constitution trumps legislative intent⁵¹; and the Constitution says that all laws in conflict with rules governing practice and procedure prescribed by the Supreme Court "shall be of no further force or effect[.]" The Constitution, quite simply, makes the Ohio Supreme Court supreme in matters of procedure. If procedure can be magically transformed into substance by a legislative wave of the wand, where does that leave the Modern Courts Amendment? If all the legislature needs to do to change procedure into substance is "intend" it to be so, then legislative intent trumps a Constitutional mandate.

A decision that allows that to happen must surely be an anomaly. It can only fervently be hoped that the holding in *Havel* goes the way of *Wilfong v. Batdorf*, and is viewed by the Court as one of those aberrations needing to be overruled to realign the law with standard notions of substance and procedure. ■

End Notes

1. 131 Ohio St. 3d 235, 2012-Ohio-552, 963

- N.E. 2d 1270.
2. Ohio Constitution, Article IV, Section 5(B).
 3. 66 Ohio St. 3d 221, 611 N.E. 2d 789 (1993).
 4. 86 Ohio St. 3d 451, 715 N.E. 2d 1062 (1999).
 5. *Id.* at 497.
 6. 38 Ohio St. 2d 317, 313 N.E. 2d 370 (1974).
 7. *But see, Havel*, 2012-Ohio-552, ¶40 (McGee Brown, J., dissenting) (citing *Kleines* as one of a string of decisions in which the Court "carefully guarded [its] rulemaking authority against legislative attempts to influence courtroom practice and procedure.")
 8. *Id.* at ¶35 (O'Donnell, J., for the majority).
 9. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).
 10. *Hayes v. Arthur Young & Company*, 9th Cir. Nos. 91-15531, 91-15546, 91-15593, 1994 U.S. Dist. LEXIS 23608, *20 (Aug. 26, 1994), quoting *Hanna v. Plumer*, 380 U.S. 460, 475, 85 S.Ct. 1136 (1965) (Harlan, J., concurring).
 11. *Hamm v. American Home Products Corp.*, 888 F. Supp. 1037, 1038 (E.D. Cal. 1995) (applying Fed. R. Civ. P. 42(b) instead of conflicting state statute that precluded introduction of evidence of defendant's wealth until after jury returned liability verdict).
 12. *See, e.g., Hayes, supra; Hamm, supra; Simpson v. Pittsburgh Coming Corp.*, 901 F.2d 277, 283 (2d Cir. 1990); *Steinberger v. State Farm Auto. Ins.*, S.D. Ohio No. 3:10-cv-015, 2010 U.S. Dist. LEXIS 100552 (Sept. 9, 2010); *Tuttle v. Sears, Roebuck & Co.*, N.D. Ohio No. 1:08 CV 333, 2009 U.S. Dist. LEXIS 80980 (Sept. 4, 2009) (Dowd, J.); *General Electric Credit Union v. National Fire Ins. of Hartford*, S.D. Ohio No. 1:09-cv-143, 2009 U.S. Dist. LEXIS 96085 (Sept. 30, 2009).
 13. *Hayes v. Arthur Young & Company, supra*, 1994 U.S. Dist. LEXIS 23608, *21, quoting *Simpson v. Pittsburgh Coming Corp.*, 901 F.2d 277, 283 (2d Cir.), cert. dismissed, 497 U.S. 1057 (1990).
 14. *See, e.g., Steinberger, supra; Tuttle, supra; General Elec. Credit Union, supra.* Although, in the briefing before the Supreme Court, the defendants in *Havel* cited two Ohio federal district court cases for the proposition that federal courts "have little difficulty applying the mandatory bifurcation provision of R.C. 2315.21," neither of these cases addressed the question of whether bifurcation was substantive or procedural under the *Erie* doctrine. *See, Geiger v. Pfizer, Inc.*, S.D. Ohio No. 2:06-CV-636, 2009 U.S. Dist. LEXIS, *1-2 (Apr. 15, 2009); *Maxey v. State Farm Fire & Cas. Co.*, 569 F.Supp.2d 720, 724 (S.D. Ohio 2008).
 15. *Steinberger v. State Farm Mut. Auto. Ins.*, S.D. Ohio No. 3:10-cv-015, 2010 U.S. Dist. LEXIS 113749 (Oct. 14, 2010).
 16. *See, Havel v. Villa St. Joseph*, 8th Dist. No. 94677, 2010-Ohio-5251 (bifurcation is procedural), rev'd by 2012 Ohio 552; *Luri v. Republic Servs.*, 193 Ohio App. 3d 682, 2011-Ohio-2389, ¶8, 953 N.E. 2d 859 (same), cert. granted and discretionary appeal allowed by 2011-Ohio-5129; *Myers v. Brown*, 192 Ohio App. 3d 670, 2011-Ohio-892 (same), rev'd by 2012-Ohio-1577; *Plaugher v. Oniala*, 5th Dist. No. 2010 CA 00204, 2011-Ohio-1207 (same), rev'd by 2012-Ohio-1576; *Fleenor v. Karr*, 4th Dist. No. 10CA814, 2011-Ohio-5706 (same), rev'd by 2012-Ohio-1578; *Hill v. Steel Ceilings, Inc.*, 5th Dist. No. 11-CA-38, 2011-Ohio-6040 (same). The sole intermediate appellate decision that held bifurcation under R.C. 2315.21(B) to be a substantive right was *Hanners v. Ho Wah Genting Wire & Cable SDN BHD*, 10th Dist. No. 09AP-361, 2009-Ohio-6481.
 17. 115 Ohio St. 3d 455, 2007-Ohio-5248, 875 N.E. 2d 919.
 18. *Id.* at ¶4.
 19. *Id.* at ¶5.
 20. *Id.* at ¶16.
 21. *Id.* at ¶17.
 22. Article II, Section 28, provides, in pertinent part, that "[t]he general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts[.]"
 23. 1 Ohio St. 3d 173, 438 N.E. 2d 881 (1982).
 24. *Id.* at 175-176.
 25. 6 Ohio St. 3d 100, 451 N.E. 2d 1185 (1983).
 26. *Id.* at 104.
 27. 36 Ohio St. 3d 100, 522 N.E. 2d 489 (1988), paragraph three of the syllabus.
 28. *Id.* at 107.
 29. *Id.* at 107-108.
 30. Kurlantzick, 'Retroactivity': *What Can We Learn from the Odd Case of Michael Skakel?*, 36 Conn. L. Rev. 511, 518-519 (Winter 2004).
 31. *Havel v. Villa St. Joseph*, 8th Dist. No. 94677, 2010-Ohio-5251, rev'd by 131 Ohio St. 3d 235, 2012-Ohio-552.
 32. *Id.* at ¶27.
 33. 10th Dist. No. 09AP-361, 2009-Ohio-6481.
 34. 2012-Ohio-552, ¶16, quoting *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E. 2d 736 (1972), overruled on other grounds by *Schenkolewski v. Cleveland Metroparks Sys.*, 67 Ohio St. 2d 31, 426 N.E. 2d 784 (1981); and *Roe v. Planned Parenthood Southwest Ohio Region*, 122 Ohio St. 3d 399, 2009-Ohio-2973, 912 N.E. 2d 61, ¶34.
 35. 41 Ohio St. 2d 208, 324 N.E. 2d 731 (1975).

36. 23 Ohio St. 3d 146, 492 N.E. 2d 401 (1986).
37. *Id.* at 148, quoting Evid. R. 501 (“The privilege of a witness, person, state or political subdivision thereof shall be governed by statute enacted by the General Assembly or by principles of common law as interpreted by the courts of this state in the light of reason and experience.”)
38. 39 Ohio St. 3d 236, 530 N.E. 2d 382 (1988).
39. *Havel*, 2012-Ohio-552, ¶25.
40. *Id.*
41. *Id.* at ¶26.
42. 108 Ohio St. 3d 86, 2006-Ohio-161, 840 N.E. 2d 1062.
43. *Havel*, at ¶27.
44. *Lovelady*, at ¶13.
45. *Id.* at ¶14.
46. *Id.*
47. *Havel*, at ¶29.
48. *Id.* at ¶32.
49. *Id.* at ¶35.
50. *Norfolk S. Ry. Co.*, 2007-Ohio-5248, ¶16,

- quoting *Jones v. Erie R.R. Co.*, 106 Ohio St. 408, 412 (1922).
51. *See, e.g., Sheward*, 86 Ohio St. 3d 451, 502 (“We recognize that Am.Sub.H.B. No. 350 arguably derives from the popular will, and that the people may alter or abolish the constitution which they created; ‘yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions of the existing Constitution, would, on that account, be justified in a violation of those provisions.’ Hamilton, *The Federalist* No. 78. It is our sworn duty to uphold the Constitution, even ‘where the legislative invasions of it had been instigated by the major voice of the community.’ *Id.* Majoritarian preferences are transitory; the Constitution is enduring and fundamental.”)



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