

SHADY GROVE: DUCK-RABBITS, CLEAR STATEMENTS, AND
FEDERALISM

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In *The World As I Found It*, novelist Bruce Duffy recounts Wittgenstein's famous example of the duck-rabbit: "a drawing that could be seen as either a duck or a rabbit before it dawned on the viewer that it was both or neither, or just one continuous line."¹ Can the duck-rabbit help us to understand *Shady Grove*,² the Supreme Court's latest foray into the *Erie* doctrine³—an area of law that aims, fruitlessly perhaps, to keep the duck pond of substance separate from the rabbit hole of procedure? New York's Civil Practice Law & Rules ("CPLR") 901(b), the state law at issue in *Shady Grove*,⁴ bans class-wide enforcement of penalty clauses and so might be seen as a duck or rabbit: substantive, affecting the amount of damages payable in an insurance action, or procedural, affecting the joinder of claims. Justice Scalia's plurality opinion ignored the question of whether the state rule is a substantive duck or procedural rabbit; he cared only that Federal Rule 23 is a procedural rabbit and thus preemptive of a conflicting state rule under the Rules Enabling Act.⁵ Justice Ginsburg's dissenting

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¹ BRUCE DUFFY, *THE WORLD AS I FOUND IT* 4 (1987).

² *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010).

³ See generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that state judicial decisions are rules of decisions in diversity actions).

⁴ N.Y. C.P.L.R. § 901(b) (McKinney 2011) ("Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.").

⁵ *Shady Grove*, 130 S. Ct. at 1444 ("[T]he validity of a Federal Rule depends entirely upon whether it regulates procedure."). See also 28 U.S.C. § 2072(a)–(b) (2006) (authorizing the Supreme Court "to prescribe general rules of practice and procedure" and specifying that "[s]uch rules shall not abridge, enlarge or modify any substantive right").

opinion saw the state rule as a substantive duck and so applicable under the Rules of Decision Act in “[t]he absence of an inevitable collision” with a Federal Rule, which she did not find.⁶ Justice Stevens’ concurring opinion saw the state rule as both a duck and rabbit, but found the state rule preempted by Federal Rule 23.⁷ This was in part because the state had gone down the procedural rabbit hole and not placed the rule in the substantive statute that provided the basis for Shady Grove’s lawsuit.⁸

Indulge the duck-rabbit analogy a bit more. Consider the other duck-rabbit that lurks in *Shady Grove*: the state law providing for interest on a claim that an insurer does not pay on time.⁹ Whether this law constitutes a penalty or a form of compensation critically affected the *Erie* issue before the *Shady Grove* Court. Viewed as a penalty, the mandatory interest payment fell within the state ban on penalty class actions, unless New York specifically authorized its class-wide enforcement.¹⁰ But viewed as compensation for the insurer’s delay in settling a claim, the payment would have fallen outside the ban and been enforceable like any other remedy under New York law. Indeed, the conflict between the state class-action ban and Federal Rule 23 would have dropped out of the case entirely.¹¹ The district court viewed the interest payment as a penalty and found that state regulations contemplating their class-wide enforcement were not sufficiently specific to take Shady Grove’s suit outside the state ban.¹² The Second Circuit found that

⁶ *Shady Grove*, 130 S. Ct. at 1467 (Ginsburg, J., dissenting); see also *id.* at 1471 (Ginsburg, J., dissenting) (explaining that “the Rules of Decision Act commands application” of the state rule where federal law does not speak to the issue); 28 U.S.C. § 1652 (2006) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”).

⁷ FED. R. CIV. P. 23 (entitled “Class Actions”).

⁸ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1448 (2010). (Stevens, J., concurring) (concurring in the judgment because the class penalty ban “is a procedural rule that is not part of New York’s substantive law[.]” but agreeing with the dissent “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”). Justice Stevens supported this conclusion by noting that the rule applied to cases decided under federal or other states’ laws in New York courts; he took this as a signal that CPLR 901(b) was a rule of judicial administration rather than a substantive policy. *Id.* at 1457.

⁹ N.Y. INS. LAW § 5106(a) (McKinney 2009) (“All overdue payments shall bear interest at the rate of two percent per month.”).

¹⁰ See N.Y. C.P.L.R. § 901(b) (McKinney 2006).

¹¹ See *Shady Grove*, 130 S. Ct. at 1439.

¹² *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467, 474 (E.D.N.Y. 2006).

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plaintiff had waived any objection to treating the interest payment as a penalty,¹³ and agreed that regulations contemplating class-wide enforcement of the payment did not clearly authorize the practice.¹⁴ Thus, by the time the case reached the U.S. Supreme Court, *this* duck-rabbit had vanished from view.¹⁵

The duck-rabbit analogy is meant to remind us that in every diversity suit the federal court has a duty to ascertain the scope of the applicable state law and to determine whether the state law is subject to preemption by a conflicting Federal Rule of Civil Procedure or federal statute.¹⁶ Both questions raise difficult interpretive issues and serious questions of federalism. When the diversity court ascertains the scope of state law, its assignment is to reach a result that comes as close as possible to how the state system would decide the issue.¹⁷ But when the diversity court assesses whether the state law is preempted, its task is to ensure the uniformity of federal procedural law.¹⁸ The district court and Justice Stevens' concurrence in *Shady Grove*, which lower courts are increasingly treating as the controlling opinion of the divided Court,¹⁹ approached these twin questions in the same way. Both employed something close to a clear statement rule to determine how New York would treat class-wide enforcement of mandatory interest payments, although they reached different conclusions on

¹³ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 549 F.3d 137, 141 n.3 (2d Cir. 2008) (“Allstate is correct that Shady Grove waived this argument [objecting to the characterization of interest as a penalty] by failing to raise it in the district court or in its initial brief on appeal.”).

¹⁴ *Id.* at 146 (explaining that “[b]ased on a plain reading” of state law, Shady Grove’s suit did not fall within the exception clause of section 901(b)).

¹⁵ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010) (“Concluding that statutory interest is a ‘penalty’ under New York law, [the district court] held that § 901(b) prohibited the proposed class action.”).

¹⁶ See generally JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 404 (10th ed. 2009) (entitling the chapter on the *Erie* doctrine “Ascertaining the Applicable Law”).

¹⁷ See Kermit Roosevelt III, *Choice of Law in Federal Courts: From Klaxon and Erie to CAFA and Shady Grove*, in PUBLIC LAW AND LEGAL THEORY RESEARCH PAPER SERIES 2010, AT 1, 33 (Univ. of Pa. Law Sch., Research Paper No. 10-28, 2010), available at <http://ssrn.com/abstract=1665092> (“That each state has exclusive authority over the meaning and scope of its law, subject to constitutional limits, should seem fairly obvious.”). See generally Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898 (2011) (discussing the problem of statutory interpretation in diversity cases).

¹⁸ *Hanna v. Plumer*, 380 U.S. 460, 473–74 (1965) (“To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution’s grant of power over federal procedure or Congress’ attempt to exercise that power in the Enabling Act.”) (citations omitted).

¹⁹ See *infra* notes 64–72 and accompanying text.

whether such class actions should be permitted in federal diversity cases.²⁰

This essay adds to the burgeoning literature on *Shady Grove* by examining the use of clear statement rules in diversity cases where the federal court must ascertain the scope of an applicable state law, as well as resolve an apparent collision between a state law and a Federal Rule of Civil Procedure. Part I recounts what was in dispute in *Shady Grove*. Part II examines how the district court resolved whether New York's ban on penalty class actions applied in a case involving statutory interest. Because lower courts are increasingly treating Justice Stevens' *Shady Grove* concurrence as the controlling opinion of the divided Court, Part III focuses on how these courts are resolving whether to apply a state procedural rule that involves substantive state policies in the face of a conflicting Federal Rule. Part IV raises concerns about the federal courts' interpretive approach at both stages of the analysis. I argue that requiring a clear statement both disempowers and over-empowers states in ways that subvert federalism and nationalism. I conclude by briefly discussing potential alternative approaches.

I. THE *SHADY GROVE* DISPUTE

Shady Grove involved a lawsuit by an assignee who failed to receive timely payment on an insurance claim arising out of the assignor's car accident.²¹ Under New York's no-fault automobile insurance statute, if an insurer fails to deny or pay claims within thirty days, it is subject to a statutory interest payment of two percent per month.²² Plaintiff filed suit in federal court on behalf of a class of similarly situated insurance claimants. Defendant argued that the claim was barred from class-wide treatment under New York CPLR 901(b), which provides: "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."²³ When commenced, the *Shady Grove* dispute thus presented two unresolved questions of state law: whether New York's mandatory

²⁰ See *Shady Grove*, 130 S. Ct. at 1457, 1459–60 (Stevens, J., concurring); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467, 472 (E.D.N.Y. 2006).

²¹ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1436 (2010).

²² N.Y. INS. LAW § 5106(a) (McKinney 2009).

²³ N.Y. C.P.L.R. § 901(b) (McKinney 2006).

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interest provision for late settlement of insurance claims is a compensatory payment or a penalty and, if treated as a penalty, whether the state insurance statute had specifically authorized class-wide enforcement of the interest provision as required by section 901(b).²⁴

The Second Circuit affirmed the lower court's dismissal of the action on jurisdictional grounds,²⁵ finding that the state had not specifically authorized class actions as required by section 901(b),²⁶ and it refused to certify the question of whether the mandatory interest payment is indeed a penalty.²⁷ The Supreme Court did not explore the question of whether the statutory interest provision is penal or remedial. Rather, it accepted the lower courts' classification and focused on whether Federal Rule 23, which governs certification of class actions in federal court, stands in irreconcilable conflict with section 901(b).²⁸ Five justices concluded that the state ban is at odds with the Federal Rule's "one-size-fits-all formula"²⁹ by barring a class action "to recover a penalty, or minimum measure of recovery created or imposed by statute."³⁰ As such, the state ban "cannot apply in diversity suits" unless the Federal Rule is invalid.³¹ The Justices splintered on whether to consider the substantive effects of the state class-action ban in determining the validity and applicability of Federal Rule 23.³² Justice Scalia, in a plurality opinion joined by Chief Justice Roberts and Justices Thomas and Sotomayor, considered this inquiry irrelevant: "the substantive nature of New York's law, or its substantive purpose, *makes no difference*."³³ Justice Stevens' concurrence, by contrast, recognized that "[a] federal rule . . . cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so

²⁴ No party argued, and no court considered, whether the mandatory interest payment should be treated as a "minimum measure of recovery" for purposes of C.P.L.R. § 901(b).

²⁵ As an individual claim, Shady Grove's claim for \$500 fell far below the \$75,000.01 minimum amount in controversy required in federal diversity cases. 28 U.S.C. § 1332(a) (2006); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 549 F.3d 137, 140–41 (2d Cir. 2008).

²⁶ *Shady Grove*, 549 F.3d at 146.

²⁷ *Id.* at 141 n.3.

²⁸ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437–38 (2010).

²⁹ *Id.* at 1435, 1437.

³⁰ *Id.* at 1436 n.1 (quoting N.Y. C.P.L.R. § 901(b) (McKinney 2006)).

³¹ *Id.* at 1437.

³² *See id.* at 1439.

³³ *Shady Grove*, 130 S. Ct. at 1444 (emphasis in original).

intertwined with a state right or remedy that it functions to define the scope of the state-created right.”³⁴ Justice Stevens emphasized, however, that for a state procedural rule “to displace a federal rule, there must be more than just a possibility that the state rule is” a substantive rule of decision and found that the legislative history to section 901(b) did not meet that exacting standard.³⁵ Justice Stevens also emphasized that New York courts applied section 901(b) to causes of action arising under federal and non-New York substantive law.³⁶ The dissent, authored by Justice Ginsburg, resisted finding a conflict between the state ban and the Federal Rule, and concluded that “*Erie* should prevent a federal court from awarding statutory penalties aggregated through a class action when New York prohibits this recovery.”³⁷

II. USING A CLEAR STATEMENT RULE TO ASCERTAIN THE APPLICABLE STATE LAW

Let us consider the duck-rabbit that did not appear before the Supreme Court: whether a mandatory interest payment is a penalty barred from class-wide enforcement under New York law. The district court determined that the statutory interest payment was a penalty, and that New York Insurance Law section 5106(a) had not authorized its class-wide enforcement with the requisite specificity under section 901(b).³⁸ Section 5106(a), the substantive basis for plaintiff’s claim, does not use the term penalty but rather requires payment of interest at a specified rate.³⁹ Shady Grove’s complaint stated that its claim for relief sought “compensatory damages, in the form of interest owed,”⁴⁰ but also referred to section 5106(a) as authorizing the “payment of an interest penalty on overdue

³⁴ *Id.* at 1452 (Stevens, J., concurring).

³⁵ *Id.* at 1460 (Stevens, J., concurring).

³⁶ *Shady Grove*, 130 S. Ct. at 1457–58 (Stevens, J., concurring).

³⁷ *Id.* at 1472 (Ginsburg, J., dissenting).

³⁸ *See id.* at 1437.

³⁹ N.Y. INS. LAW § 5106(a) (McKinney 2009). Separate sections of the New York Insurance Law deal with the imposition of penalties on insurance carriers for failing to meet various statutory requirements. Section 2406, for example, addresses the power of the Superintendent of Insurance to impose a “penalty” on persons who have been found in violation of rules for competitive practice. *See* N.Y. INS. LAW § 2406(a) (McKinney 2006); *see also* N.Y. COMP. CODES R. & REGS. tit. 11, § 219.5(c) (2009) (providing for the imposition of “monetary penalties” for the violation of rules governing advertisements of life insurance and entitled “Enforcement Proceedings”).

⁴⁰ Joint Appendix at *22, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2009) (No. 08-1008), 2009 WL 2031024.

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benefits.”⁴¹ Extra-contractual remedies, such as the mandated interest provision, can include punitive damages, treble damages, minimum damages, or attorney’s fees. Whether a payment is a penalty raises a question of law that varies from statute to statute.⁴² In deciding to characterize the interest payment as a penalty, the district court relied on a decision of the New York intermediate appeals court in a case that involved whether the trial court had properly calculated interest against an insurer prior to applying a setoff. In that case the New York court stated that the interest payment could not be waived because its purpose “is designed to inflict an economic sanction or penalty on those insurers who do not comply” with the requirement of prompt payment.⁴³

The district court further rejected Shady Grove’s argument that the state insurance statute had authorized class-wide enforcement of the interest provision. Section 5106(a) of the state’s no-fault insurance law is carried out through regulations promulgated by the Superintendent of Insurance. Those regulations refer to “a class action brought for payment of [overdue] benefits,” and prescribe the accrual date for the statutory interest that would accompany such benefits in the event of a judgment.⁴⁴ Nevertheless, the district

⁴¹ *Id.* at *11 (“liable for payment of an interest penalty on overdue benefits”); *id.* at *20 (“failing to pay interest”).

⁴² For example, both federal and New York tax law distinguish between interest and penalties. See David M. Lawrence, *Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis*, 65 N.C. L. REV. 49, 65 (1986) (“Questions of classification arise with actual damages, multiple and punitive damages, restitution, and tax penalties and interest.”); Kenneth H. Ryesky, *Implications of the Untimely Filed Estate Tax Return*, 7 J. SUFFOLK ACAD. L. 103, 104–15 (1990–91) (discussing the distinction between interest and penalties under federal and New York estate tax law). Moreover, legislatures use both compensatory and punitive approaches to remedy the problem of late payment of insurance claims. See, e.g., Phyllis Savage, *The Availability of Excess Damages for Wrongful Refusal to Honor First Party Insurance Claims—An Emerging Trend*, 45 FORDHAM L. REV. 164, 182 (1976–77) (“[T]hese courts have molded the law to provide just recovery rather than conforming the recovery to rigid legal rules.”); Robert H. Shaw, III, *INSURANCE—Increasing Liability for Refusal to Pay First Party Claims: Bad Faith and Punitive Damages*, 13 WAKE FOREST L. REV. 685 (1977) (discussing the limitations on damages in insurance claims); Del Stiltner, Note, *Extra-Contractual Damages in Suits on Insurance Policies*, 46 U. CIN. L. REV. 170, 171 (1977) (“This Note will examine the historical development of the extra-contractual liability of insurers, the comparative advantages and disadvantages of each remedy and the damages recoverable under the different causes of action.”).

⁴³ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 466 F. Supp.2d 467, 474 (E.D.N.Y. 2006) (quoting *Cardinell v. Allstate Ins. Co.*, 302 A.D.2d 772, 774 (N.Y. App. Div. 2003)).

⁴⁴ N.Y. COMP. CODES R. & REGS. tit. 11, § 65-3.9(c) (2009). The regulation is entitled “Interest on overdue payments” and provides:

If any applicant is a member of a class in a class action brought for payment of benefits but is not a named party, interest shall not accumulate on the disputed claim or element of claim until a class which includes such applicant is certified by court order, or such

court held that the regulation fell short of the specific authorization required by section 901(b) to permit enforcement on a class-wide basis.⁴⁵ On that critical point, the federal court provided no citation, stating only that Shady Grove's argument lacked support in a "plain reading" of the CPLR.⁴⁶ The relevant section says that "[u]nless a statute creating or imposing a penalty . . . specifically authorizes the recovery thereof in a class action," class-wide enforcement would not be permitted.⁴⁷

The district court then dismissed Shady Grove's case on jurisdictional grounds, finding that as an individual claim it did not meet the amount-in-controversy requirement for diversity jurisdiction.⁴⁸ On appeal to the Second Circuit, Shady Grove argued that the district court had "erred in failing to find that the exception clause of CPLR 901(b) was triggered"⁴⁹ and requested that the federal appeals court certify to the New York Court of Appeals the question of whether the mandatory interest payment is a penalty and so within the CPLR's class-action ban.⁵⁰ Shady Grove's request for certification apparently was triggered by the New York Court of Appeals' decision in *Sperry v. Crompton Corp.*,⁵¹ decided after the

benefits are authorized in that action by Appellate Court decision, whichever is earlier. *Id.* In practice, no-fault claims often are filed "in bulk" by an assignee. See Karen B. Rothenberg & Jennifer R. Rappaport, *No-Fault: The Litigation Epidemic*, 231 N.Y. L.J. 4 (2004) (reporting that in the first seven months of 2004, "the Civil Court in Kings County has seen almost 16,000 filings of no-fault claims, accounting for approximately 25 percent of all civil actions filed during that period" and that most claims are filed "in bulk" by assignees).

⁴⁵ *Shady Grove*, 466 F. Supp.2d at 474.

⁴⁶ *Id.* at 474–75 ("Even were the language contained in a regulation sufficient, such 'contemplation' does not invoke the 'unless clause,' which requires use of a class action to be 'specifically authorized.'").

⁴⁷ N.Y. C.P.L.R. 901(b) (McKinney 2006). There is some analogous support for the proposition that N.Y. courts might not interpret the insurance regulation as meeting the threshold for the "unless" clause of section 901(b). See, e.g., *Rubin v. Nine W. Group, Inc.*, No. 0763/99, 1999 WL 1425364 (N.Y. Sup. Ct. Nov. 3, 1999) (classifying treble damages as punitive and finding that a 1988 amendment to the Donnelly Act did not meet the "specifically authorize" exception to section 901(b)). However, none of these cases are directly on point and, in any event, the district court did not inquire whether under New York case law the "specifically authorize" requirement could be met by regulation.

⁴⁸ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 466 F. Supp.2d, 467, 476 (E.D.N.Y. 2006) ("[P]laintiff Shady Grove does not, in its individual capacity, assert contractual claims in excess of \$75,000.").

⁴⁹ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 549 F.3d 137, 141 (2d Cir. 2008).

⁵⁰ *Id.* at 141 n.3 (stating that Shady Grove requested certification to the New York Court of Appeals of the question of "whether the interest provision of N.Y. Ins. Law § 5106(a) constitutes a 'penalty' within the meaning of CPLR 901(b)"). See also Reply Brief of Appellant Shady Grove Orthopedic Assocs., P.A. at 11–15, *Shady Grove Orthopedics Assocs., P.A. v. Allstate Ins. Co.*, No. 07-0141-cv (2d Cir. June 25, 2007) (discussing penalty provision).

⁵¹ *Sperry v. Crompton Corp.*, 8 N.Y.3d 204 (N.Y. 2007).

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appeal had been filed.⁵² *Sperry* stated that although the New York Court of Appeals had “never construed the term ‘penalty’ within the meaning of CPLR 901(b),” it nevertheless had “articulated various rules regarding the identification of penalties[,]” looking to whether a state statute “expressly denominates an enhanced damages provision to be compensatory in nature,” whether the provision appears in a statute of limitations, and the overall statutory context.⁵³ *Shady Grove* argued that certification was needed because:

[W]hether the subject interest provision constitutes a penalty under section 901(b) . . . is clearly determinative of this appeal: if the interest provision is not such a penalty, the judgment below must be reversed. It is equally clear that no controlling precedent exists on this issue, since the Court of Appeals has never been asked to determine whether the interest provision is or is not a penalty.⁵⁴

Nevertheless, the Second Circuit declined to certify, finding that *Shady Grove* had waived this issue on appeal by belatedly raising it in its reply brief and failing to raise it at the district court level.⁵⁵ Moreover, the Second Circuit rejected *Shady Grove*’s argument that the interest payment fell under the “unless a statute . . . specifically authorizes” exception to the section 901(b) class-action ban, on the ground that the absence of clear statutory authorization could not

⁵² *Shady Grove*, 549 F.3d at 141 n.3 (referring to *Sperry* as “the occasion for *Shady Grove*’s new argument”).

⁵³ *Sperry*, 8 N.Y.3d at 212–13.

⁵⁴ Reply Brief of Appellant *Shady Grove Orthopedic Assocs., P.A.* at 15, *Shady Grove Orthopedics Assocs., P.A. v. Allstate Ins. Co.*, No. 07-0141-cv (2d Cir. June 25, 2007).

⁵⁵ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Insurance Co.*, 549 F.3d 137, 141 n.3. *Shady Grove* argued that it had consistently maintained that section 901(b) did not apply to the case, and that its discussion of whether the interest payment is a penalty was simply another argument in support of a previously raised position, and not a new legal theory. Reply Brief of Appellant *Shady Grove Orthopedic Assocs., P.A.* at 15 n.1, *Shady Grove Orthopedics Assocs., P.A. v. Allstate Ins. Co.*, No. 07-0141-cv (2d Cir. June 25, 2007). Moreover, “unless a true waiver is involved” (*Chestnut v. City of Lowell*, 305 F.3d 18, 20 (1st Cir. 2002)), some appeals courts will, as a matter of discretion, consider even a new legal theory that was forfeited in the district court when “exceptional circumstances” exist, or “whenever the public interest or justice so warrants.” *Tri-M Group, LLC v. Sharp*, No. 10-2365, 2011 WL 941602, at *4 (3d Cir. Mar. 21, 2011) (quoting *Franki Found. Co. v. Alger-Rau & Assocs., Inc.*, 513 F.2d 581, 586 (3d Cir. 1975)). *See also* *Richison v. Ernest Group, Inc.*, No. 09-6301, 2011 WL 856271, at *3 (10th Cir. Mar. 14, 2011) (“Unlike waived theories, we will entertain forfeited theories on appeal, but we will reverse a district court’s judgment on the basis of a forfeiture theory only if failing to do so would trench a plainly erroneous result.”). *See generally* HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW: APPELLATE COURT REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 75–77 (2007) (distinguishing between waiver and forfeiture for review of errors on appeal).

be cured by a regulation: “At most,” the court stated, “this regulation contemplates the recovery of a penalty in a class action; it does not demonstrate that the statute ‘specifically authorizes’ that recovery as required by § 901(b).”⁵⁶

III. DETERMINING SUBSTANTIVE EFFECT THROUGH CLEAR STATEMENT

The stage thus was set for the Supreme Court to focus its attention solely on whether the class-action penalty ban clashed with Federal Rule 23.⁵⁷ For the plurality, led by Justice Scalia, even a clear statement from the N.Y. legislature regarding the substantive nature of section 901(b) would not have prevented the state ban from being displaced by Federal Rule 23.⁵⁸ Under the “Scalia rule” in *Shady Grove*, the only relevant question is whether the Federal Rule is substantive or procedural, without regard to the substantive goals of the state rule.⁵⁹ Justice Stevens’ concurrence, however, did not foreclose the idea that some state policies might be important enough to displace a Federal Rule in a diversity case.⁶⁰ He concluded, however, that section 901(b) was not such a policy.⁶¹ He supported this conclusion by noting that section 901(b) applied to cases in New York decided under federal or another state law, rather than being limited to cases decided under New York’s

⁵⁶ *Shady Grove*, 549 F.3d at 146. The Second Circuit took a “plain meaning” approach, relying on N.Y. law for this principle. *Id.* (citing *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653 (2006)).

⁵⁷ Arguably, the Court could have scrutinized more closely the Second Circuit’s finding of waiver and examined for itself the antecedent question of whether the state interest provision comes within the class-action ban. The questions as presented in the petition for certiorari did not press this issue, and *Shady Grove* raised it only in a footnote in its brief. See Brief for Petitioner at 9 n.2, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, No. 08-1008 (U.S. July 10, 2009) (“*Shady Grove* also challenged the characterization of the interest requirement as a statutory penalty and requested that the issue be certified to the New York Court of Appeals, but the Second Circuit declined to consider these arguments because they were made in *Shady Grove*’s reply brief.”). Had the Court been persuaded that the interest payment was not a penalty, perhaps the preferable course would have been to dismiss the petition as improvidently granted. See *Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (explaining that a writ may be dismissed, even after argument, when “[e]xamination of a case on the merits . . . bring[s] into ‘proper focus’ a consideration which, though present in the record at the time of granting the writ, only later indicates that the grant was improvident”).

⁵⁸ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1440–41 (2010).

⁵⁹ *Id.* at 1444.

⁶⁰ *Id.* at 1448 (Stevens, J., concurring).

⁶¹ *Id.* at 1459–60.

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substantive state law.⁶² In making this distinction, he left open the possibility that a clear statement from the state legislature on the substantive nature of the provision might have made a difference to his interpretation.⁶³

Several lower courts, following the “narrowest grounds” rule for applying a divided Supreme Court opinion, have treated Justice Stevens’ concurrence as the controlling opinion in *Shady Grove*,⁶⁴ and are using something analogous to a clear statement rule in disputes involving the Rules Enabling Act by giving weight to state rules that are clearly expressed as substantive by a legislature in the text of a substantive law, while discounting state policies that could be considered substantive but are located in the state’s procedure code.⁶⁵ In particular, a number of diversity courts since *Shady Grove* have applied state restrictions on class action suits when the restrictions were embedded in the substantive statute that provided the basis for the suit.⁶⁶ The critical part of the Stevens concurrence relied on by the lower courts in these cases is

⁶² *Id.* at 1457.

⁶³ *Id.* at 1458.

⁶⁴ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1448–61 (2010). *E.g.*, *Godin v. Schencks*, 629 F.3d 79, 87 (1st Cir. 2010) (noting four Justices joined Justice Stevens’ opinion concerning substantive rights limitation in the Rules Enabling Act); *Garman v. Campbell Cnty. Sch. Dist.*, 630 F.3d 977 (10th Cir. 2010) (noting Justice Stevens analyzed the Rules Enabling Act on narrower grounds than the majority); *James River Ins. Co. v. Rapid Funding, LLC*, 10-1145, 2011 WL 3211505 (10th Cir. July 29, 2011) (“Justice Stevens concurred in the judgment that Rule 23 applied but relied on narrower grounds than the plurality, agreeing with the dissent ‘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.’”); *Tait v. BSH Home Appliances Corp.*, No. SACV 10-711 DOC, 2011 WL 1832941, *8 (C.D. Cal. May 12, 2011) (stating that the court “treats Justice Stevens’s opinion as controlling”); *In re Packaged Ice Antitrust Litig.*, No. 08-md-01952, 2011 WL 891169, *15 (E.D. Mich. Mar. 11, 2011) (“Justice Stevens’ concurrence is the controlling opinion by which interpreting courts are bound.”). *But see, e.g.*, *Mezyk v. U.S. Bank Pension Plan*, No. 3:09-CV-384-JPG, 2011 WL 601653, at *4 (S.D. Ill. Feb. 11, 2011) (noting “a categorical rule entitling a plaintiff whose suit meets the specified criteria [of Rule 23] to pursue his claim as a class action”); *G.M. Sign, Inc. v. Brink’s Mfg. Co.*, No. 09 C 5528, 2011 WL 248511, at *3 (N.D. Ill. Jan. 25, 2011) (deciding that Federal Rule 23 “provides a one-size-fits-all formula for deciding the class-action question”).

⁶⁵ *See Marks v. United States*, 430 U.S. 188, 193 (1977) (setting out the “narrowest grounds” rule for applying divided Supreme Court cases). For a questioning of the *Marks* doctrine, see *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (“It does not seem ‘useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.”) (quoting *Nichols v. United States*, 511 U.S. 738, 745–46 (1994)).

⁶⁶ *E.g.*, *Tait v. BSH Home Appliances Corp.*, No. SACV 10-711 DOC, 2011 WL 1832941, *8 (C.D. Cal. May 12, 2011); *Bearden v. Honeywell Int’l Inc.*, No. 3:09-1035, 2010 WL 3239285, at *10 (M.D. Tenn. Aug. 16, 2010); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 1:08-WP-65000, 2010 WL 2756947, at *2 (N.D. Ohio July 12, 2010); *McKinney v. Bayer Corp.*, 744 F. Supp. 2d 733 (N.D. Ohio 2010).

his assertion that under the Rules Enabling Act “[a] federal rule . . . cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.”⁶⁷

For example, in *Bearden v. Honeywell International Inc.*,⁶⁸ the District Court for the Middle District of Tennessee refused to allow plaintiffs in a diversity case to bring a class action under the Tennessee Consumer Protection Act (TCPA), which states that “[a]ny person who suffers an ascertainable loss . . . as a result of . . . an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages.”⁶⁹ In 2008, the Supreme Court of Tennessee had interpreted “individually” as a prohibition on class actions under TCPA.⁷⁰ The *Bearden* court reasoned that section 901(b) was located in New York’s civil procedure code, and, with the exception of the prohibition on class actions to recover penalties, was nearly identical to Federal Rule 23.⁷¹ By contrast, the restriction on class actions at issue in *Bearden* was embedded in the TCPA, a substantive Tennessee law. The court ruled that the provision was “so intertwined with a state right or remedy that it functions to define the scope of the state-created right” that according to Stevens’ concurrence in *Shady Grove*, it should not be displaced by Federal Rule 23.⁷²

⁶⁷ *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring).

⁶⁸ *Bearden*, 2010 WL 3239285.

⁶⁹ TENN. CODE ANN. § 47-18-109 (2010).

⁷⁰ *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 310 (Tenn. 2008).

⁷¹ *See Bearden*, 2010 WL 3239285, at *10 (quoting *Shady Grove*, 130 S. Ct. at 1457 (Stevens, J., concurring)).

⁷² *Bearden v. Honeywell Int’l Inc.*, No. 3:09-1035, 2010 WL 3239285, at *9 (M.D. Tenn. Aug. 16, 2010) (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1452 (2010) (Stevens, J., concurring)). Similarly, in *In re Wellbutrin XL Antitrust Litig.*, No. 08-2433, 2010 WL 5186052 (E.D. Pa. Dec. 22, 2010), antitrust claims were brought as a class action under both the Illinois Antitrust Act (IAA) and New York’s Donnelly Act. *Id.* at *1. The IAA contains an express prohibition on class actions, while the Donnelly Act did not. *Id.* at *5, *7. In the wake of *Shady Grove*, the court allowed the suit to proceed as a class action under New York law despite section 901(b)’s limitations on class actions. *See id.* at *9. Class certification was denied, however, under the Illinois law, since the substantive statute under which the claim was brought disallowed class actions. *Id.* at *6. The court in *In re Wellbutrin* noted that the New York legislature had undertaken to amend the Donnelly Act after the passage of section 901(b) and declined to expressly allow class actions, as required by section 901(b). *Id.* at *7. This was discounted, however, because Justice Stevens’ concurrence in *Shady Grove* focused on the text of section 901(b) itself, and particularly on the fact that it applied to all suits in New York courts, rather than only to those based on New York law. *Id.* at *8; *see* Barbara J. Hart & Kesav M. Wable, *Donnelly Act Class Claimants Given New Lease on Life*, N.Y.L.J., May 17, 2010, at S8 (noting that the legislature

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IV. DUCK-RABBITS AND CLEAR STATEMENT RULES

Something analogous to clear statement rules thus appeared at two points in the *Shady Grove* litigation: in the lower courts as a way to determine whether New York had specifically authorized class-wide treatment of the insurance “penalty,” and implicitly in Justice Stevens’ concurrence to determine whether the class-action penalty ban is substantive or procedural.⁷³ I suggest that both clear statement requirements are problematic, but for different reasons. Using a clear statement rule to determine the content of state law departs from settled doctrine about the role of the federal court in ascertaining state law in a diversity action; it rearranges state legislative processes in ways that may subvert federalism; and it may discourage state innovation in ways that adversely affect national policy making. Using a clear statement rule to determine whether a state law is substantive or procedural for purposes of the Rules of Enabling Act may create opportunities for state strategic behavior in ways that subvert nationalism and undermine the goal of national procedural uniformity.

It is by now well settled that canons of interpretation provide mechanisms for promoting policies, values, and interests.⁷⁴ In particular, judicial federalism has come to rely on a canon of statutory construction that requires a clear statement from Congress before a statute will be construed as preempting state law.⁷⁵ Thus, the Court typically has required Congress to use “unmistakably clear” language if a statute is “intend[ed] to alter the ‘usual constitutional balance between the States and the

amended the Donnelly Act in 1998 in order to permit class actions by indirect purchasers for antitrust violations under the Act, but they have been barred in state court from doing so under section 901(b)). *But see* *Sperry v. Crompton Corp.*, 8 N.Y.3d 204 (2007) (holding that treble damages under the Donnelly Act are a form of penalty for the purposes of barring class actions under section 901(b), unless specifically authorized by the statute).

⁷³ *But see Preemption of State Procedural Rules*, 124 HARV. L. REV. 320, 325 (2010) (“The Court . . . should have adopted a clear-statement approach that would require state legislatures to clarify whether a particular provision is supposed to apply in diversity cases.”).

⁷⁴ *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 619 (1992) (discussing the federalism canons).

⁷⁵ *See* WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 354–62 (2000) (“The [federalism] canons [are] designed to protect state authority from federal encroachment.”). The requirement of a clear statement is stronger than the “traditional preemption canon.” *Id.* at 358. *See generally* S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 760–61 (1991) (outlining the Court’s justifications for a clear statement requirement).

Federal Government.”⁷⁶ Similarly, a clear statement requirement has emerged in administrative law doctrine.⁷⁷ A clear statement rule in these settings arguably promotes federalism by preventing the federal government from interfering with state sovereignty unless national law makers have stated clearly their desire and reasons for doing so.⁷⁸

Clear statement rules can be devised, however, to protect national interests at the expense of the states, and in these circumstances the federal court effectively imposes a federal interpretive rule on the state legislature, the state court, or both. Used this way, the requirement of clarity creates a presumption that ambiguities in state law are to be interpreted in favor of the federal government’s interest in promoting a national program or goals, or when a uniform or centralized response seems preferred. The Court’s use of a clear statement rule in *Michigan v. Long*, for example, in determining whether a state judgment rests on an independent and adequate state ground of decision, and so is immune from federal review, falls into this latter category.⁷⁹ In this vein, Roderick M. Hills, Jr., has proposed a presumption of institutional autonomy, the equivalent of a clear statement rule, to guide courts in their interpretation of state statutes and constitutions as they affect the role of the state legislature in regulating federal access to state and local institutions.⁸⁰ Hills explains that “[b]y requiring a ‘plain statement’ from the state legislatures before barring a nonfederal officer from bargaining with the federal government, the presumption helps ensure that state legislatures will not withhold access to nonfederal institutions for improper—that is, strategic—reasons.”⁸¹

⁷⁶ *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). See John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 407 (2010) (discussing clear statement rules as part of a federalism canon that aims to protect state sovereignty against federal overreaching).

⁷⁷ See Note, *Chevron and the Substantive Canons: A Categorical Distinction*, 124 HARV. L. REV. 594, 596–97 (2010) (discussing clear statement requirements and administrative deference).

⁷⁸ See Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures’ Control*, 97 MICH. L. REV. 1201, 1205 (1999) (“The [clear] statement rule . . . protects federalism through the *national* political process by barring federal intrusions into state sovereignty absent a clear congressional statement to the contrary.”).

⁷⁹ *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (holding that a state court seeking to shield a judgment from Supreme Court review has the burden of indicating “clearly and expressly” that the decision rested on “separate, adequate, and independent grounds”).

⁸⁰ Hills, Jr., *supra* note 78, at 1205.

⁸¹ *Id.* at 1232. Similarly, Thomas W. Merrill has proposed a clear statement rule, dubbed

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Clear statement rules sometimes require the legislature to use specific, almost talismanic, words when it intends a statutory provision to negate a background presumption. But in some situations, as Hills' proposal indicates, the rule asks for a plain statement that ups the legislative ante, requiring heightened specificity of an indeterminate form. In this sense, the lower court in *Shady Grove* used something analogous to a clear statement requirement in ascertaining whether the interest provision, construed as a penalty, fell within the CPLR's class-action ban. The district court held that because state regulations, rather than the state statute, contemplated class-wide treatment of the mandatory interest provision, the state legislature had not spoken with the specificity required under section 901(b).⁸² No support was provided for this conclusion, although the court indicated it was following a "plain meaning" approach.⁸³ The Second Circuit followed suit, citing to a N.Y. high court opinion that did apply a "plain meaning" approach to an unresolved statutory question.⁸⁴ However, reciting the "plain meaning" canon does not answer whether the state court would treat the Superintendent's regulations as sufficient under the exception clause to section 901(b). As Justice Ginsburg emphasized in her dissenting opinion, "[w]e have often recognized that 'general words' appearing in a statute may, in fact, have limited application."⁸⁵ Moreover, looking beyond the *Shady Grove* dispute, it is not self-evident that a diversity court ought to impose a clear statement rule on those state courts that do not ordinarily follow this approach to statutory interpretation.⁸⁶

a topic-specific default rule, for resolving statutory ambiguities in cases where a national uniform rule is superior to a diversity of state approaches. See Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in *FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS* 166, 168 (Richard A. Epstein & Michael Greve eds., 2007) (calling for a preemption default rule for environmental law cases when the application of state law would favor one state over another). Merrill's approach favors preemption of state law in any situation in which a state's regulatory standard will externalize costs to other states or interfere with a national market. See *id.* at 173.

⁸² See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 466 F. Supp. 2d 467, 474 (E.D.N.Y. 2006).

⁸³ *Id.*

⁸⁴ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 549 F.3d 137, 146 (2d Cir. 2008) (quoting *DaimlerChrysler Corp. v. Spitzer*, 860 N.E.2d 705, 708 (2006)).

⁸⁵ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1469 (2010) (Ginsburg, J., dissenting) (considering whether section 901(b) applies to cases arising under federal or non-N.Y. substantive law).

⁸⁶ Gluck, *supra* note 17, at 1997 ("*Erie* requires federal courts, in most cases, to apply state interpretive methodology to state statutory questions."). But see Ethan J. Lieb & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 48 (2010) (questioning "any form of methodological stare decisis requiring judges to follow fixed regimes

The district court's approach thus potentially cuts against federalism in an important way. A clear statement rule increases a state's cost of enacting legislation by imposing a "clarity tax."⁸⁷ As Ernest A. Young has explained, the requirement of a legislative clear statement of purpose inevitably will "add to the hurdles that any legislation must pass, by increasing the political costs that proponents must incur in order to achieve their objectives."⁸⁸ One might argue that these increased transaction costs are not terribly severe when imposed by a state court. However, when imposed by an Article III court against the state, the presumption effectively allows a non-elected federal judge to prescribe law-making processes for elected state representatives and to penalize explanations that are considered to be insufficient under a federal standard.⁸⁹

A clear statement approach in this setting also might generate negative spillovers on national policy-making. Roderick M. Hills, Jr., has persuasively argued that Congress, like all large-scale government, suffers from a democracy-deficit that he traces in part to the problem of "political overload"—the tendency of the national state to bite off more than it can chew.⁹⁰ State laws potentially help to overcome national gridlock by serving as agenda setters: they identify problems and present solutions that the national forum might otherwise overlook or be unable to enact.⁹¹ Hills thus urges federal courts to accord *Chevron*-style deference to state laws as a way to mobilize the public and to encourage states to bring policy questions to Congress's attention.⁹² Turning to *Shady Grove*,

that categorically ignore a statute's etiology or the processes used to enact it."). See also Michael Steven Green, *Horizontal Erie and the Presumption of Forum Law*, 109 MICH. L. REV. 1238, 1240 (2011) (emphasizing that a federal diversity court "cannot presume that unsettled state law is the same as federal law").

⁸⁷ Manning, *supra* note 76, at 399, 403.

⁸⁸ Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1608–09 (2000); see also Bradford R. Clark, *Process-Based Preemption*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 192, 206 (William W. Buzbee ed., 2009) (criticizing clear statement rules because they impose additional burdens on the process for legislatively enacting laws).

⁸⁹ Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE. L.J. 2, 50 (2008) (discussing judicial "penalizing" of "bad" legislative history).

⁹⁰ See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 16 (2007) (attributing the concept of political overload to Samuel Beer).

⁹¹ *Id.* at 20.

⁹² See *id.* at 56; see generally *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (holding that the judiciary should defer to a federal agency's reasonable interpretation of ambiguous language in a federal statute which it administers).

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imposing a clear statement rule on state legislation could inhibit innovation by raising the costs of political action and so prevent state legislatures from treating issues that are suppressed or ignored at the national level.⁹³

Something analogous to a clear statement rule appears in the approach taken by federal courts that rely on Justice Stevens' *Shady Grove* concurrence to drawing the substance/procedure line.⁹⁴ These courts are upholding state restrictions on class action suits despite Federal Rule 23 when they discern that the state has provided a clear statement that the rule serves a substantive purpose. In this context, a clear statement approach operates as a presumption in favor of applying a Federal Rule unless a state legislature clarifies that it intends a procedural rule to be a substantive rule of decision and thus applicable in a diversity suit.⁹⁵ The presumption thus supports federalism values by allowing the state to consider and to explain whether a particular policy is intended as a substantive rule of decision. The question is whether this approach goes too far in deferring to state interests—whether it hands a state legislature carte blanche to displace a Federal Rule through the simple device of using explicit language to label a state procedural rule as substantive.

From this perspective, the clear statement approach has the potential to shift the balance of power between the state and federal government by enhancing the power of state legislatures at the expense of federal interests. Nina Mendelson has raised concerns that federal agencies, if permitted to follow the approach of *Geier v. American Honda Motor Co.*,⁹⁶ “could freely preempt relevant state law by pointing to *any* statutory goal that might be undermined by state law.”⁹⁷ An analogous argument, drawn from Supremacy Clause concerns and the need for federal procedural uniformity, tilts against allowing state legislatures the power to displace Federal Rules of Civil Procedure merely by clearly categorizing a

⁹³ Hills, Jr., *supra* note 90, at 20 (“State laws . . . are an important influence on Congress’s agenda.”).

⁹⁴ See, e.g., *Bearden v. Honeywell Int’l Inc.*, No. 3:09-1035, 2010 WL 3239285, at *10 (M.D. Tenn. Aug. 16, 2010) (applying the *Marks* rule and concluding that “Justice Stevens’ concurrence is the controlling opinion.”).

⁹⁵ In *Preemption of State Procedural Rules* the student authors make the case for such a presumption on the ground that it would permit the state legislature—rather than the state judge—to decide whether a rule is to apply in a diversity case, and that such a presumption would have the benefit of administrative ease. 124 HARV. L. REV. 320, 327–28 (2010).

⁹⁶ *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

⁹⁷ Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 713 (2008) (emphasis in original).

state procedure as substantive.⁹⁸

V. ALTERNATIVE APPROACHES AND CONCLUSION

I have suggested that the federal judiciary's use of a clear statement requirement in the wake of *Shady Grove* inadvertently may both disempower and over-empower state legislatures. But are there superior ways to achieve federal procedural uniformity without suppressing important state substantive concerns?

Certification of unresolved questions of state law to a state's highest court is a traditional solution, and the advantages and disadvantages of this procedure are well known. Certification gives the state court an opportunity to clarify how it would rule if it were adjudicating the issue,⁹⁹ and so it is arguably the approach most consistent with the twin aims of *Erie*. Certification enables the diversity case to be decided the same in federal court as in state court, thus preventing forum shopping and avoiding inequitable administration of the laws.¹⁰⁰ Certification would have enabled the federal court in *Shady Grove* to determine whether the N.Y. court interpreted the mandatory interest provision as punitive or remedial, critically assisting the analysis required under the Rules of Decision Act. However, some state courts have been lukewarm toward certification requests because of the attendant delay and expense,¹⁰¹ and a handful of states still have not enacted statutes authorizing the practice.¹⁰² In addition, certification shifts the institutional focus from the state legislature—to which a clear statement requirement is directed—to the state court, and may in

⁹⁸ Moreover, a legislative clear statement of a rule could have perverse effects on the grant of diversity jurisdiction, for it would require the federal court to enforce substantive rights set out in state legislation but leave them free to ignore state common law doctrines that are procedural in design but arguably affect substantive rights. Effectively, the federal courts would return to the regime of general common law set out in *Swift v. Tyson*, and specifically rejected in *Erie*. *Swift v. Tyson*, 41 U.S. 1 (1842); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

⁹⁹ Judge Calabresi has put forward a version of certification that places the burden on the federal court to write an opinion indicating how it would rule, giving the state court the option to endorse or to reject the federal court's interpretation; the federal court's opinion would be binding in the interim. See Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1301–02 (2003).

¹⁰⁰ *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (“[T]he twin aims of the *Erie* rule [are] discouragement of forum-shopping and avoidance of inequitable administration of the laws.”).

¹⁰¹ Judge Calabresi's version of certification would potentially reduce delay by mandating time-limits for the state court's response, but it would increase state caseload burdens. See Calabresi, *supra* note 99, at 1299.

¹⁰² See Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373, 373 n.1 (2000).

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subtle but unexpected ways unintentionally alter state politics.¹⁰³ Arguably, we might devise a procedure that elicits the views of the state legislature (or of a state administrative agency) in a diversity suit where a state substantive statute faces possible displacement by a Federal Rule.¹⁰⁴ This approach could take the form of allowing a state attorney general to file an amicus curiae brief or to appear as an intervener to express the state's views. However, this approach also has problems: it introduces complexity and the attorney general may not be the appropriate representative.¹⁰⁵ Finally, using certification to determine whether a state rule is substantive or procedural would seem to afford the state greater latitude in displacing a Federal Rule than is warranted under the Rules Enabling Act.

These problems suggest that perhaps the time has come to consider amending the Federal Rules in ways that will accommodate important substantive state policies within a framework of federal procedural uniformity. This approach potentially meets Justice Ginsburg's concern that in some cases the Federal Rules might be read to avoid unnecessary conflicts with

¹⁰³ See generally Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010) (noting the tension that exists in some states between the legislature and the judiciary over whether the legislature can dictate statutory interpretation methods for the courts to follow).

¹⁰⁴ Federal Rule 5.1, adopted in 2006 to enforce 28 U.S.C. § 2403(b) (2006), requires notification to the federal or state attorney general, depending on whether a federal or state statute is being constitutionally challenged, and gives the attorney general sixty days to intervene. FED. R. CIV. P. 5.1(a)(2). Section 2403 has not been interpreted as requiring notification to the state attorney general where a state statute may be preempted by federal law, unless the state statute is challenged on constitutional grounds. See Mark D. Rosen, *Contextualizing Preemption*, 102 NW. U. L. REV. 781, 808–09 (2008). Arguably, the existing mechanism could be amended to reach diversity cases where there is a conflict between a Federal Rule and a potentially substantive state policy.

¹⁰⁵ In some states, the attorney general is accountable neither to the legislature nor to the governor; forty-three attorneys general are popularly elected, six are appointed by the governor, and Tennessee's attorney general is appointed by the state supreme court. Mae Beavers, *Office is No Longer Accountable*, TENNESSEAN, (Apr. 3, 2011), <http://www.ongo.com/v/675846/-1/8A9B64600793AF74/office-is-no-longer-accountable>; *Attorney General Election Updates*, NAAGAZETTE, <http://www.naag.org/attorney-general-election-updates.php> (last visited July 22, 2011) (reciting statistics); Kevin Sack, *In Partisan Battles, Clashes over Health Lawsuits*, N.Y. TIMES (Mar. 27, 2010), <http://www.nytimes.com/2010/03/28/us/politics/28govs.html>. Specifically, Sack stated that:

Attorneys general are charged with representing the governor and executive branch agencies, but also may initiate and intervene in litigation in the interest of the citizenry. It is not uncommon, given that governors and attorneys general are elected independently and can be from opposing parties, that they clash over questions of authority.

Id.

important state policies.¹⁰⁶ The model here would be Federal Rule 15,¹⁰⁷ which was amended in 1991 to add 15(c)(1)(A).¹⁰⁸ That subsection allows relation-back of an amendment to a pleading when allowed by the state law containing the statute of limitations,¹⁰⁹ even if relation-back would not otherwise be allowed under the Federal Rule. This approach could be followed with other Federal Rules that put substantive state policies at risk. Conceivably, the Rules Advisory Committee could amend some of the Federal Rules to add a “savings clause,” similar to Rule 15(c)(1)(A), where appropriate. For example, the conflict in *Shady Grove* could be avoided in the future by amending Federal Rule 23 to add a requirement that the class-action remedy not be precluded by the state statute giving rise to the cause of action. This approach carries disadvantages, not the least of which is adding to procedural complexity as Federal Rule 15 practice itself illustrates.¹¹⁰ Overall, however, this reform might be preferable to the emerging clear statement rule, for it would accord greater protection to state-created substantive rights while constraining state discretion to displace Federal Rules.

* * *

In *Shady Grove*, Justice Scalia wrote, “The test [under the Rules Enabling Act] is not whether the rule affects a litigant’s substantive rights; most procedural rules do.”¹¹¹ Yet his plurality opinion perpetuates the fiction that substance and procedure can be kept separate like ducks and rabbits.¹¹² I have tried in this essay to

¹⁰⁶ *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1460 (2010) (Ginsburg, J., dissenting) (“I would continue to interpret Federal Rules with awareness of, and sensitivity to, important state regulatory policies.”).

¹⁰⁷ FED. R. CIV. P. 15.

¹⁰⁸ FED. R. CIV. P. 15(c)(1)(A); 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1503 (2010).

¹⁰⁹ FED. R. CIV. P. 15(c)(1)(A).

¹¹⁰ Under Federal Rule 15(c)(1)(A), relation-back will be allowed in a diversity case if it would have been allowed in state court. *Id.* But the result is less clear in the event that a state has a more restrictive relation-back rule than Rule 15(c). See CHARLES ALAN WRIGHT, *supra* note 108, at § 1503.

¹¹¹ *Shady Grove*, 130 S. Ct. at 1442 (citing *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 445 (1946)).

¹¹² See Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 43–52 (2010) (offering a criticism of the Court’s unrealistic efforts to maintain a stable boundary between substance and procedure); see also Meryl J. Thomas, Note, *The Merits of Procedure vs. Substance: Erie, Iqbal, and Affidavits of Merit as Medmal Reform*, 52 ARIZ. L. REV. 1135, 1140–43 (2010) (discussing state

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bring duck-rabbits into our range of vision. Although I recognize that this essay has raised more questions than it has answered, I hope that the line of inquiry will encourage others to go further.

affidavit-of-merit procedures to illustrate the uncertain boundary between substance and procedure).