A Preference for Justice: Protecting the Rights of the Elderly Through Federal Application of State Trial-preference Statutes

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COVID-19 and its aftermath have left elderly Americans in an uncertain position as the lingering effects of “long COVID” are still relatively unknown. When senior citizens are parties to litigation, some unscrupulous actors may seek to delay trial in a morbid attempt to “wait out” the elderly party. Some states therefore provide statutory protections for the elderly by granting them preference in trial scheduling. Unfortunately, this protection exists in only some states, and federal trial courts have expressed uncertainty as to whether these statutes are entitled to application at the federal level as substantive law under the Erie doctrine. As long as federal courts refuse to apply state trial preference statutes when sitting in diversity, adverse parties can effectively stall case resolution by bringing suit in federal court rather than state court.

Even at the federal level, trial efficiency varies greatly by district, which means that litigants in certain locations are better positioned to play this waiting game. The Institute for the Advancement of the American Legal System has suggested that expectations and legal culture play some role in these discrepancies. This Note evaluates this problem through the lens of Justice Stevens’s concurrence in the 4-1-4 Shady Grove decision to suggest that state trial preference statutes use a procedural vehicle to protect the rights of elderly litigants and that federal courts should therefore apply them when hearing state law claims. A side effect of this approach is that it could assist in unifying disparate legal cultures that have contributed to inconsistency in trial efficiency across federal district courts.

I. Introduction

Imagine that you are a senior citizen and someone you trust has taken advantage of you. You have lost years of savings and a sense of security in your remaining years. You want justice. You could seek relief in court, but litigation takes time and energy that you do not feel like you have.[[2]](#footnote-2) You feel torn between “wasting” the relatively few years you have left in court, hoping that relief will come while you still have time to enjoy it, accepting the loss, doing your best to move on, and trying to enjoy your remaining years.[[3]](#footnote-3) On top of that, it is possible that the person who took advantage of you is not even from the same state as you or has “skipped town” and no longer even resides in your state.[[4]](#footnote-4) Seeking justice may therefore even require you to pursue your case in federal courts.[[5]](#footnote-5)

Far from being a remote hypothetical, this is exactly the nightmare scenario litigants faced in recent lawsuits against former President Donald Trump relating to his “Trump University” real estate seminars.[[6]](#footnote-6) Enrollees at Trump University paid thousands of dollars for access to the University’s training in real estate investing along with promises of personal mentoring.[[7]](#footnote-7) When those promises came up empty, two class-action lawsuits were filed in 2010 and 2013 which included thousands of class members, many of whom were over age sixty-five.[[8]](#footnote-8) Plaintiffs in these lawsuits sat and waited for years until shortly after Election Day in 2016 when Trump agreed to settle the lawsuits.[[9]](#footnote-9) Unfortunately, while waiting years for resolution, some class members—like eighty-five-year-old Boyce Chait, who had paid nearly $35,000 to Trump University—had already passed away.[[10]](#footnote-10) As tragic as that is, the wait was extended even further for one class member who had misread the original class action notice, failed to opt out of the settlement, was prohibited from doing so after the deadline, and then chose to appeal that decision.[[11]](#footnote-11) While waiting for resolution of that appeal, other elderly class members—some of whom had financed their tuition by credit card or had exhausted their savings on the program’s tuition and resorted to covering other expenses by credit card in the meantime—were stuck with the resulting credit card debt and associated interest, faced bankruptcy and foreclosure on their homes, and were forced to delay retirement.[[12]](#footnote-12)

Thankfully, scenarios like these have not gone unnoticed. Numerous states have assisted senior citizens by passing state laws or creating rules of procedure ensuring that trials involving elderly parties have potential routes to receive preference in scheduling or other speedy processing.[[13]](#footnote-13) In many of these cases, the resulting trial must take place within four months.[[14]](#footnote-14) Unfortunately, however, there is not yet any comparable guarantee at the federal level. While the Federal Rules of Civil Procedure do acknowledge the general goal of the speedy resolution of actions, explicit recognition of the need to protect seniors is notably absent.[[15]](#footnote-15) Additionally, certain federal courts have acknowledged that they are unclear about how to apply state statutes on trial preference when hearing state law claims, and that there is a lack of precedent in the area.[[16]](#footnote-16) Federal courts’ wrestling with this issue indicates that there is no distinct federal rule upon which they can fall back to accomplish the same objective.[[17]](#footnote-17)

This Note proposes that state statutes or rules of procedure that provide for trial preference or some other form of expedited processing should apply to elderly parties in civil actions being heard by federal courts sitting in diversity. This would help to ensure that those elderly parties can obtain justice, while maximizing efficiency in the burdens placed on them in their remaining years. Accordingly, Part II of this Note will review the current need for trial preference for elderly parties and its potential to grow as a result of COVID-19. Part II will also explore various state statutes and the purposes for which they were enacted and will place these concerns against the backdrop of inconsistent efficiency across various federal courts. Part III of this Note will review the historical approach and more modern developments in the application of state law by federal courts sitting in diversity. Finally, Part IV of this Note will provide recommendations for federal courts regarding how they should handle cases involving elderly litigants when sitting in diversity.

II. Background

A. Scope of the Issue

According to the National Council on Aging, elder abuse is fairly common in the United States, with up to five million senior citizens being abused annually at a financial cost of $36.5 billion.[[18]](#footnote-18) With approximately 52.4 million people over the age of sixty-five in the United States in 2018, that means that roughly ten percent of senior citizens are abused *every year*.[[19]](#footnote-19) And despite such staggering numbers, there are indications that seniors are extremely unlikely to report such abuse.[[20]](#footnote-20) In one study conducted by the Office of Inspector General of the United States Department of Health and Human Services, nearly twenty percent of potential nursing home abuse cases were never reported to the state agencies responsible for investigating them, and even among those that *were* reported, approximately ninety-seven percent were never thereafter reported to law enforcement.[[21]](#footnote-21) Another study conducted by the same office near the same time looked at Medicare claims between 2015 and 2017 dealing with the treatment of senior citizens who had potentially faced abuse and neglect.[[22]](#footnote-22) In that study, nearly one-third of potential cases were never reported.[[23]](#footnote-23) While the underlying reasons for the underreporting of elder abuse can vary, the Rape, Abuse & Incest National Network (RAINN) suggests some explanations, including the simple inability to report due to physical or mental impairment, shame, dependence on the abuser, and fear of retaliation.[[24]](#footnote-24) As RAINN points out, seniors may also fear that they will not be taken seriously due to stereotypes about their mental clarity.[[25]](#footnote-25) Alternatively, as mentioned above, it might just not be worth the effort. In a situation where a victim knows that their remaining years are limited, they may simply want to pretend it never happened and attempt to recover some degree of “normalcy” by just moving on.[[26]](#footnote-26)

The problem of elder abuse can only be expected to grow.[[27]](#footnote-27) By 2060, the number of elderly individuals in America is projected to double.[[28]](#footnote-28) Over the next ten years alone, the United States is likely to see an increase of twenty million individuals over the age of sixty-five.[[29]](#footnote-29) In fact, in July 2021, the United States Secretary of Commerce Gina Raimondo described the impending demographic shifts as “untenable,” saying that it would hit “like a ton of bricks.”[[30]](#footnote-30) But like any other citizen, senior citizens face issues beyond mere elder abuse.[[31]](#footnote-31) As individuals age, they must cope with declining motor skills which place them at higher risk of accidents, and they are more prone to injuries following slips and falls.[[32]](#footnote-32) Additionally, they become more likely to need medications and use medical equipment and implants.[[33]](#footnote-33) Accordingly, senior citizens may be especially likely to become involved in lawsuits related to these accidents, defective products, and defective drugs,[[34]](#footnote-34) not to mention any of the typical conflicts faced by the rest of society.[[35]](#footnote-35) As the New York State Court System described it, “issues involving older adults arise in all courts,” from housing courts dealing with eviction issues to family courts handling abuse cases where seniors live with adult children, and beyond.[[36]](#footnote-36)

B. Life Expectancy of Senior Citizens

To understand the need for expedited trial processing for senior citizens, we must lay the groundwork by reviewing current life expectancy trends and how they may be changing due to current events. According to the Social Security Administration, in 2019, average life expectancy for a seventy-year-old is approximately fifteen years.[[37]](#footnote-37) For an eighty-year-old, that average life expectancy drops to approximately eight to nine years.[[38]](#footnote-38) However, those numbers are even lower for certain populations of color.[[39]](#footnote-39) For example, average life expectancy for a non-Hispanic Black seventy-year-old male can be as low as twelve years, and just over seven years for a non-Hispanic Black eighty-year-old male.[[40]](#footnote-40)

That situation may be worsening as a result of both the immediate and long-term effects of the COVID-19 pandemic. A study published in the Proceedings of the National Academy of Sciences in February 2021, based on calculations using data from October 2020, suggested that COVID-19 would lead to a projected reduction in life expectancy of 0.87 years for sixty-five-year-olds overall.[[41]](#footnote-41) The authors of that study calculated their projections under high-, medium-, and low-mortality scenarios based on predicted death totals from COVID-19 associated with greater or lesser mask compliance and found projected life-expectancy reductions ranging from 0.75 years under the low-mortality scenario to 0.94 years under the high-mortality scenario.[[42]](#footnote-42) However, even under the higher mortality scenario used by the authors, this did not take into account potentially longer-term health effects the virus may inflict on the elderly.[[43]](#footnote-43)

While a reduction in life expectancy of only 0.87 years may not seem exceptionally large, the authors also projected much larger reductions in projected life expectancy for Black and Latino populations.[[44]](#footnote-44) Under the medium-mortality scenario, life expectancy for the white population at age sixty-five was projected to fall by only 0.63 years. Life expectancy for the Black population at age sixty-five was approximately 2.7 times worse, projected to fall by 1.73 years under the medium-mortality scenario, while life expectancy for the Latino population was projected to fall by 2.24 years (three-and-a-half times worse than their white counterparts.)[[45]](#footnote-45) Under the higher-mortality scenario, white, Black, and Latino sixty-five-year-olds saw projected reductions of 0.68 years, 2.26 years and 2.41 years, respectively.[[46]](#footnote-46)

In an illustration of how much the scientific community continues to learn and be surprised by COVID-19, these same authors revisited these projections in early 2022.[[47]](#footnote-47) While this study is still in the preprint stage and has not yet undergone peer review, in reflecting on actual 2020 data, the authors note that overall life expectancy at age sixty-five actually fell by 1.1 years, more than the 0.87 years they had projected previously.[[48]](#footnote-48) While overall life expectancy fared worse than their projections, life expectancy in Black and Latino populations came in at similar levels to that which was projected: 1.5 years and 2.1 years, respectively.[[49]](#footnote-49) The authors further projected that, for 2021, overall life expectancy at age sixty-five would remain at a reduced 1.1 years, with slight improvement for Black and Latino populations at 1.2 years and 1.8 years, respectively.[[50]](#footnote-50) However, the authors are careful to note that “[t]he overall impacts on life expectancy in 2021 will almost certainly be even greater than those shown here because our estimates incorporate deaths from only COVID-19.”[[51]](#footnote-51) Finally, the authors caution that there is increasing evidence of an elevated mortality risk following infection with COVID-19 and that “the mortality impact of long COVID is not yet known.”[[52]](#footnote-52)

Early signs increasingly suggest that COVID-19 carries a longer-term elevation in risk for various diseases. In regard to the ongoing risks to previously infected individuals, a study published in early 2022 has suggested that even individuals who had only mild cases of COVID-19 and who did not require hospitalization still face an increased risk of various cardiovascular diseases, even beyond the acute phase of the disease.[[53]](#footnote-53) This study noted these increased risks across all age, race, sex, and pre-existing condition categories, including in those who did not present any cardiovascular disease before infection with COVID-19.[[54]](#footnote-54) And because many of the diseases the study discusses are chronic conditions, the authors warn that “they will likely have long-lasting consequences for patients and health systems and also have broad implications on economic productivity and life expectancy.”[[55]](#footnote-55)

Similarly, a new study awaiting final publication is suggesting that COVID-19 infection may have longer-term effects on neurological function in older adults.[[56]](#footnote-56) This study examined changes in the brain for fifty-one- to eighty-one-year-old adults in the United Kingdom.[[57]](#footnote-57) This was a longitudinal study, in which subjects had already had received brain imaging prior to infection with COVID-19, and then received brain imaging again on average approximately three years later.[[58]](#footnote-58) The scans of those who had not been infected with COVID-19 in the intervening period were compared with those who had been infected, and, on average, the post-infections scans were conducted approximately five months after infection with COVID-19.[[59]](#footnote-59) Shockingly, the scans of those participants who had been infected with COVID-19 showed reduced thickness of gray matter, indications of tissue damage, and reduced brain size overall, and this was after only a few months.[[60]](#footnote-60) The study further does not come to any conclusions regarding whether such effects are reversible or whether they will persist, but it does suggest that greater impacts on life expectancy may still be yet to come as we continue to learn more about the character of this disease.[[61]](#footnote-61) Once again, all of this must be considered in the context that the population of Americans age sixty-five and older is projected to double over the next twenty years[[62]](#footnote-62) and the weakening immune system in elderly adults will likely be a factor.[[63]](#footnote-63)

C. Court Efficiency

As average life expectancy for senior citizens declines[[64]](#footnote-64) and they remain at higher risk of involvement in lawsuits,[[65]](#footnote-65) they encounter a federal court system that is not always adequately efficient.[[66]](#footnote-66) With several Federal Rules of Civil Procedure giving judges discretion to take actions facilitating the speedy resolution of actions, one might wonder whether there is any real issue to resolve here at all.[[67]](#footnote-67) According to this argument, the federal system should already be relatively efficient, and therefore there would not be much to gain by creating greater efficiency for the elderly.[[68]](#footnote-68) The reality, however, is that the speed of resolution of federal cases is inconsistent across various districts and circuits, and still may make up a sizeable portion of an elderly litigant’s remaining years.[[69]](#footnote-69) It is therefore important to remember that the pursuit of justice must consider the entire process, not just averages over the country as a whole.

1. State Court Efficiency

State courts vary in the efficiency with which cases are processed. In most state trial courts, standards for disposing of civil cases fall within one to two years.[[70]](#footnote-70) The National Center for State Courts (NCSC) monitors these standards in their efforts to improve access to justice and to promote model time standards.[[71]](#footnote-71)

Comparing a few of the largest states, the NCSC notes that civil trial processing standards in the state of California generally aim for seventy-five-percent resolution within one year and one-hundred-percent resolution within two years, but there are no formal time standards for California appellate courts.[[72]](#footnote-72)

In New York, standard civil trial court case processing standards aim for one-hundred-percent disposition within twenty-seven months, or just over two years.[[73]](#footnote-73) Like California, New York has not yet adopted formal standards for appellate courts.[[74]](#footnote-74)

Florida is a state with both trial- and appellate-level case processing standards. At the trial level, the standard for Florida courts is eighteen months in jury cases and twelve months in non-jury cases.[[75]](#footnote-75) At the appellate level, the standard is 180 days from oral argument to final decision.[[76]](#footnote-76)

Other states simply have no case processing standards at all. Utah, Montana, Nevada, Oklahoma, South Dakota, Tennessee, Kentucky, and Indiana are examples of states with no formally adopted processing standards.[[77]](#footnote-77) Of course, the lack of a formal standard does not necessarily mean that cases will face excessively slow processing. In Kentucky, for example, a law firm counsels prospective clients that a personal injury case may take six months to one year to reach trial.[[78]](#footnote-78) In Montana, by contrast, medical malpractice cases may take “a few months to a few years“ to reach trial[[79]](#footnote-79), which ultimately is fairly consistent with the formal standards adopted by various other states.[[80]](#footnote-80)

The NCSC also publishes model time standards as a guide for state courts.[[81]](#footnote-81) At the trial level, the NCSC recommends disposition of ninety percent of general civil cases within one year and ninety-eight percent within eighteen months.[[82]](#footnote-82) At the appellate level, the NCSC recommends that initial appellate courts hearing appeals by right dispose of ninety-five percent of cases within thirteen months, and those hearing discretionary appeals dispose of ninety-five percent of cases within eight months.[[83]](#footnote-83)

In addition to time standards, the NCSC also recognizes that merely tracking metrics is not sufficient to improve the operation of state courts.[[84]](#footnote-84) The NCSC therefore published a framework that state courts can follow as they seek to improve operational efficiency and access to justice.[[85]](#footnote-85) This framework is not limited merely to empirical measurement of efficiency metrics but includes factors such as managerial culture.[[86]](#footnote-86) The NCSC emphasizes:

“Many court reform efforts are based on the belief that any policy can be put in place in any court at any time. In reality, court practices are slow to change. They are conditioned on the past and reflect the influence of informal norms and well-established ways of doing business.”[[87]](#footnote-87) Accordingly, the NCSC notes that “what works in a given court appears to be and is generally thought to be highly dependent on the personalities, skills, and interests of the sitting judges.” [[88]](#footnote-88)

Despite the existence of model time standards and frameworks for high performance, delays are still possible at the state court level. Notably, the magnitude of the COVID-19 pandemic has wreaked havoc with state court processing efficiency.[[89]](#footnote-89) In the early stages of the pandemic, courts faced shutdowns and struggled to adapt to online activity, resulting in California’s state courts processing 1.4 million fewer cases between March and August 2020 as compared to that same period the previous year.[[90]](#footnote-90) These sorts of delays hit low-income and elderly litigants especially hard, prompting Deborah Chang, president of the Consumer Attorneys of California to remark, “It is so devastating to lose a plaintiff before they reach the trial date because they die. Sometimes the claim dies with them. That’s when justice delayed is truly justice denied.”[[91]](#footnote-91)

But even two years into the pandemic, courts are still struggling. In January 2022, Reuters reported that federal and state courts increasingly cancelled trials due to the spread of the Omicron variant of COVID-19.[[92]](#footnote-92) As much as one may hope that the COVID-19 pandemic is disappearing, it is always difficult to predict what new variants may appear.[[93]](#footnote-93)

D. Review of State Statutes

In recognition of this need to protect elderly litigants from intentional or unintentional delay, several states have instituted rules providing for expedited trials or giving trial preference to elderly litigants. Some states address this issue by giving courts discretion over whether to expedite a trial involving an elderly litigant by allowing them to consider factors such as age and health conditions or whether such preference would be necessary to prevent prejudicing the party’s interests in the case.[[94]](#footnote-94) Other states take this a step further and create an entitlement to trial preference for elderly litigants without regard to their health or any risk of prejudicing their interests.[[95]](#footnote-95) Finally, there are still some states that have taken neither approach and do not explicitly provide for any trial preference at all for elderly litigants.[[96]](#footnote-96)

1. Discretionary States

Some states have responded to the problem by giving courts varying degrees of discretion over whether to expedite a trial involving an elderly litigant. Florida is one example of such a discretionary state.[[97]](#footnote-97) The Florida statute reads, “In a civil action in which a person over the age of 65 is a party, such party may move the court to advance the trial on the docket. The presiding judge, after consideration of the age and health of the party, may advance the trial on the docket.”[[98]](#footnote-98) While the judge has discretion under this statute to consider the age and health of the elderly party, the rationale for the law was to prevent parties from pursuing delay tactics to try to outlast an elderly party or to coax out a more favorable settlement.[[99]](#footnote-99)

In California, by comparison, a judge has even less discretion, as California’s statute requires that the elderly party be over the age of seventy, and the court may only grant the petition if “the health of the party is such that a preference is necessary.”[[100]](#footnote-100) In 1982, The California Court of Appeal addressed the legislative intent behind this statute.[[101]](#footnote-101) The court referenced the bill digest of the Assembly Committee and stated that the statute protects a substantive right because a representative cannot recover non-economic damages for “pain, suffering, and disfigurement” after a litigant’s death.[[102]](#footnote-102) The same court, in *Greenblatt v. Kaplan’s Restaurant* and *Koch-Ash v. Superior Court*, described the legislative intent as “obvious” and centered on the protection of elderly litigants’ rights, and especially their “substantive right to trial during their lifetime and potential recovery of damages that would not survive plaintiff’s pretrial death.”[[103]](#footnote-103) Specifically, the concern was that the legislature acknowledged the “risk that death or incapacity might deprive [elderly litigants] of the opportunity to have their case effectively tried and the opportunity to recover their just measure of damages or appropriate redress.”[[104]](#footnote-104)

More recently, Sacramento recognized that a higher incidence of opioid use among elderly adults increases the risk of abuse.[[105]](#footnote-105) The city therefore strategically began bringing suits under this state law to take advantage of expedited trial processing.[[106]](#footnote-106) Sacramento City Attorney Susana Alcala Wood noted, “As a result of [defendant opioid manufacturers’] legal gamesmanship, [lawsuits may be delayed and be heard] before a federal court . . . as opposed to Sacramento County Superior Court, where it belongs and should proceed on an expedited basis.”[[107]](#footnote-107) Additionally, in regard to legal gamesmanship, even in state court, when a party over seventy moves for expedited trial, opposing counsel will often attempt to avoid trial preference by conflating a separate provision requiring that the plaintiff is likely to die within six months, which is not required under § 36(a).[[108]](#footnote-108) Rather, this is a separate provision giving the court discretion to grant preference to a party of undefined age and is not part of the language regarding litigants over the age of seventy.[[109]](#footnote-109)

In a recent development, California has amended its survival statute to allow a decedent’s personal representative or successor to recover damages for pain and suffering, something that was previously barred.[[110]](#footnote-110) This raises questions surrounding the California trial preference statute.[[111]](#footnote-111) Specifically, in light of the new ability of representatives of deceased litigants to recover damages for pain and suffering, the legislative intent behind § 36(a) to protect that very right appears to have evaporated.[[112]](#footnote-112) Accordingly, this provision may invite challenge in the near future.[[113]](#footnote-113)

In Louisiana, the statute uses mandatory language within a discretionary scheme, stating that the court “shall give preference . . . if the court finds that the interests of justice will be served by granting such preference.”[[114]](#footnote-114)

Other states that take a discretionary approach include Washington, Michigan, Nevada, and Colorado.[[115]](#footnote-115) Washington, however, allows trial preference only if the elderly litigant over age seventy is also “frail.”[[116]](#footnote-116)

2. Entitlement States

By contrast, a number of other states do not give judges this same discretion and merely entitle elderly litigants to expedited processing.[[117]](#footnote-117) For example, New York’s statute explicitly states that “cases are entitled to preference” in any action involving a party age seventy or older.[[118]](#footnote-118) While this rule does still condition this preference on “application of the party” and therefore requires the party to move for expedited processing, the preference is “virtually automatic.”[[119]](#footnote-119) In fact, New York courts stated unequivocally that “[a] party who has reached 70 years of age is automatically entitled to a preference” and even went so far as to require a hearing to determine whether sanctions were required for a party who challenged the court’s grant of preference.[[120]](#footnote-120) The New York Supreme Court, Appellate Division, noted that the intent of this rule is to “afford an elderly party swifter access to the courts so that he may obtain some measure of financial comfort during his remaining years.”[[121]](#footnote-121)

Illinois uses similar language for those aged seventy and older [[122]](#footnote-122) Like New York, Illinois’s statute also requires the elderly party to move for the preference, but upon doing so, the party is entitled to the preference.[[123]](#footnote-123) Unlike New York, however, Illinois’s statute explicitly limits this to parties who have “a substantial interest in the case as a whole.”[[124]](#footnote-124)

Other states, such as Rhode Island, Massachusetts, and Connecticut, do the same for those over age sixty-five.[[125]](#footnote-125) Rhode Island’s statute uses the language “shall be accelerated to trial at the request of the party,” but it also contains a provision to ensure that expediting an action will not preclude reasonable discovery.[[126]](#footnote-126) Connecticut’s statute also uses “shall” language to signal entitlement to this preference without any other limitation except that actions brought on behalf of the state take precedence over all others.[[127]](#footnote-127)

Massachusetts likewise uses “shall” language while also including a purpose, namely that the trial “may be heard and determined with as little delay as possible.”[[128]](#footnote-128) Interpreting this statute, in 2018, the Superior Court of Massachusetts denied a request to stay proceedings in the trial court during an interlocutory appeal because the plaintiff was over sixty-five years old.[[129]](#footnote-129) The Court noted that the appeal could take “a year or two to be resolved” and stated that the legislature had clarified that “older civil litigants are entitled to a prompt resolution of their claims at the trial court level.”[[130]](#footnote-130)

3. States Without Trial Preference for the Elderly

Despite the approximately one dozen states whose statutes do explicitly address trial preference for the elderly or rules of procedure, other states do not include any provisions for expedited trial processing for senior citizens.[[131]](#footnote-131) Texas, for example, provides an expedited actions process that applies to any civil suit where plaintiffs seek monetary relief of $250,000 or less, but this rule makes no reference to the age of the parties.[[132]](#footnote-132) While this may seem better than nothing, the average nursing home abuse case, for example, is worth $406,000 per claim.[[133]](#footnote-133) In other words, the average nursing home abuse case would not even qualify for expedited trial preference in Texas.[[134]](#footnote-134)

In the face of COVID-19, a Texas state judge has recently commented on the challenges faced by elderly litigants.[[135]](#footnote-135) While not referencing the Texas Rules of Civil Procedure directly, Judge Les Hatch did acknowledge that restrictions on in-person trials during COVID-19 have led to backlogs in the Texas court system.[[136]](#footnote-136) As a result, Judge Hatch expressed concerns that “justice delayed is justice denied” for the elderly or chronically ill who, as a result of delays, may be denied their opportunity to seek justice.[[137]](#footnote-137)

4. Federal District Court Efficiency

Time-to-resolution of initial trial-level cases in a federal district court may vary by several years depending on the federal district in question. Between the years 2000 and 2020, the average district court case duration was approximately one year.[[138]](#footnote-138) However, when this data is parsed by individual district courts, a greater degree of inconsistency appears. Over that period, the Southern District of West Virginia, for example, had the longest average case duration of just over three years.[[139]](#footnote-139) Overall, thirty-five districts had an average case duration above the national average.[[140]](#footnote-140)

But these numbers look only at averages over the past twenty years. The Federal court system has also seen increased delays because of COVID-19.[[141]](#footnote-141) When the COVID-19 pandemic first arrived, many courts shut down entirely.[[142]](#footnote-142) Even after many courts have reopened, several federal courts have still been observed delaying trials, citing the pandemic as justification.[[143]](#footnote-143) As with the averages over the past twenty years discussed above, these pandemic-related delays are also inconsistent across various courts. California, for example, saw only half as many cases resolved in the spring and summer of 2020 as in the same period in 2019.[[144]](#footnote-144) Where certain courts have fallen behind in their schedules, others have stood firm in an effort to maintain their processing efficiency.[[145]](#footnote-145) For example, the Western District of Wisconsin refused to push back pretrial deadlines to ensure that all parties were ready to proceed as early as possible even where trials themselves were delayed.[[146]](#footnote-146)

The causes of this inconsistency can vary, but the Institute for the Advancement of the American Legal System (IAALS) reviewed the situation in 2009 and suggested that certain cultural factors can play a role.[[147]](#footnote-147) One particular factor identified by the IAALS was the local legal culture and the resulting attitudes among practitioners as to what case processing timelines would be “fair” and appropriate.[[148]](#footnote-148) The report found that norms in some cities could be as much as double those in other cities, and that this could in turn influence local court rules.[[149]](#footnote-149) Additionally, the influence of individual judges, especially the Chief Judge in a District, has been observed to influence other judges within a particular district.[[150]](#footnote-150) This accords with the IAALS’s findings that even cases of a similar nature, e.g., employment cases, could vary widely in processing efficiency from one federal district court to another, and therefore a different balance of case type from one court to the next may not necessarily explain the discrepancies.[[151]](#footnote-151)

5. Appellate Court Efficiency

After a case is resolved at the trial level, (approximately one year on average, or up to three years in certain districts)[[152]](#footnote-152) those that are pursued further on appeal only increase the waiting game.[[153]](#footnote-153) After cases are reopened on appeal, they may still take three-and-a-half to five years to fully resolve.[[154]](#footnote-154) While the Eleventh Circuit was most efficient at an average case duration of 290 days, the Fourth Circuit had the longest time to resolution at 582 days (approximately 1.5 years).[[155]](#footnote-155) In late 2021, the Judicial Efficiency Improvement Act was introduced in the United States Senate to attempt to address some of these efficiency issues.[[156]](#footnote-156) This proposed legislation would split several states off of the existing Ninth Circuit, create a new Twelfth Circuit, increase the number of judges in the Ninth Circuit, and add additional district judges across the country.[[157]](#footnote-157) Senator Lisa Murkowski, one of the cosponsors of the legislation, reasoned that appeals in the current Ninth Circuit take thirty percent longer to process than in the next largest circuit.[[158]](#footnote-158)

E. Existing Federal Rules on Trial Efficiency

From the very first page, the Federal Rules of Civil Procedure acknowledge that a primary objective of the courts is the “just, speedy, and inexpensive determination of every action and proceeding.”[[159]](#footnote-159) The Rules here elaborate that judges should exercise discretion in construing all other Rules in accordance with this goal.[[160]](#footnote-160) Federal Rule of Civil Procedure 16 likewise provides that, at a pretrial conference, a judge *may* take actions “facilitating in other ways the just, speedy, and inexpensive disposition of the action.”[[161]](#footnote-161) But discretion, by its very nature, leaves gaps.

When it comes to giving priority to certain types of actions in the Federal system, the Rules and federal law are far narrower.[[162]](#footnote-162) Rule 40, for example, only requires that federal courts give priority to actions that are entitled to receive priority under federal law.[[163]](#footnote-163) Likewise, Section 1657 of Title 28 of the United States Code provides that courts “shall expedite the consideration of any action” brought under certain statutes, actions for temporary or injunctive relief, or where good cause is shown.[[164]](#footnote-164) However, “good cause” is defined by that statute as involving the maintenance of a right under the Constitution or a Federal statute and would not necessarily reach the expediting of trials involving senior citizens.[[165]](#footnote-165)

In fact, despite these rules giving judges discretion in pursuing efficiency, the rules do not always have their intended effect. Lorna Schofield, former chair of the American Bar Association’s Section of Litigation, recognized the insufficiency of the Federal Rules in achieving efficiencies.[[166]](#footnote-166) She noted that the rules already contain the framework for more efficient case management, yet the tools provided by these rules are underutilized, both because attorneys do not typically make use of them, and judges are reluctant to invoke them independently.[[167]](#footnote-167)

Additionally, the trend in judicial management of litigation has been toward an overemphasis on the “inexpensive” side of the analysis and not enough of an emphasis on “just” and speedy”.[[168]](#footnote-168) To illustrate this, Professor Brooke Coleman points to *Bell Atlantic Corp. v. Twombly*[[169]](#footnote-169)and *Ashcroft v. Iqbal*[[170]](#footnote-170)as illustrating the Court’s excessive focus on cost.[[171]](#footnote-171) In the former case, the Court pointed to the cost of discovery and the risk that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment or trial]” as part of its justification for requiring a stricter pleading standard.[[172]](#footnote-172) In the latter, the Court pointed to the costs to the defendant in terms of time and resources.[[173]](#footnote-173) As Professor Coleman argues, “efficiency” is about more than financial costs, and should balance “all costs and benefits, both pecuniary and nonpecuniary.”[[174]](#footnote-174) This imbalanced emphasis on cost-minimization has therefore led judges to seek avoidance of trials, and may deter the pursuit of justice by meritorious plaintiffs.[[175]](#footnote-175) In other words, discretion opens the door to misinterpretation. As Professor Coleman notes, “even when a plaintiff loses, seeing the claim through the litigation process provides a benefit to the system in terms of the individual’s ability to abide by the result and the public’s perception of the system’s legitimacy.”[[176]](#footnote-176)

II. Analysis

A. Federal application of state statutes

With the variety of approaches toward trial preference for the elderly at the state level, the question of how federal courts sitting in diversity on state law claims should approach these statutes is raised. As many first-year law students may recall, the *Erie* doctrine generally provides that federal courts sitting in diversity will apply state substantive law, but will not apply state procedural law.[[177]](#footnote-177) In *Erie Railroad Co. v. Tompkins*, Mr. Tompkins was injured when he was struck by something protruding from a passing train.[[178]](#footnote-178) Mr. Tompkins brought suit in federal court through diversity jurisdiction because under Pennsylvania case law, he would have been regarded as a trespasser and the railroad would not have been liable unless its negligence was “wanton or willful."[[179]](#footnote-179) Tompkins argued that because this rule derived only from a court decision, and not from a state statute, the Court was not bound to apply Pennsylvania case law, and was free to apply general law, which established that “[w]here the public has made open and notorious use of a railroad right of way for a long period of time and without objection, the company owes to persons on such permissive pathway a duty of care” and therefore the railroad would be liable for his injuries.[[180]](#footnote-180)

In its decision, the *Erie* Court denied that there was any separate “federal common law,” stating that “[t]he common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State . . . .”[[181]](#footnote-181) The Court emphasized that “[t]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.”[[182]](#footnote-182) In dissent, however, Justice Reed, anticipating later dilemmas, noted that “[t]he line between procedural and substantive law is hazy, but no one doubts federal power over procedure.”[[183]](#footnote-183)

Seventeen years later, this doctrine was developed further in *Hanna v. Plumer*.[[184]](#footnote-184) This case involved a complaint filed by a citizen of Ohio against a citizen of Massachusetts, and the resulting question of whether service of process in a diversity suit must comply with Massachusetts state law or the Federal Rules of Civil Procedure.[[185]](#footnote-185) The Federal Rules allowed for service by leaving a copy of the summons and complaint at the person’s dwelling or with a person of “suitable age and discretion then residing therein.”[[186]](#footnote-186) Massachusetts law, by contrast, required “delivery in hand upon such executor or administrator or service thereof accepted by him.”[[187]](#footnote-187) The Supreme Court in *Hanna* summarized *Erie* as roughly standing for the proposition that “federal courts are to apply state substantive law and federal procedural law.”[[188]](#footnote-188) However, in defining those terms, it stated that “the line between ‘substance’ and ‘procedure’ shifts as the legal context changes.” The Court further pointed to the roots of the *Erie* rule in “a realization that it would be unfair for the character of result of a litigation materially to differ because the suit had been brought in a federal court.”[[189]](#footnote-189) The key concern, therefore, was the prevention of forum shopping, and noted that “nonsubstantial, or trivial, variations [are] . . . unlikely to influence the choice of a forum.”[[190]](#footnote-190) The Court elaborated that *Erie* considerations do not come into play where a Federal Rule clearly governs a situation but rather where a Federal Rule either does not exist or where “the scope of the Federal Rule was not as broad as the losing party urged.”[[191]](#footnote-191) It concluded that federal courts have the power to regulate “matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.”[[192]](#footnote-192) However, the Court, in clarifying that the Federal Rules would not “cease to function whenever [they] alter the *mode* of enforcing state-created rights” (in that case, the method of serving process) left open the implication that an outright denial of such state-created rights may go too far.[[193]](#footnote-193)

More recently, the United States Supreme Court has shed more light on how exactly one should rationally classify a state law as either substantive or procedural.[[194]](#footnote-194) In *Gasperini v. Center for Humanities, Inc.*, the Court specifically considered whether state rules governing the size of jury verdicts should be treated as substantive or procedural law.[[195]](#footnote-195) Writing for the majority, Justice Ginsburg acknowledged that, in some sense, the state law was “both ‘substantive’ and ‘procedural.’”[[196]](#footnote-196) She argued that the law was “substantive” in that [its] standard controls how much a plaintiff can be awarded; ‘procedural” in that [it] assigns decision-making authority to New York’s Appellate Division.”[[197]](#footnote-197) Justice Ginsburg went further, however, and noted that “[j]ust as the Erie principle precludes a federal court from giving a state-created claim ‘longer life . . . than [the claim] would have had in the state court,’ so Erie precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court.”[[198]](#footnote-198) In the end, the Court determined that the state law in question, despite regulating practices within the courts, was substantive and the federal court should have applied it.[[199]](#footnote-199)

Finally, in 2010, Justice Scalia threw another wrinkle into the discussion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co*.[[200]](#footnote-200)This case involved the question of whether a state law that prohibited class actions where the suit sought “penalties or statutory minimum damages” conflicted with Federal Rule of Civil Procedure 23.[[201]](#footnote-201) This was a splintered decision with cross-ideological alignment, in which only pieces of Scalia’s opinion could gather the support of any four Justices.[[202]](#footnote-202) Before beginning his analysis, Scalia noted that if a federal rule “answers the question in dispute[,] it governs” and that “[w]e do not wade into Erie’s murky waters unless the federal rule is inapplicable or invalid.”[[203]](#footnote-203)

The fundamental conflict in *Shady Grove* was between New York Civil Practice Law and Rules § 901(b) and Rule 23.[[204]](#footnote-204) The New York statute provided that “an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.”[[205]](#footnote-205) Federal Rule 23, by contrast, provided conditions under which a class action may be maintained and did not limit them based on whether the action sought to recover a penalty.[[206]](#footnote-206) The Rules Enabling Act, 28 U.S.C. § 2072, specifies that, while the Supreme Court has the power to “prescribe general rules of practice and procedure” for the federal court system, those rules “shall not abridge, enlarge, or modify any substantive right.”[[207]](#footnote-207)

The dispute at issue in the case was an attempt by Shady Grove Orthopedic Associates (a medical provider) to bring a class action lawsuit against Allstate Insurance for the payment of statutory interest it was obligated to pay under New York law due to Allstate’s missing the deadline for either payment or denial of an insurance claim within thirty days.[[208]](#footnote-208) The Second Circuit found that the New York law was substantive and chose to apply it, reasoning that, while the Rules Enabling Act would control if there was conflict between the federal and state law, there was no conflict here as they addressed different issues.[[209]](#footnote-209) Namely, the Second Circuit claimed that the New York law concerned “whether the particular type of claim is eligible for class treatment” at all, and the Federal Rule concerned the criteria for class certification after a claim is eligible.[[210]](#footnote-210)

In the first portion of Justice Scalia’s opinion, joined by Chief Justice Roberts and Justices Thomas, Sotomayor, and Stevens, the Court rejected the Second Circuit’s reasoning, finding that “[b]oth are preconditions for maintaining a class action.”[[211]](#footnote-211) Justice Scalia summarized the finding in stating that “[b]oth of § 901’s subsections undeniably answer the same question as Rule 23: whether a class action may proceed for a given suit.”[[212]](#footnote-212)

Justice Stevens, as one of those joining the Opinion of the Court described above, wrote a separate concurrence,[[213]](#footnote-213) and therefore his observations are especially relevant in interpreting the scope of the *Shady Grove* opinion. Stevens began by acknowledging that the New York statute was not part of New York’s substantive law and that he therefore agreed with Justice Scalia’s holding.[[214]](#footnote-214) However, he then went on to state that he also agreed with Justice Ginsburg’s dissent—which itself was joined by Justices Kennedy, Breyer, and Alito (the addition of Stevens thus making a five-member majority on that point)—in concluding that “there are some state procedural rules that federal courts must apply in diversity cases because they function as a part of the State’s definition of substantive rights and remedies.”[[215]](#footnote-215) Stevens emphasized § 2072(b) of the Rules Enabling Act which prohibits “abridg[ing], enlarg[ing] or modify[ing] any substantive right.”[[216]](#footnote-216) He clarified that this means that “federal rules cannot displace a State’s definition of its own rights or remedies.”[[217]](#footnote-217) Elaborating on this distinction, Justice Stevens stated that “[w]hen a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies, federal courts must recognize and respect that choice.”[[218]](#footnote-218)

Stevens then went on to identify a “two-step framework” to navigate issues where federal and state laws both appear to govern.[[219]](#footnote-219) The first step of the analysis asks whether the federal law “leav[es] no room for the operation” of the state law.[[220]](#footnote-220) If not, and especially where the rules can operate alongside one another, an *Erie* inquiry is appropriate.[[221]](#footnote-221) The second step of the analysis applies where there *is* a conflict, and asks whether the federal law “effectively abridges, enlarges, or modifies a state-created right” and therefore violates the Rules Enabling Act.[[222]](#footnote-222) In making this analysis, Stevens emphasizes that the relevant question is not whether the form of the law appears to be substantive or procedural, but rather “whether the state law actually is part of a State’s framework of substantive rights or remedies.”[[223]](#footnote-223)

Where Justice Stevens broke with the dissent was on the much narrower question of whether Rule 23 is generally applicable or whether it applies only where there is no conflict with state law.[[224]](#footnote-224) Specifically, he took issue with the dissent’s failure to approach the question of whether the state law was substantive through the lens of the Rules Enabling Act and whether it would abridge, enlarge, or modify a state right.[[225]](#footnote-225) He acknowledged that the question of whether a state law does so is difficult, and therefore stated that the decision should turn not on whether there is a “possibility that a federal rule would alter a state-created right,” but whether there is “little doubt.”[[226]](#footnote-226) The answer to this question, in Stevens’s view, is based not on whether there is “some policy reason” underlying the state rule, but whether the rule is “intimately bound up in the scope of a substantive right or remedy.”[[227]](#footnote-227)

In applying that analysis to the facts of the *Shady Grove* case, Justice Stevens pointed to the evidence that the state law in question was intended only to make it easy to litigate when necessary, but not too easy when it is not.[[228]](#footnote-228) He concluded that a state law’s displacement of a federal law requires “more than just a possibility that the state rule is different than it appears.”[[229]](#footnote-229)

B. Federal Court Application of *Erie* to Trial Preference Statutes

As much as the Supreme Court has wrestled with where to draw the line in applying federal procedural laws and state statutory law, lower federal courts have also struggled in determining when and how to apply these state statutes on trial preference in federal court.[[230]](#footnote-230)

In 2021, in *Orlando v. Government Employee’s Insurance Co.*, for example, the federal district court was asked to apply Nevada’s state trial preference statute in a diversity action.[[231]](#footnote-231) Notably, the state statute at issue here was discretionary, and merely gave the court the option of “giv[ing] preference in setting a date for the trial . . . .”[[232]](#footnote-232) The court acknowledged that they could find no precedent on whether state trial preference statutes were substantive law (that must be applied by federal courts sitting in diversity) or procedural law.[[233]](#footnote-233) The court therefore came down on the side of reading the state law as procedural and refused to apply it.[[234]](#footnote-234)

Likewise, that same year, in *Wood v. Allstate Insurance Co.*, a federal court was also unable to determine whether the state trial preference statute applied in Federal court.[[235]](#footnote-235) The statute here was the Colorado trial preference statute, which also gives courts discretion on whether to expedite a trial for movants over the age of seventy.[[236]](#footnote-236) In both of these cases, despite the court’s inability to answer the question of whether federal courts sitting in diversity must apply the state statute, the result would have been the same because both Colorado and federal courts also have discretion to expedite case handling.[[237]](#footnote-237) These cases therefore highlight the existence of the dilemma even where no definitive conclusion is necessary.

Other courts, by contrast, have come to a quicker decision, albeit without much analysis. For example, in *Wakefield v. Global Financial Private Capital LLC*, a federal court interpreting Cal. Civ. Proc. Code § 36 noted that there is no federal counterpart to that state law, but simply came to the same outcome via Federal Rules of Civil Procedure 1 and 16.[[238]](#footnote-238) Likewise, a federal District court in *Berenson v. Administrators of the Tulane University Educational Fund* simply dismissed the plaintiff’s claims of entitlement to trial preference under the Louisiana statute by declaring in a footnote that “Louisiana rules of civil procedure do not apply in federal court.”[[239]](#footnote-239) In light of these federal courts’ inconsistent conclusions on the question of whether state trial preference statutes are substantive or procedural law, and accordingly whether they should be applied by federal courts sitting in diversity on state law claims, this is an unsettled question that is in need of resolution at the federal level.

C. Inconsistency in Court Efficiency Results in Inconsistent Protection of Senior Citizen Rights

As noted above in Section II.B., the average life expectancy for an eighty-year-old in 2019 was roughly eight-and-a-half years for males and just over nine-and-a-half years for females.[[240]](#footnote-240) At the same time, case processing in federal courts can take anywhere from three to five years depending on the jurisdiction.[[241]](#footnote-241) For an eighty-year-old litigant, therefore, slow case processing can have the effect of tying up nearly a third to half of their remaining years awaiting resolution.[[242]](#footnote-242) Of course, this does not even take into consideration the additional delays recently caused by COVID-19 and the potential for further reductions in life expectancy resulting from long-term complications due to previous COVID-19 infection.[[243]](#footnote-243) Adding to the dilemma created by inconsistent case efficiency from one court to another, the fact that some courts have more actively pushed back against COVID-19 related delays has added additional inconsistency into the system. The result is that the pursuit of justice can vary for some elderly litigants depending on where they are located.[[244]](#footnote-244) This delay may increase the likelihood of unsatisfactory settlements as elderly plaintiffs may recognize the downsides of pursuing justice in their remaining years. Additionally, as Sacramento City Attorney Susana Alcala Wood has described, adverse parties may employ “gamesmanship” to remove cases to federal court in an effort to wait out the elderly litigant who may or may not be afforded the same protections available via trial preference in the state court system.[[245]](#footnote-245)

D. State Trial Preference Statutes Protect the Substantive Rights of Elderly Litigants

As several state courts have acknowledged, the legislative intent behind state trial preference statutes is often focused on protecting the substantive rights of elderly litigants.[[246]](#footnote-246) Recall that the California Court of Appeal pointed to the legislative intent to minimize the “risk that death or incapacity might deprive [elderly litigants] of the opportunity to have their case effectively tried and the opportunity to recover their just measure of damages or appropriate redress.”[[247]](#footnote-247) Likewise, the New York Supreme Court, Appellate Division, recognized the intent to “afford an elderly party swifter access to the courts so that he may obtain some measure of financial comfort during his remaining years.”[[248]](#footnote-248) These statutes, therefore, are not merely focused on efficient case processing for its own sake.

Applying the *Erie* doctrine to this problem, we can start with the general framework identified in *Hanna* that federal courts should apply state substantive law and federal procedural law.[[249]](#footnote-249) That case further tells us that matters falling in “the uncertain area between substance and procedure” should be guided by federal procedure.[[250]](#footnote-250) But as Justice Ginsburg noted in *Gasperini*, *Erie* “precludes a federal court from giving a state-created claim ‘longer life . . . than [the claim] would have had in the state court.’”[[251]](#footnote-251)

But it is *Shady Grove* that provides the final piece of this puzzle.[[252]](#footnote-252) As the majority opinion by Justice Scalia there stated, where a federal statute directly addresses the question in dispute, it governs.[[253]](#footnote-253) The problem in the context of state trial preference statutes is most stark in cases of entitlement statutes. In these cases, the state law mandates that an elderly litigant has a right to expedited trial processing; federal law merely *allows* a court to expedite an elderly litigants case.[[254]](#footnote-254) Under Justice Stevens’ two-step analysis in *Shady Grove*, there is no “direct collision” between federal discretionary and state entitlement statutes the way there was in the facts of that case where a federal law said “yes” and a state law said “no.”[[255]](#footnote-255) State trial preference statutes, by contrast, fall into that area described by Justice Stevens where federal discretion does not contradict, but merely stops short of the state protection.[[256]](#footnote-256) Accordingly, an *Erie* analysis is appropriate in these cases and, as Justice Stevens clarifies, federal courts should apply state procedural rules where there is “little doubt” that they “function as a part of the State’s definition of substantive rights and remedies.”[[257]](#footnote-257) In entitlement states like California, courts have left no doubt that their trial preference statutes do exactly that.[[258]](#footnote-258)

Putting these cases together and applying them to the problem of trial preference for elderly litigants, even if these state statutes could be argued to fall in the “uncertain area between substance and procedure,” the failure to apply them in federal court would clearly give a state-created claim longer life than if it had been brought in state court.[[259]](#footnote-259) And based on the state courts’ descriptions of the trial preference statutes in *Greenblatt* and *Milton Point Realty*, these statutes are focused on “us[ing] a traditionally procedural vehicle as a means of defining the scope of substantive rights [and] remedies,” and therefore, “federal courts must recognize and respect that choice.”[[260]](#footnote-260)

E. Consideration of Counterarguments for Age-based Preferences

While protections for senior citizens may seem like an obvious conclusion for many, Professor Nina Kohn of the Syracuse University College of Law argues that in some circumstances they may be counterproductive.[[261]](#footnote-261) Specifically, she notes that chronological age is a poor predictor of functional abilities, and many laws privileging the elderly promote stereotypes.[[262]](#footnote-262) She points out that many elder protection laws were adopted based on previous child protection laws, which has led to the continuance of the paternalistic treatment embedded in those child protection statutes.[[263]](#footnote-263) She recommends, therefore, that elder protections should be based instead on a “victim-centered, civil rights-friendly framework” and especially emphasizes that framing elder protection statutes in terms of “rights” can “affect individual and community behavior and how individual actors and communities structure relationships.”[[264]](#footnote-264) Elsewhere, Kohn has argued that there are logistical issues created by discriminating in favor of older adults, specifically that it can “undermine efforts to allocate resources efficiently.”[[265]](#footnote-265) By using age as a proxy for other concerns like frailty or worthiness, such use “will increasingly result in policies poorly tailored to the objectives that they seek to achieve.”[[266]](#footnote-266) Additionally, she notes, they can “promote ageist stereotyping, . . . and make the prospect of aging more dismal for young and old alike.”[[267]](#footnote-267) In her view, any negative consequences of these laws are unlikely to be outweighed by positive ones.[[268]](#footnote-268)

Far from creating such risks, however, the protections suggested by this Note in the Recommendations section below are not based on paternalism or treating the elderly as if they were children. Instead, they are based on empirical realities of federal court efficiency and empirical realities of life expectancy.[[269]](#footnote-269) Accordingly, they maintain protection for the elderly while still respecting the concerns raised by Kohn.

An alternative approach has been suggested by former Massachusetts Superior Court Associate Justice Linda Giles. Giles argues that age is not a monolithic category, and “very real differences” exist between age cohorts.[[270]](#footnote-270) She argues therefore that instead of considering mere chronological age, rules should instead consider expected remaining years of life.[[271]](#footnote-271) This proposal is not without merit for certain types of paternalistic protections for the elderly. Giles herself acknowledges that “some forms of age discrimination are undeniably necessary and reasonable.”[[272]](#footnote-272) For example, she speaks approvingly of protecting the elderly against age-related discrimination.[[273]](#footnote-273) Her concerns ultimately appear to center on “stereotyped assumptions of [seniors’] abilities and disabilities” and the “inaccurate pigeon hole that [seniors] are impaired cognitively or are physically- or decisionally-challenged”[[274]](#footnote-274) However, trial preference statutes are not based on stereotypes of seniors’ physical or mental capacity, but rather on empirical data of the unknowable but inevitable future for individuals of a certain age, and a concern for ensuring that their rights in court are protected.[[275]](#footnote-275)

Finally, it should be kept in mind that there are downsides to expedited trial processing in that an expedited trial date means less time for trial preparation.[[276]](#footnote-276) Additionally, a successful motion for an expedited trial may remove the possibility of requesting a continuance should such a step become necessary.[[277]](#footnote-277)

III. Resolution and Recommendation

Federal courts should recognize state statutes giving trial preference to elderly litigants as substantive law and should therefore apply them at the federal level. While the simplest approach to solving this problem might be to merely add a new federal statute to trigger the requirement in Federal Rule of Civil Procedure 40 to give preference to actions entitled to priority by federal statute, this may be too much of a one-size-fits-all solution. This is especially so in light of differences from one state to the next in regard to what each is trying to accomplish with its statute.[[278]](#footnote-278) This is especially so given the rapid demographic changes projected over the next two decades, and the differences among various age cohorts within the broader “elderly” category as noted by former Massachusetts Superior Court Associate Justice Linda Giles.[[279]](#footnote-279)

Similar considerations would advise against merely creating a new Federal Rule of Civil Procedure to govern these state trial preference statutes, as many tools already available to federal judges to achieve efficiency are underutilized, whether that is due to attorney oversight or judicial reluctance to intervene.[[280]](#footnote-280)

Instead, federal courts should recognize state statutes giving trial preference to elderly litigants as substantive law, which entitle them to application at the federal level under the Erie doctrine.[[281]](#footnote-281) This would ensure consistent outcomes in both federal and state court within each state jurisdiction, and would prevent the gamesmanship described by Sacramento City Attorney Susana Alcala Wood, in which corporate defendants seek to move cases involving elderly litigants to federal court to achieve a different outcome than they would achieve in state court.[[282]](#footnote-282) Finally, such an approach would allow for states to adjust their substantive protections of seniors as needed based on local conditions, rather than employing a single national approach in federal courts that vary widely in efficiency.[[283]](#footnote-283)

This approach is most relevant in entitlement states where elderly litigants are automatically entitled to trial preference by state law.[[284]](#footnote-284) These states most clearly fit into the category discussed by Justice Stevens in *Shady Grove* in which there is “little doubt” that failure to apply the state rule would alter a state-created substantive right.[[285]](#footnote-285)

This recommended approach is also appropriate in discretionary states where state courts merely have the option to expedite trials involving elderly litigants. Here, the discretionary nature of the state statute falls short of Justice Stevens’ “little doubt” standard, and it is also clear that federal courts *could* expedite a trial involving an elderly litigant if they so choose.[[286]](#footnote-286) However, the federal rules involved in a case like this are not so broad as to create a “direct collision” between the state and federal rule.[[287]](#footnote-287) In the absence of such a direct collision, federal courts should pay special heed to the state statute’s weighing of elderly status in the federal court’s own discretionary decision-making. By doing so, the court need not wade deeply into *Erie*-type analyses but can signal recognition of the importance of the factors involved. This would also aid in shifting legal culture in the ways described by the IAALS[[288]](#footnote-288) and NCSC[[289]](#footnote-289) and help to resolve the underutilization problem described by Lorna Schofield where judges do not make full use of available rules due to reluctance to stand out from the crowd.[[290]](#footnote-290)

Finally, in states where there is no existing trial preference statute for elderly litigants at all, federal judges have the opportunity to employ their discretionary powers under existing federal rules to begin demonstrating a commitment to protecting elderly litigants from gamesmanship by which cases are removed to federal court with the intention of delaying resolution.[[291]](#footnote-291) In light of the influence of legal culture mentioned above, this could also serve the dual purposes of influencing other judges who are not making full use of these powers, as well as setting an example for these states that could influence their willingness to enact such protections of their own.

IV. Conclusion

State statutes giving trial preference to elderly litigants are an appropriate response to local conditions, and federal courts should recognize them as substantive law which may be applied in federal courts sitting in diversity. This acknowledges the absence of sufficient federal rules— or the inconsistent application of existing federal rules— to provide for the protection of elderly litigants, who may face pressures to settle unsatisfactorily to avoid spending a large portion of their remaining years in court. State-by-state approaches also may allow for more nimble adjustment to respond to any unintended consequences that may result from the growth in the elderly population and preferences it may receive.

1. Josh Hanson, Articles Editor 2022-2023; J.D. 2023, University of Illinois at Urbana-Champaign; B.A. 2009, Political Science, Wheaton College (Illinois). [↑](#footnote-ref-1)
2. . Nick Penzenstadler, *Elderly Trump University Plaintiffs Die Waiting for Checks*, USA Today (May 26, 2017, 1:16 PM), https://www.usatoday.com/
story/news/2017/05/26/elderly-trump-university-plaintiffs-die-waiting-checks/1021
93734/. [↑](#footnote-ref-2)
3. . *See* *Getting to Trial with Preference if a Party is Elderly*, L. Offs. of STIMMEL, STIMMEL & ROESER, https://www.stimmel-law.com/en/articles/getting-trial-preference-if-party-elderly (last visited Dec. 29, 2022) [hereinafter Stimmel]. [↑](#footnote-ref-3)
4. . *See generally* Penzenstadler, *supra* note 1. [↑](#footnote-ref-4)
5. . *See* 28 U.S.C. § 1332. [↑](#footnote-ref-5)
6. . Penzenstadler, *supra* note 1. [↑](#footnote-ref-6)
7. . Low v. Trump Univ., LLC, 881 F.3d 1111, 1114–15 (9th Cir. 2018). [↑](#footnote-ref-7)
8. . Penzenstadler, *supra* note 1; *Low*, 881 F.3d at 1114. [↑](#footnote-ref-8)
9. . Penzenstadler, *supra* note 1. [↑](#footnote-ref-9)
10. . *Id.* [↑](#footnote-ref-10)
11. . *Low*, 881 F.3d at 1116. [↑](#footnote-ref-11)
12. . Penzenstadler, *supra* note 1. [↑](#footnote-ref-12)
13. . *See, e.g*., 735 Ill. Comp. Stat. 5/2-1007.1(a) (2022); Cal. Civ. Proc. Code § 36(a) (West 2022); 9 R.I. Gen. Laws § 9-2-18 (2022). [↑](#footnote-ref-13)
14. . *See, e.g.*, Nev. Rev. Stat. § 16.025 (2021) (“If a motion for preference is granted pursuant to subsection 1 or 2: (a) The court shall set a date for the trial of the action that is not more than 120 days after the hearing on the motion. . . .”); Cal. Civ. Proc. Code § 36(a) (West 2022) (“Upon the granting of such a motion for preference, the court shall set the matter for trial not more than 120 days from that date . . . .”). [↑](#footnote-ref-14)
15. . *See, e.g.*, Fed. R. Civ. P. 16(c)(2)(P). [↑](#footnote-ref-15)
16. 025 is not a substantive law but a procedural one, and thus has no place in federal court. Neither party identifies, nor can I find, controlling precedent resolving this issue or a federal rule that might govern or contradict the state law.”).

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188. . *Hanna*, 380 U.S. at 465. [↑](#footnote-ref-188)
189. . *Id.* at 467, 471. [↑](#footnote-ref-189)
190. . *Id.* at 468. [↑](#footnote-ref-190)
191. . *Id.* at 470–71. [↑](#footnote-ref-191)
192. . *Id.* at 472. [↑](#footnote-ref-192)
193. . *Id.* at 473 (emphasis added). [↑](#footnote-ref-193)
194. . *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996). [↑](#footnote-ref-194)
195. . *See* *id.* at 421–22. [↑](#footnote-ref-195)
196. . *Id.* at 426. [↑](#footnote-ref-196)
197. . *Id.* [↑](#footnote-ref-197)
198. . *Id.* at 430–31 (citations omitted) (quoting Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533–34 (1949)). [↑](#footnote-ref-198)
199. . *Id.*  [↑](#footnote-ref-199)
200. . *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 393 (2010). [↑](#footnote-ref-200)
201. . *Id.* at 396–398; *see* Fed. R. Civ. P. 23. [↑](#footnote-ref-201)
202. . *Shady Grove* *Orthopedic Assocs.*, 559 U.S. at 395–96. (“Justice SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II–A, an opinion with respect to Parts II–B and II–D, in which THE CHIEF JUSTICE, Justice THOMAS, and Justice SOTOMAYOR join, and an opinion with respect to Part II–C, in which THE CHIEF JUSTICE and Justice THOMAS join.”). [↑](#footnote-ref-202)
203. . *Id.* at 398. [↑](#footnote-ref-203)
204. . *Id.* at 396; *see* N.Y. C.P.L.R. § 901(b) (McKinney 1975), *invalidated by* Holster v. Gatco, Inc., 618 F.3d 214 (2d Cir. 2010); Fed. R. Civ. P. 23. [↑](#footnote-ref-204)
205. . Civ. Prac. & Rule § 901(b). [↑](#footnote-ref-205)
206. . *See* Fed. R. Civ. P. 23. [↑](#footnote-ref-206)
207. . 28 U.S.C. § 2072 (West). [↑](#footnote-ref-207)
208. . Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 397 (2010). [↑](#footnote-ref-208)
209. . *Id.* at 398. [↑](#footnote-ref-209)
210. . *Id.* at 399. [↑](#footnote-ref-210)
211. . *Id.* [↑](#footnote-ref-211)
212. . *Id.* at 401. [↑](#footnote-ref-212)
213. . *Id.* at 416 (Stevens, J., partially concurring). [↑](#footnote-ref-213)
214. . *Id.* [↑](#footnote-ref-214)
215. . *Id.* at 416–17. [↑](#footnote-ref-215)
216. . *Id.* at 418; 28 U.S.C. § 2072(b). [↑](#footnote-ref-216)
217. . Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 397, 418 (2010). (Stevens, J., partially concurring). [↑](#footnote-ref-217)
218. . *Id.* at 420. [↑](#footnote-ref-218)
219. . *Id.* at 421. [↑](#footnote-ref-219)
220. . *Id.* [↑](#footnote-ref-220)
221. . *Id.* [↑](#footnote-ref-221)
222. . *Id.* at 422–23. [↑](#footnote-ref-222)
223. . *Id.* at 419. [↑](#footnote-ref-223)
224. . *Id.* at 431. [↑](#footnote-ref-224)
225. . *Id.* [↑](#footnote-ref-225)
226. . *Id.* at 432. [↑](#footnote-ref-226)
227. . *Id.* at 433. [↑](#footnote-ref-227)
228. . *Id.* at 435. [↑](#footnote-ref-228)
229. . *Id.* at 436. [↑](#footnote-ref-229)
230. . *See* Orlando v. Gov't Emps. Ins. Co., No. 220CV01904JADVCF, 2021 WL. 1342521, at \*1 (D. Nev. Apr. 9, 2021). [↑](#footnote-ref-230)
231. . *Id.* [↑](#footnote-ref-231)
232. . Nev. Rev. Stat. § 16.025(1) (2021). [↑](#footnote-ref-232)
233. . *Orlando*, 2021 WL 1342521, at \*1 (stating parties disagreed about whether state statute is substantive rule or procedural one, and federal court could find no controlling precedent to decide whether Erie applies). [↑](#footnote-ref-233)
234. . *Id.*  [↑](#footnote-ref-234)
235. . Wood v. Allstate Ins. Co., No. 21-CV-00931-RM-KMT, 2021 WL 1541704, at \*2 n.1 (D. Colo. Apr. 20, 2021) (noting that court is unclear on whether Colorado statute on trial preference applies in federal court). [↑](#footnote-ref-235)
236. . *Id.*; Colo. Rev. Stat. § 13-1-129 (2021). [↑](#footnote-ref-236)
237. . *See* Colo. Rev. Stat. § 13-1-129 (2021); Fed. R. Civ. P. 16(c)(2)(P). [↑](#footnote-ref-237)
238. . Wakefield v. Glob. Fin. Priv. Cap., LLC, No. 15CV0451 JM(JMA), 2015 WL 12699870, at \*2–3 (S.D. Cal. Sept. 17, 2015) (insinuating that 28 U.S.C. § 1657 *could* apply, although age preference may not implicate a constitutional right under the Constitution or federal statute.); Fed. R. Civ. P. 1; Fed. R. Civ. P. 16(a)(1). [↑](#footnote-ref-238)
239. . Berenson v. Adm’rs of the Tulane Univ. Educ. Fund, No. 17-329, 2017 WL 3480794, at \*2 n.15 (E.D. La. Aug. 14, 2017). [↑](#footnote-ref-239)
240. . *SSA*, *supra* note 36. [↑](#footnote-ref-240)
241. . Dalton, *supra* note 68. [↑](#footnote-ref-241)
242. . *See* *SSA*, *supra* note 36. [↑](#footnote-ref-242)
243. . *See* Xie et. al., *supra* note 52. [↑](#footnote-ref-243)
244. . Salcedo & Wolfe, *supra* note 144. [↑](#footnote-ref-244)
245. . *See* *City of Sacramento*, *supra* note 104; Vielmetti, *supra* note 98. [↑](#footnote-ref-245)
246. . Greenblatt v. Kaplan’s Restaurant, 217 Cal. Rptr. 746, 747 (Cal. Ct. App. 1985). [↑](#footnote-ref-246)
247. . *Id.* at 747. [↑](#footnote-ref-247)
248. . Milton Point Realty Co. v. Haas, 457 N.Y.S.2d 333, 334 (N.Y. App. Div. 1982). [↑](#footnote-ref-248)
249. . Hanna v. Plumer, 380 U.S. 460, 465 (1965). [↑](#footnote-ref-249)
250. . *Id.* at 472. [↑](#footnote-ref-250)
251. . Gasperini v. Ctr. for Human., Inc., 518 U.S. 415, 430 (1996) (quoting Ragan v. Merch. Transfer & Warehouse Co., 337 U.S. 530, 533–34 (1949)). [↑](#footnote-ref-251)
252. . *See* *generally* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 393 (2010). [↑](#footnote-ref-252)
253. . *Id.* at 398. [↑](#footnote-ref-253)
254. . *See, e.g.*, N.Y. C.P.L.R. Law § 3403(a)(4) (McKinney 2021);Fed. R. Civ. P. 16(c)(2)(P). [↑](#footnote-ref-254)
255. . *See Shady Grove*, 559 U.S. at 421 (Stevens, J., partially concurring). [↑](#footnote-ref-255)
256. . *Id.*  [↑](#footnote-ref-256)
257. . *Id.* at 416–17, 432. [↑](#footnote-ref-257)
258. . *See* Greenblatt v. Kaplan’s Rest., 217 Cal. Rptr. 746, 747 (Cal. Ct. App. 1985); Koch-Ash v. Superior Ct., 225 Cal. Rptr. 657, 660 (Cal. Ct. App. 1986). [↑](#footnote-ref-258)
259. . *See* Hanna v. Plumer, 380 U.S. 460, 472 (1965); Gasperini v. Ctr. for Human., Inc., 518 U.S. 415, 430 (1996) (quoting Ragan v. Merch. Transfer & Warehouse Co., 337 U.S. 530, 533–34 (1949)). [↑](#footnote-ref-259)
260. . *See* *Greenblatt*, 217 Cal. Rptr. at 747; Milton Point Realty Co. v. Haas, 457 N.Y.S.2d 333, 334 (N.Y. App. Div. 1982); *Shady Grove*, 559 U.S. at 420 (Stevens, J., partially concurring). [↑](#footnote-ref-260)
261. . Nina A. Kohn, *Outliving Civil Rights*, 86 Wash. U. L. Rev. 1053, 1065 (2009) [hereinafter Kohn, *Outliving*]. [↑](#footnote-ref-261)
262. . *Id.* at 1089. [↑](#footnote-ref-262)
263. . *Id.* at 1057 (arguing that certain elder protection legislation is unwise and may burden equal protection of the law). [↑](#footnote-ref-263)
264. . *Id.* at 1104, 1114. [↑](#footnote-ref-264)
265. . Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 44 U.C. Davis L. Rev. 213, 279 (2010) [hereinafter Kohn, *Rethinking*]. [↑](#footnote-ref-265)
266. . *Id.* at 280. [↑](#footnote-ref-266)
267. . *Id.* at 279. [↑](#footnote-ref-267)
268. . *Id.*  [↑](#footnote-ref-268)
269. . *See* Dalton, *supra* note 68; *Actuarial Life Table*, *SSA*, *supra* note 36. [↑](#footnote-ref-269)
270. . Linda E. Giles, *60 is the New 50: A Look at Age-Based Legislation Through the Eyes of a Reluctant ‘Elder’*, 61 Bos. Bar J. 6, 7 (2017) (“Policy-makers lump older individuals into age-based, monolithic categories (e.g., middle-old, old, the oldest) without account for very real differences among the age cohorts.”). [↑](#footnote-ref-270)
271. . *Id.* [↑](#footnote-ref-271)
272. . *Id.* at 6. [↑](#footnote-ref-272)
273. . *Id.*  [↑](#footnote-ref-273)
274. . *Id.* at 7. [↑](#footnote-ref-274)
275. . Michael J. Crowley, *Trial Preference for Those Over 70*, Janssen Malloy LLP, https://janssenlaw.com/trial-preference-for-those-over-70/ (last visited Dec. 29, 2022). [↑](#footnote-ref-275)
276. . Laurel Halbany, *Expediting Trial Through Motions for Preference*, Plaintiff (Dec. 2017), https://www.plaintiffmagazine.com/recent-issues/item/expediting-trial-through-motions-for-preference. [↑](#footnote-ref-276)
277. . *Id.*  [↑](#footnote-ref-277)
278. . Fed. R. Civ. P. 40. [↑](#footnote-ref-278)
279. . *See* *Projected Future Growth of Older Population*, Admin. for Cmty. Living, https://acl.gov/aging-and-disability-in-america/data-and-research/projected-future-growth-older-population (last updated May 4, 2022); Giles, *supra* note 269, at 7 (“Policy-makers lump older individuals into age-based, monolithic categories (e.g., middle-old, old, the oldest) without account for very real differences among the age cohorts.”). [↑](#footnote-ref-279)
280. . Schofield, *supra* note 165. [↑](#footnote-ref-280)
281. . *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). [↑](#footnote-ref-281)
282. . *City of Sacramento*, *supra* note 104. [↑](#footnote-ref-282)
283. . Dalton, *supra* note 68. [↑](#footnote-ref-283)
284. . *See* Cal. Civ. Proc. Code § 36(a)(1)-(2) (West); 735 Ill. Comp. Stat. Ann. 5/2-1007.1 (West); Fla. Stat. Ann. § 415.1115 (West). [↑](#footnote-ref-284)
285. . *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 432 (2010) (Stevens, J., partially concurring). [↑](#footnote-ref-285)
286. . *See* *id.* (Stevens, J., partially concurring); Wakefield v. Glob. Fin. Priv. Cap., LLC, No. 15CV0451 JM(JMA), 2015 WL 12699870, at \*2–3 (S.D. Cal. Sept. 17, 2015); Fed. R. Civ. P. 1; Fed. R. Civ. P. 16(a). [↑](#footnote-ref-286)
287. . *See* Hanna v. Plumer, 380 U.S. 460, 470–71 (1965); *Shady Grove*, 559 U.S. at 421. [↑](#footnote-ref-287)
288. . *See* Civil Case Processing, *supra* note 146, at 72–73. [↑](#footnote-ref-288)
289. . *See* Ostrom & Hanson, *supra* note 84, at 18. [↑](#footnote-ref-289)
290. . *See* Schofield, *supra* note 165. [↑](#footnote-ref-290)
291. . *See* *City of Sacramento*, *supra* note 104. [↑](#footnote-ref-291)