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THE EXCESSIVE HISTORY OF FEDERAL RULE 15(c) AND ITS LESSONS FOR CIVIL RULES REVISION†

Harold S. Lewis, Jr.*

INTRODUCTION

What role remains for traditional doctrinal analysis? Bounded on one side by the neo-nihilism of critical legal studies, and on the other by the unabashedly "cold-blooded"¹ latter-day Darwinism of law and economics, can traditional analysts still make a valuable contribution? In the midst of these curve-ball throwing southpaws and hard-throwing right-handers, can today's leftover Langdellians² serve out their years with dignity as respected utility players?

This case study of one Federal Rule of Civil Procedure is designed to suggest affirmative answers to these questions. My focus is on the surprisingly extensive body of case law, culminating in the Supreme Court's 1986 decision in *Schiavone v. Fortune*,³ that parses the second sentence of Federal Rule 15(c).⁴ Added in 1966, that sentence at-

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1. R. POSNER, *THE FEDERAL COURTS* 171 (1985).

2. Judge Posner equates traditional doctrinal analysis with the "nineteenth-century formalist thinking of Dean Langdell." *Id.* at 324.

3. 106 S. Ct. 2379 (1986).

4. FED. R. CIV. P. 15(c). The Rule states:

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with re-

tempts to set standards for the relation back of party-changing amendments to pleadings. A more prototypically pedestrian, less prepossessing topic of the traditionalist type could scarcely be imagined. Yet a review of its history brings larger points into sharp relief: something is seriously amiss in our Federal Rules amending process, and the costs of stasis are high.

More particularly, I hope to show that the management or mismanagement of the Federal Rules promulgation and amendment process has significant caseload implications; that the cumbersome complex of the Supreme Court and the Judicial Conference of the United States has failed to stay abreast of litigation developments that warrant consideration of Rules amendments; that the Court could improve the process marginally by serving as a better sentinel, systematically identifying needed changes in the Rules; but finally, that the Court, even with its extensive drafting support team, needs assistance in its role as principal promulgator of Federal Rules amendments.

These ideas are not new. A decade ago acute judicial⁵ and academic⁶ observers cited important institutional and practical objections to a rulemaking scheme which, then as now, was left to the initiative and discretion of the Supreme Court. Yet it is a timeworn office of traditional doctrinal scholarship to iterate,⁷ to survey the results of developments in the most recent reporting period and remind the bench, the bar, and the legislature (if it is listening) that accumulated experience has confirmed previously noted imperfections in our law or procedures.

Twenty checkered years of experience with the 1966 amendment to Federal Rule 15(c) vividly highlight the flabbiness of the Supreme Court's oversight of the Federal Rules. A review of that history gives fresh bite to the long-standing criticisms of the rules-revision process. It suggests that there are some issues, properly the subject of federal civil rulemaking, on which after a point repetitive litigation sheds insufficient light to justify its costs. On these issues, additional rulemaking would be far more efficient and no less fair. The same history also suggests that the current institutional rulemaking machinery is plainly

spect to the United States or any agency or officer thereof to be brought into the action as a defendant.

5. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905, 933-38 (1976).

6. Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A. J. 579 (1975).

7. Even Judge Posner, perhaps the best-known exponent of applying economic analysis to substantive and institutional legal issues, opines that there is seldom a discovery of anything new in legal scholarship, as opposed to scholarship in the social sciences. R. POSNER, *supra* note 1, at 327-28.

inadequate to the task of initiating needed proposals for the study of particular rules. While the most obvious answer — direct legislative intervention in the rulemaking process — is probably not the best one, it is ultimately the responsibility of Congress to reassess the entire process and remedy its deficiencies.

Part I briefly surveys the respective areas of responsibility for federal civil rulemaking that the Court and the Congress have exercised since the Rules' adoption in 1938. Part II is an extended review, in five sections, of the history of rule 15(c) before and, most tellingly, after its amendment in 1966. Part III, returning to the roles of the Court and the Congress, considers the lessons of the history of rule 15(c) for the rules-revision process.

I. FEDERAL CIVIL RULEMAKING: CONGRESS FINALLY STICKS A FOOT IN THE DOOR OF ITS OWN HOUSE

It is no longer seriously questioned that the ultimate authority to establish federal civil procedural rules resides in Congress.⁸ True to this conception, it is a statute, the Rules Enabling Act of 1934,⁹ which authorizes the Supreme Court to promulgate general civil rules, reserving to Congress the final authority to alter or veto rules the Court proposes. Shortly after Congress approved the Supreme Court's comprehensive blueprint of federal civil rules in 1938, the Court paid reciprocal homage to the Congress. It acknowledged Congress' "undoubted power to regulate the practice and procedure of the federal courts" and to "exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States."¹⁰

The federal civil rulemaking function has since "been delegated almost entirely to the courts; Congress' power over the area has been reduced to a monitoring status."¹¹ Subsequent legislation has further cemented the Supreme Court's preeminent position. For example, Congress has commanded the Judicial Conference of the United States to "carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court."¹² The Conference is then directed to submit its recommendations for rules changes or additions "to the

8. Weinstein, *supra* note 5, at 905 & n.2, 906, 927, 929; see Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 565, 569-70 (1967).

9. 28 U.S.C. § 2072 (1982).

10. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941).

11. Weinstein, *supra* note 5, at 927.

12. 28 U.S.C. § 331 (1982).

Supreme Court for its consideration and adoption, modification or rejection in accordance with law."¹³ Moreover, the Chief Justice substantially influences the rules-amending process by determining membership on the key Judicial Conference committees that are charged with rulemaking responsibility. He appoints the members of the Advisory Committee on Civil Rules, which prepares the initial draft of proposed rules changes, as well as the members of the Standing Committee on Rules of Practice and Procedure, which reviews and approves the Advisory Committee's draft before forwarding it to the Conference as a whole. Final proposals acceptable to the entire Judicial Conference are then presented to the Court for its approval and submission to Congress, as the Rules Enabling Act prescribes.¹⁴

Equally significant is the passive role of Congress once the Court signs off on proposed rules amendments. Under the Rules Enabling Act, proposed amendments reported to Congress by the Chief Justice no later than May 1 of a regular session of Congress will, "ninety days after they have been thus reported," take effect automatically.¹⁵ And, until recently, that is what invariably happened. In 1982, however, Congress finally balked at a Supreme Court proposal for a Federal Rules amendment. It first delayed the proposed effective date¹⁶ and then altogether scotched¹⁷ proposed amendments to Federal Rule 4 which the Chief Justice had transmitted to the Congress earlier that year.¹⁸ This reassertion of congressional authority, without precedent in the arena of federal procedural rulemaking since the Rules Enabling Act was adopted in 1934,¹⁹ came in response to "numerous complaints" received by the House Committee on the Judiciary about a Supreme Court proposal to make service by mail the primary method of service of process.²⁰ In the end Congress amended Federal Rule 4 directly, substituting its own scheme of mail service for that proposed

13. 28 U.S.C. § 331 (1982).

14. For a description of the rules-amending and -approval process, see generally Weinstein, *supra* note 5, at 908-09; Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUDICATURE SOC'Y., 250, 253 (1963); Wright, *supra* note 8, at 565-66; Lesnick, *supra* note 6, at 581.

15. 28 U.S.C. § 2072 (1982).

16. Act of Aug. 2, 1982, Pub. L. No. 97-227, 96 Stat. 246.

17. Act of Jan. 12, 1983, Pub. L. No. 97-462, § 5, 96 Stat. 2527, 2530.

18. See 28 U.S.C.A. § 2071 note (West Supp. 1987) (amendments proposed Apr. 20, 1982).

19. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 675 & n.18 (1975). In a parallel development a decade before, Congress did object to the proposed Federal Rules of Evidence, forbidding such rules from becoming effective without further authorizing legislation. Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9. See text at note 283 *infra*.

20. See H.R. REP. NO. 7154, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 4437, 4439.

by the Court.²¹

Neither the Senate nor the House submitted a report accompanying this legislation, and perhaps for that reason Congress' intervention in the rulemaking process has attracted little attention. This congressional action is potentially quite significant, however, for it underscores deficiencies in the current process and signals a potential decentralization of the rulemaking initiative if those deficiencies stand uncorrected.

On only this one occasion has Congress modified a Supreme Court-proposed federal civil procedural rules change or proposed such changes of its own. Whether Congress should itself amend Federal Rules more often, beef-up or alter the existing Judicial Conference apparatus, delegate the chore to an administrative or independent agency, or maintain the status quo raises complex questions of legitimacy, conflict of interest, and institutional efficiency. But one thing seems certain: Federal Rules oversight under the current regime has sometimes been sadly lacking. The history of judicial efforts to put flesh on the skeleton of Federal Rule 15(c) is a notable example.

II. THE AGONIZING HISTORY OF FEDERAL RULE 15(C)

A. *The Principle of Relation Back and Federal Rule 15(c)*

Relation-back rules breathe new life into lawsuits in which the person or entity the plaintiff intends to sue, the "intended defendant," has not received personal or precise notice of an action's commencement until after the last day of an applicable period of limitations.²² Without relation back, amendments changing or adding parties after expiration of a statutory period violate a statute of limitations and one or more of its underlying policies.²³

There is substantial agreement about the nature of those policies. Foremost is protecting a defendant from claims brought after "memories have faded, witnesses have died or disappeared, and evidence has been lost."²⁴ Subsidiary policies have been termed as: alleviating a potential defendant's economic or psychological insecurity, often styled a "policy of repose"; relieving courts of the burden of trying stale

21. Act of Jan. 12, 1983, Pub. L. No. 97-462, § 5, 96 Stat. 2527, 2530.

22. See, e.g., *Williams v. Pennsylvania R.R.*, 91 F. Supp. 652, 655 (D. Del. 1950): [T]he statute of limitations seems the only reason for the motion [to amend and relate back] and for the opposition to it. Without any question of the statute of limitations there could be little objection to the amendment and, indeed, if no statute of limitations presented complications, it seems probable that a new suit would obviate any amendment or desire for it.

23. Note, *Amendments That Add Plaintiffs Under Federal Rule of Civil Procedure 15(c)*, 50 GEO. WASH. L. REV. 671, 672 (1982).

24. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

claims; penalizing plaintiffs who negligently or intentionally delay the filing of their claims; easing the judicial system's caseload by eliminating old claims; and avoiding the disruptive effect that aged, unsettled claims may have on commercial intercourse.²⁵ There is also a widespread consensus that the period specified in any limitations statute is essentially arbitrary; this arbitrariness is sometimes said to follow from the fact that the statute is a creature of legislation rather than adjudication.²⁶

Arrayed against these policies are several others which support rules allowing relation back. Both the majority and dissent in *Schiavone* recognized that the principle of relation back is consonant with the Rules' general goal of promoting decisions on the merits. The Justices understood that this goal could be frustrated by "mere technicalities."²⁷ Justice Stevens, writing for the dissenters, described rule 15(c) as having the principal purpose of "enabl[ing] a plaintiff to correct a pleading error after the statute of limitations has run if the correction will not prejudice his adversary in any way."²⁸ Rule 15(c) seeks to effect a compromise between the conflicting policies of statutes of limitations and modern procedural rules.²⁹ Its multiple timely notice requirements reflect the drafters' deference to the important goals of statutes of limitations,³⁰ yet its main thrust is to identify circumstances that justify relaxation of limitations strictures when necessary to facilitate decisions on the merits.

It is scarcely controversial to hold, with Professors James and Hazard, that when a party-changing amendment is made after a limitations period expires, the relation-back problem should "be solved in terms of the basic policies served by the statute imposing the limitation."³¹ In the same breath, though, these commentators observe that "[t]he cases are in hopeless conflict."³² A look at the decisions before the 1966 amendment discloses the dimensions of the quagmire.

25. See F. JAMES & G. HAZARD, CIVIL PROCEDURE 218-19 (3d ed. 1985); Note, *supra* note 23, at 672 & nn.7-8; Note, *Federal Rule of Civil Procedure 15(c): Relation Back of Amendments*, 57 MINN. L. REV. 83, 84-85 (1972) [hereinafter Note, *Federal Rule*].

26. See Note, *Federal Rule*, *supra* note 25, at 85 n.8, cited with approval in *Schiavone v. Fortune*, 106 S. Ct. 2379, 2385 (1986); Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1157 n.608 (1982).

27. 106 S. Ct. at 2383 (majority opinion) (quoting *Foman v. Davis*, 371 U.S. 178, 181 (1962)); 106 S. Ct. at 2389 n.6 (Stevens, J., dissenting) (same); see also Note, *Federal Rule*, *supra* note 25, at 87.

28. 106 S. Ct. at 2389.

29. See Note, *supra* note 23, at 672.

30. See Note, *Federal Rule*, *supra* note 25, at 87.

31. F. JAMES & G. HAZARD, *supra* note 25, at 220.

32. *Id.* at 220 n.9.

B. *The Original Rule 15(c)*

Before the Federal Rules were adopted in 1938, an amendment of any kind was denied relation-back effect if a district judge viewed it as stating a "new cause of action." Only if the amendment were considered a restatement in different form of the originally pleaded cause of action would relation back be permitted and the bar of limitations thus removed. Predictably, this standard generated a great deal of definitional litigation involving the concept of "cause of action."³³

The original rule 15(c) promulgated in 1938 substituted for the "cause of action" standard a different question: Whether the new matter asserted by amendment arose from the "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."³⁴ While at the time of its adoption it was clearly understood that relation back is for the most part of critical importance only when a complaint is amended after a limitations period has run,³⁵ the original rule did not refer at all to the applicable period of limitations or identify what act — filing, service, or something else — was critical to timely commencement. Nor did it distinguish amendments that substantively alter a claim for relief without changing the denomination of the defendant from those that substitute a new defendant or merely correct the spelling or description of the original defendant.

The "arising out of" approach did permit courts to measure the allegations of the amended pleading against the relatively concrete datum of operative facts, instead of the largely conceptual notion of "cause of action." Under this regime, most courts allowed the relation back of such amendments on the same terms as any other amendment permitted by rule 15(c), that is, whenever the claim asserted in the amended pleading arose out of the transaction set forth in the original pleading. Amendments changing the capacity, name, or identity of defendants were generally permitted so long as the court judged that the intended defendant had received fair notice of the pendency of the action through service of the original, defective complaint. Prior to the 1966 amendment, courts inclined to permit relation back would characterize most such mistakes in the original pleading as mere "misno-

33. See Note, *Federal Rule*, *supra* note 25, at 85-86; Haworth, *Changing Defendants in Private Civil Actions Under Federal Rule 15(c) — An Ancient Problem Lingers On*, 1975 Wis. L. REV. 552, 554.

34. As originally enacted, rule 15(c), entitled "Relation Back of Amendments," read in its entirety: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Fed. R. Civ. P. 15(c), 308 U.S. 683 (1939).

35. See note 22 *supra*.

mers."³⁶ So long as the original complaint was timely filed, service of an amended summons and complaint correcting such "misnomers" was held not to prejudice a defendant — even where the original, defective *service* was not made, and hence notice not received, until after the limitations period had expired.³⁷

Indeed, even when a particular amendment was deemed to substitute or add a "new" defendant, federal judges created several equitable exceptions to salvage apparently untimely actions. Chief among these was the "identity-of-interest" doctrine. This imputed to the intended defendant the notice of litigation that had been directed only to the original, unintended defendant, if the commercial or other relationship between the two was such that notice to one should reasonably be viewed as notice to the other.³⁸ Some courts demurred, however, choosing to regard rule 15(c) as simply a restatement of the law that had been developed before the Federal Rules.³⁹ These judges were understandably concerned that a largely unrestrained "transaction or occurrence" approach pays insufficient attention to the timeliness of notice received by the intended defendant and thus carries the potential for serious damage to limitations policies.

C. *The First Decade of the 1966 Amendment to Rule 15(c): To What Cases Do Its New Standards Apply?*

It seemed like a good idea at the time. Near the end of the first quarter century of Federal Rule 15(c), a number of decisions involving federal government defendants applied the rule quite restrictively.⁴⁰ The Advisory Committee on the Civil Rules, responding most immediately to these decisions, proposed an amendment to the rule which sought to state the requirements of relation back with specificity. But the amended rule was flawed at birth, abused during adolescence, and has now been mauled at maturity. Since the 1966 amendment, a bewildering variety of interpretive problems have vexed the federal courts in their attempt to fix the proper scope for relation back.

The rule that emerged from the Committee's proposal left the for-

36. See, e.g., cases cited in Haworth, *supra* note 33, at 560-61; see generally Note, *Federal Rule*, *supra* note 25, at 89-90 & n.29, 112.

37. See Haworth, *supra* note 33, at 562 (discussing *Jackson v. Duke*, 259 F.2d 3 (5th Cir. 1958) (misnomer), and *Grandey v. Pacific Indem. Co.*, 217 F.2d 27 (5th Cir. 1954) (misnomer and misdescription)).

38. See Note, *Federal Rule*, *supra* note 25, at 91-92.

39. *Id.* at 89-90.

40. See cases cited *infra* note 46; *Lemmon v. Social Sec. Admin.*, 20 F.R.D. 215 (E.D.S.C. 1957); *Florentine v. Landon*, 114 F. Supp. 452 (S.D. Cal. 1953), *modified*, 231 F.2d 452 (9th Cir. 1955) (cited in *Byse, Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 HARV. L. REV. 40, 45 n.15 (1963)).

mer rule⁴¹ intact as the first sentence of an expanded whole. In its entirety the new rule reads as follows:

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. *An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.*

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.⁴²

The threshold problem concerns the types of alterations in an original pleading to which the additional requirements of the new second sentence will apply. An amendment changing only the factual or legal allegations asserted in the original pleading will be permitted upon a simple showing that the "claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." This is the sole requirement of rule 15(c)'s first sentence, the surviving part of the original rule.

By contrast, amendments "changing the party against whom a claim is asserted" are subject to the elaborated notice requirements of the second sentence, added in 1966. As a result, courts continue to be plagued under the 1966 amendment with the question of which amendments truly change parties defendant. For example, is there a change of party when the amendment merely corrects a misspelling or misdescription of the party originally named? Should it make a difference if there exists a person or entity, other than the intended defendant, to which the misspelled or misdescribed name pertains?

The Advisory Committee's note accompanying the 1966 amendment parenthetically indicates that the party-changing amendments it had in mind in the second sentence include those which merely "cor-

41. See note 34 *supra*.

42. FED. R. CIV. P. 15(c) (emphasis added).

rect a misnomer or misdescription of a defendant.”⁴³ On this view an amendment prompted by a misspelling or misdescription that would formerly have been characterized as a “mere misnomer” would now be governed by the stringent requirements of the second sentence of rule 15(c). Those requirements demand that the intended defendant receive notice of the institution of the action “within the period provided by law for commencing the action against him.” Of course, such notice is provided only by service of process, not by filing, and many states do not require service before a limitations deadline.⁴⁴ Thus a “mere misnomer” easily correctable by an amended pleading before 1966 could thereafter be cured with relation-back effect only in the relatively unlikely event that the intended defendant received some kind of notice of the original action before a limitations period expired.

If, as the Advisory Committee’s parenthetical phrase suggests, a court decides that a misdescription or misspelling does work a change of parties, it must then grapple with the component requirements of the second sentence of rule 15(c). What is the substance of the notice and knowledge the intended defendant must have received or gained? Through what means must the required notice be given? And, most troublesome, by what deadline must that notice and knowledge be complete? To approach these questions let us start, in the traditionalist mode, with the work of the Advisory Committee.

The Advisory Committee’s note observed that the decisions under the original rule were problematic “most acutely in certain actions by private parties against officers or agencies of the United States.”⁴⁵ It cited four federal district court decisions issued within the preceding eight years that had denied amendments under rule 15(c) where plaintiffs had named the United States or a federal agency or department instead of the particular federal officer designated by statute as the defendant.⁴⁶ The Committee observed that the policy of the particular federal statutes of limitations at issue would not have been offended by allowing amendment, because the United States had been “put on notice of the claim within the stated period . . . by means of the initial

43. FED. R. CIV. P. 15(c) advisory committee’s note to the 1966 amendment, *reprinted in* 39 F.R.D. 69, 82 (1966) [hereinafter Advisory Committee note].

44. Note, *Federal Rule*, *supra* note 25, at 103. A majority of states require only filing, not service, before a limitations period expires. See note 230 *infra* and accompanying text; see also Haworth, *supra* note 33, at 563.

45. Advisory Committee note, *supra* note 43, 39 F.R.D. at 82.

46. *Cohn v. Federal Sec. Admin.*, 199 F. Supp. 884, 885 (W.D.N.Y. 1961); *Hall v. Department of Health, Education, & Welfare*, 199 F. Supp. 833, 834 (S.D. Tex. 1960); *Sandridge v. Folsom*, 200 F. Supp. 25, 27 (M.D. Tenn. 1959); *Cunningham v. United States*, 199 F. Supp. 541, 542 (W.D. Mo. 1958).

delivery of process to a responsible government official.”⁴⁷ The Committee, citing these cases, wrote that “incorrect criteria have sometimes been applied, leading sporadically to doubtful results.”⁴⁸ At the same time, it noted that the “relation back of amendments changing defendants has generally been better handled by the courts” in actions involving private parties.⁴⁹

Apparently referring to both the governmental defendant and private-party actions described immediately above,⁵⁰ the Committee stated in summary that its proposed amendment “amplified” rule 15(c) “to provide a general solution.”⁵¹ In language the Supreme Court has since relied on to support a strict interpretation of the amendment,⁵² the Committee then wrote:

An amendment changing the party against whom a claim is asserted relates back if the amendment satisfies the usual condition of Rule 15(c) of “arising out of the conduct . . . set forth . . . in the original pleading,” and if, within the applicable limitations period, the party brought in by amendment, first, received such notice of the institution of the action — the notice need not be formal — that he would not be prejudiced in defending the action, and, second, knew or should have known that the action would have been brought against him initially had there not been a mistake concerning the identity of the proper party.⁵³

The pertinent text of the new rule 15(c) conforms closely to the foregoing quotation from the Committee’s note, with an arguably significant exception. The note’s phrase “within the applicable limitations period” appears in the amended rule itself as “within the period provided by law for commencing the action against him” (with “him” referring to “the party to be brought in by amendment”). This language, together with the added paragraph designed to provide specifically for the government-defendant cases,⁵⁴ was duly approved in succession by the Judicial Conference’s Standing Committee, the full

47. Advisory Committee note, *supra* note 43, 39 F.R.D. at 83. The *Schiavone* plaintiffs read these cases somewhat differently. They considered it “virtually certain that notice to the government came after the short limitations period, but within the penumbra or grace period for later service of process under Rule 4.” Brief of Petitioners, *Schiavone v. Fortune*, 106 S. Ct. 2379 (1986) (No. 84-1839) (LEXIS, Genfed library, Briefs file).

48. Advisory Committee note, *supra* note 43, 39 F.R.D. at 83.

49. *Id.*

50. By negative pregnant there is another indication in the note that the Committee designed its “general solution” for both private-party and governmental defendant cases. The sentence following the Committee’s detailed description of its test explains that a new, second paragraph which the amendment also adds to rule 15(c) applies to the government cases only.

51. Advisory Committee note, *supra* note 43, 39 F.R.D. at 83.

52. *Schiavone v. Fortune*, 106 S. Ct. 2379, 2385 (1986).

53. Advisory Committee note, *supra* note 43, 39 F.R.D. at 83 (emphasis of the “within” phrase added).

54. See note 50 *supra*.

Judicial Conference, the Supreme Court, and finally the Congress, which failed to veto it within the ninety-day period prescribed by the Rules Enabling Act.⁵⁵

The Committee thus "amplified" its general test for relation back to cover private- and government-defendant cases without distinction. Its note begins by observing: "Rule 15(c) is amplified to state more clearly when an amendment of a pleading changing the party against whom a claim is asserted (including an amendment to correct a misnomer or misdescription of a defendant) shall 'relate back' to the date of the original pleading."⁵⁶ That the new test appears designed to expand the circumstances in which relation back would be allowed is indicated by the Committee's critical references to the restrictive government-defendant decisions⁵⁷ and by its indirect but apparently approving citation to decisions that had allowed relation back against private defendants.⁵⁸

Admittedly, this introduction to the note could also be read to suggest that the Committee intended to contract the scope of relation back in some circumstances in which federal courts had usually allowed it. While the text of the amendment itself applies the relation-back test only to amendments "changing" the party defendant, the parenthetical phrase in the first sentence of the Committee's note suggests that such changes occur even when the originally named defendant is merely misnamed or misdescribed. As observed above, courts for many years before the amendment had allowed relation back under "misnomer," "misdescription," or "identity of interest" concepts, applying only the easily satisfied "claim arising out of" test of the original rule 15(c). Relation back was frequently approved when the original service was made either upon the intended defendant, his agent, or a closely related entity, at least where the name endorsed on the original complaint was not that of another extant person or corporation.⁵⁹ Indeed relation back was allowed in some of these cases even though only filing, and not service of the original complaint, was completed within the period of limitations.⁶⁰ Thus Professor Haworth concluded that under the Advisory Committee's parenthetical phrase "[a]mendments previously allowed as a matter of course will now be

55. 28 U.S.C. § 2072 (1982).

56. Advisory Committee note, *supra* note 43, 39 F.R.D. at 82.

57. See note 46 *supra* and accompanying text; see also Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1235-37 (1966).

58. See Advisory Committee note, *supra* note 43, 39 F.R.D. at 83. These private-party decisions are discussed in more detail in text at notes 206-17 *infra*.

59. See Haworth, *supra* note 33, at 559-62.

60. *Id.* at 562.

subjected to a fairly rigorous test, a procedure considerably more stringent than past practice.”⁶¹

Still, the only cases which the Advisory Committee pointed to in explaining the desirability of an amendment to rule 15(c) were those in which it believed relation back had been unfairly denied. Accordingly, some courts, concerned lest formerly correctable misnomers would now be unamendable under the requirements of the rule’s second sentence, continued to handle misnomer or misdescription amendments under the loose “arising out of” test of the first sentence. Thus where an intended natural person defendant was misnamed, or a defendant corporation was misdescribed as incorporated in one state rather than another, many courts in the decade after the 1966 amendment continued to allow the amendment even though the strict requirements of the second sentence of rule 15(c) could not be met.⁶² In the words of a contemporary edition of a standard treatise:

[W]hen an amendment merely involves correcting a misnomer and does not entail the actual “changing” of the parties, it should be allowed as a matter of course as long as it satisfies the standard in the first sentence of Rule 15(c) and without regard to the special requirements of the second sentence of the subdivision.⁶³

Professor Haworth concluded that “courts are ignoring the Advisory Committee’s intent [to treat misnomer and misdescription cases under the stringent standards of the second sentence] in order to avoid what they must consider to be an unduly harsh result.”⁶⁴ Whether this was in fact the Committee’s “intent,” or rather an inference about its intent resulting from sloppy drafting, is an open question.

Commentators have sought to circumvent the purport of the parenthetical phrase by differentiating those misnomers and misdescriptions that actually change the identity of a defendant from those that do not. Professors James and Hazard argue for relation back whenever the defendant sought to be added by amendment

was fully aware of the suit *from the beginning*. This may happen when the process mistakenly describes a nonexistent corporate entity but is served upon defendant and is actually recognized for what is intended; or where the action is mistakenly brought against an existing entity, but the wrong one, because substantive liability rests upon another entity closely related in financial interest to the first.⁶⁵

61. *Id.* at 556. *See also id.* at 561-62.

62. *Id.* at 556-58.

63. 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1498, at 513 (1971), *quoted in* Haworth, *supra* note 33, at 557 n.23.

64. Haworth, *supra* note 33, at 557.

65. F. JAMES & G. HAZARD, *supra* note 25, at 220 (emphasis added). These scholars were confident that in the first-described situation, “the amendment is generally held to relate back.”

But what is meant by notice "from the beginning"? The Supreme Court, in *Schiavone*, would permit relation back on an "identity of interest" rationale only if the intended defendant had been made aware of the suit before the expiration of the period of limitations.⁶⁶ Professors James and Hazard apparently contemplate that an action may be timely although the intended defendant receives notice of the suit, through service of process mistakenly describing a nonexistent corporate entity, *after* a period of limitations expires, provided that the complaint was filed before that deadline and the applicable law permits service of process thereafter. Only where the new defendant has, before amendment, "really been a stranger to the case" — where she has received neither formal nor informal notice of the pendency of an action sufficient to alert her to her status as an intended defendant — would they defer to limitations concerns and deny relation back.⁶⁷

Professor Moore, too, has attempted a general formulation to distinguish between mere misnomers and changes of parties. His test inquires

whether, on the basis of an objective standard, it is reasonable to conclude that the plaintiff had in mind a particular entity or person, merely made a mistake as to the name, and actually served the entity or person intended, or whether plaintiff actually meant to serve and sue a different person.⁶⁸

Read literally, this test plainly errs in focusing solely on *plaintiff's* state of mind and thus in trampling unduly on the policies supporting statutes of limitations. It ignores the defendant's interest by failing to specify some time by which the plaintiff must have carried out the original, faulty service. As will be seen, *Schiavone* makes short shrift of such a test. The plaintiffs there did have in mind a particular entity, filed a timely complaint, merely made a mistake in naming the entity, and actually served an agent of the intended defendant within the period the Federal Rules allowed for service of a correctly captioned summons and complaint. But they failed to effect service of the defective summons and complaint on the intended defendant's agent until after the limitations period had expired. In the Supreme Court's construction of rule 15(c), that service failed to give notice to the misnamed intended defendant "within the period provided by law for commencing the action against him."

In any event, at least a few courts did apply the relatively unforgiv-

Id. The Supreme Court held otherwise in *Schiavone v. Fortune*, 106 S. Ct. 2379 (1986). See text at notes 165-228 *infra*. For a similar test see Cohn, *supra* note 57, at 1235.

66. 106 S. Ct. at 2384.

67. See F. JAMES & G. HAZARD, *supra* note 25, at 220.

68. 2 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 4.44, at 4-418 (2d ed. 1987).

ing standards of the 1966 amendment to misnomer or misdescription situations, insisting that the intended defendant receive the two kinds of notice described by the second sentence of rule 15(c) before the expiration of the limitations period.⁶⁹ Noting that the main current of decision was inconsistent with these results,⁷⁰ commentators complained about “varying standards for allowing pleading changes to relate back” and concluded “that the attempt by the Advisory Committee to eliminate these variations has largely failed”⁷¹ and that “inconsistent results are still a frequent occurrence.”⁷²

D. *The Second Decade of the 1966 Amendment to Rule 15(c): Does the Rule 15(c) Notice Deadline Mean What It Appears To Say?*

Despite the rear-guard action of those lower courts that refused to apply the strict requirements of the 1966 amendment to misnomers,⁷³ and the significant scholarly criticism⁷⁴ of the 1966 amendment as its first decade drew to a close, no further amendment was forthcoming. The next decade would see not only continued confusion about the kinds of alterations to complaints which worked a change of defendants and thus triggered application of the strict requirements of the second sentence, but also heightened debate about the meaning of one of those requirements, the notice deadline date.

During the first decade, rule 15(c) was still commonly held to allow relation back against intended defendants who would have had good limitations defenses in state court.⁷⁵ The same result was also sometimes reached by different means. When a plaintiff could not satisfy the strict notice requirements of rule 15(c) in a diversity action, the Court of Appeals for the First Circuit applied instead a more generous relation-back rule of the forum state, placing higher value on preserving the plaintiff's claim than on restoring the defendant's repose.⁷⁶ But at the dawn of the second decade, in 1978, the Third Cir-

69. See, e.g., *Graves v. General Ins. Corp.*, 412 F.2d 583 (10th Cir. 1969); *People of the Living God v. Star Towing Co.*, 289 F. Supp. 635 (E.D. La. 1968).

70. See text at notes 62-64 *supra*.

71. Haworth, *supra* note 33, at 559.

72. Note, *Federal Rule*, *supra* note 25, at 96.

73. See text at notes 62-64 *supra*.

74. See Haworth, *supra* note 33, at 559-62; Note, *Federal Rule*, *supra* note 25, at 108-14.

75. See, e.g., *Welch v. Louisiana Power & Light Co.*, 466 F.2d 1344 (5th Cir. 1972); *Loudenslager v. Teeple*, 466 F.2d 249 (3d Cir. 1972); see also *Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479, 483-85 (6th Cir. 1973).

76. *Marshall v. Mulrenin*, 508 F.2d 39 (1st Cir. 1974). But a district court in the First Circuit refused to apply the *Mulrenin* approach in a federal question case. *Magno v. Canadian Pac. Ltd.*, 84 F.R.D. 414 (D. Mass. 1979).

cuit squarely rejected the First Circuit's position that a forum state's more liberal relation-back rule supersedes the notice deadline of rule 15(c).⁷⁷ This rumbling foreshadowed a more basic disagreement during the remainder of the second decade about the meaning of the rule 15(c) deadline itself.

For example later in 1978 a creative, if clumsy, opinion of the Second Circuit purported to redefine the rule 15(c) notice deadline flexibly in order to avoid the diversity "anomaly" that results when a federal court applies a literal definition of the deadline in a state with a more relaxed attitude toward the statute of limitations.⁷⁸ The anomaly is as striking as it is simple: In a state which permits service after expiration of the limitations period and requires only filing beforehand, a strict reading of rule 15(c) "bars relation back for late notice to a new defendant when a like notice to the original defendant would be timely."⁷⁹ To pretermit the anomaly, the Second Circuit construed the rule 15(c) notice deadline phrase — "within the period provided by law for commencing the action against him" — to mean the last day of the limitations period *plus* whatever additional time the forum state allowed for service.⁸⁰ Two years later, the Fifth Circuit followed suit with a similarly expansive interpretation of the 15(c) notice deadline.⁸¹

Subsequently, however, other courts of appeals, confronted with mounting caseload pressures, went the other way. In succession the Seventh,⁸² Eighth,⁸³ Tenth,⁸⁴ Ninth,⁸⁵ and Third⁸⁶ Circuits construed the "within" phrase to mean that the intended defendant must have received the specified kinds of notice (of the institution of the action

77. *Britt v. Arvanitis*, 590 F.2d 57 (3d Cir. 1978).

78. *Ingram v. Kumar*, 585 F.2d 566 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979). This anomaly was first judicially noticed in a frequently cited district court decision issued shortly before the effective date of the 1966 amendment. *Martz v. Miller Bros. Co.*, 244 F. Supp. 246 (D. Del. 1965). The anomaly was most recently alluded to, although not specifically addressed, in Justice Blackmun's opinion for the majority in *Schiavone*, 106 S. Ct. at 2382-83.

79. *Schiavone*, 106 S. Ct. at 2383.

80. *Ingram*, 585 F.2d at 571. The Second Circuit misapplied this test, however, by permitting relation back even though service of process on the intended defendant was completed *after* the 60-day grace period for timely service then permitted by New York law. See text at notes 109-25 *infra*.

81. *Kirk v. Cronvich*, 629 F.2d 404, 408 (5th Cir. 1980).

82. *Hughes v. United States*, 701 F.2d 56, 58 (7th Cir. 1982).

83. *Trace X Chem., Inc. v. Gulf Oil Chem. Co.*, 724 F.2d 68, 70-71 (8th Cir. 1983) (allowing relation back because the intended defendant received the prescribed notice from the originally served defendant before the limitation period ran).

84. *Watson v. Unipress, Inc.*, 733 F.2d 1386, 1390 (10th Cir. 1984).

85. *Cooper v. United States Postal Serv.*, 740 F.2d 714, 716 (9th Cir. 1984), *cert. denied*, 471 U.S. 1022 (1985).

86. *Schiavone v. Fortune*, 750 F.2d 15, 18 (3d Cir. 1984), *affid.*, 106 S. Ct. 2379 (1986).

and of the probable mistake in defendants) before the limitations period had run, regardless of more forgiving rules for timely commencement prevailing in the courts of the forum state. Some of these decisions recognized that such strict interpretations of the rule posed what the Third Circuit referred to as an "*Erie* question"⁸⁷ for federal diversity courts in states which permit service after a limitation period expires or apply a relation-back rule more flexible than rule 15(c).

But the full extent of the litigation provoked by the 1966 amendment to rule 15(c) is not reflected in these splits of authority among the circuit courts of appeals. To plumb the depths of the confusion the 1966 amendment spawned, I surveyed the rule 15(c) notice deadline decisions of all the federal courts since 1980, when the Supreme Court decided *Walker v. Armco Steel Corp.*⁸⁸ The Court there held that Federal Rule 3, which provides that an action is commenced by the filing of the complaint, was not intended "to toll a state statute of limitations" but merely to mark "the date from which various timing requirements of the Federal Rules begin to run."⁸⁹ Having found no other federal rule on point, the Court applied a state law on timely commencement which required the plaintiff to file and complete service of process before the limitations period had run. The Court expressly declined to reevaluate the suggestion of *Ragan v. Merchants Transfer & Warehouse Co.*⁹⁰ that Federal Rule 3 should govern timely commencement in federal question cases.⁹¹

Accordingly, *Walker*, while settling a diversity issue, raised new questions about the then-prevailing view that the complaint-filing benchmark of rule 3 defines timely commencement in federal question actions.⁹² The House Committee on the Judiciary later took note of this remaining interpretive problem,⁹³ but it did not consider any amendment to rule 3, either to overturn *Walker's* diversity holding or to address the federal question issue *Walker* explicitly reserved. Congressional inaction on this point thus left intact the many decisions that imbue rule 3 with statute of limitations significance in federal question cases, although *Walker* denies that significance to rule 3 in diversity cases. The divergence is a bit bizarre, since nothing in the

87. *Schiavone*, 750 F.2d at 18.

88. 446 U.S. 740 (1980).

89. 446 U.S. at 750-51.

90. 337 U.S. 530 (1949).

91. 446 U.S. at 751 n.11.

92. See text at note 144 *infra*.

93. See statement by Rep. Edwards of the House Judiciary Committee, commenting on proposed amendments to Federal Rule 4 that were ultimately enacted in 1982. H.R. REP. NO. 7154, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 4434, 4441 n.14.

text or history of rule 3 suggests that the filing of a complaint has limitations significance under one head of jurisdiction but not the other.

In deciding to focus on the post-*Walker* opinions interpreting rule 15(c), I reasoned that the courts would have to confront not only the stingy "literal" reading of the notice deadline favored by the emerging majority of the court of appeals decisions,⁹⁴ and the more generous reading given by two courts of appeals a few years earlier,⁹⁵ but also the import of *Walker*. After all, the crux of the difficulty surrounding rule 15(c) is whether that federal rule stipulates any constant deadline by which the kinds of notice the rule requires must be received by the intended defendant. Since *Walker* holds that no similar deadline is declared by Federal Rule 3 (or presumably by any other federal rule)⁹⁶ for the timely commencement of diversity actions against correctly named defendants, I expected attentive lower federal courts to question whether rule 15(c) provides any fixed notice deadline for the far rarer situation of relation back. For example, I wondered whether the courts would seize on the "against him" language in rule 15(c) as indicating that the drafters intended the relation-back notice deadline to vary with state law timely-commencement standards, at least in actions founded on diversity.

What I found was a bewildering patchwork of seemingly ad hoc approaches to the problem reflected in scores of lower court decisions issued between 1980 and 1986 alone. The rulemakers' neglect of rule 15(c) produced abundant jurisprudential casualties. I will portray the extent and magnitude of these problems, and the resulting drain on judicial resources, in two ways. First, I will discuss the most recent body of reported⁹⁷ diversity and federal question decisions that have grappled with the variety of interpretive approaches to the notice deadline issue. Second, I will rehearse the painful progress through the federal judicial system of *Schiavone*, which represents the culmination of two decades of litigation generated by the 1966 amendment.

1. *The Diversity Cases*

Most striking are those decisions that apparently approve the

94. See cases cited in notes 82-86 *supra*.

95. *Ingram v. Kumar*, 585 F.2d 566 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979); *Kirk v. Cronvich*, 629 F.2d 404 (5th Cir. 1980) (discussed in text at notes 78-81 *supra*.)

96. *Ringrose v. Engelberg Huller Co.*, 692 F.2d 403, 409 (6th Cir. 1982) (Jones, J., concurring).

97. I know of no reliable way to gauge what proportion of the relation-back decisions result in opinions or how many such opinions are reported. It is somewhat suggestive, though, that some of the opinions cited in the following discussion are reported only unofficially.

Martz anomaly⁹⁸ by denying a plaintiff who has named the defendant incorrectly the benefit of a state-law grace period which would have been available to serve a defendant named correctly. Some of these decisions recognize expressly that this interpretation places a mis-named defendant in a more advantageous limitations posture than a correctly named defendant for no apparent reason.⁹⁹ Others do not refer directly to the conflict between a strict reading of rule 15(c) and more liberal state timely-commencement rules, but the existence of such a conflict emerges from the facts.¹⁰⁰

It may be said in support of these results that they are based on a straightforward, if by no means inevitable,¹⁰¹ reading of the rule 15(c) phrase "within the period provided by law for commencing the action against him." But this reading fails to attend to the teachings of *Walker*. It simply assumes that the drafters of the rule intended to create a unitary federal definition of timely commencement for relation-back purposes in the face of *Walker's* conclusion that rule 3 embodies no similar definition for timely commencement against defendants named correctly. Further, this reading of the phrase's supposed "plain language," when juxtaposed with the holding of *Walker*, implements the perverse, unexplained policy of according wrongly named defendants the greatest possible measure of repose — even if the forum state's own timely-commencement or relation-back rules protect them less — while subjecting correctly named defendants to the vagaries of state law.

A second and larger category of the diversity cases consists of those which read the "within" phrase strictly without any mention of the forum state's timely-commencement or relation-back rules or even of the limitations and service dates from which those rules might be deduced.¹⁰² These "unrecognized anomaly" cases create a discrep-

98. See notes 78-79 *supra* and accompanying text.

99. See, e.g., *Tretter v. Johns-Manville Corp.*, 88 F.R.D. 329, 332 (E.D. Mo. 1980). The court wrote without explanation that it did "not agree that such a result is necessarily anomalous or unfair." 88 F.R.D. at 332.

100. See *Cook v. Starling*, 594 F. Supp. 177 (N.D. Ill. 1984); *McClanahan v. American Gilonite Co.*, 30 Fed. R. Serv. 2d (Callaghan) 1163 (D. Colo. 1980). These actions were filed one day before the period of limitations expired, but service on correctly named defendants was not made until some time thereafter. The actions were considered timely commenced as against the correctly named, but not the added, defendants.

101. For example, this reading gives no independent significance to the words "against him." They may suggest that timely commencement depends on the particular act, such as filing or service, by which a given jurisdiction considers a limitations period "tolled." The marker event may vary even among states that use a common limitations period. See text at notes 219 & 223 *infra*.

102. See *Watson v. Unipress, Inc.*, 733 F.2d 1386 (10th Cir. 1984); *Norton v. International Harvester Co.*, 627 F.2d 18 (7th Cir. 1980); *Colonial Mortgage Serv. Co. v. Aerenson*, 603 F. Supp. 323 (D. Del. 1985); *Ridge Co. v. NCR Corp.*, 597 F. Supp. 1239 (N.D. Ind. 1984);

ancy between the treatment of correctly and wrongly named defendants only in forum states that afford a post-limitations grace period, but all of them rest on a wooden reading of the 15(c) deadline phrase and ignore the import of *Walker*.

By contrast, other courts found several ways around the seemingly literal interpretation of the rule 15(c) deadline date. That is, they allowed the relation back of amendments that added defendants who first received notice that an action was pending against them only after a limitations period expired. Some courts in this group reached this result by heeding the implications of *Walker*, allowing relation back whenever the intended defendant received the prescribed notice within a grace period authorized by the "tolling" (actually, timely-commencement)¹⁰³ provisions of a forum state.¹⁰⁴ Others reached the same generous result without regard to timely-commencement provisions of state law. They construed the rule 15(c) notice deadline date to include that "reasonable" time after filing which, until 1983, federal courts had typically allowed for service of process under the then-prevailing interpretation of Federal Rule 4;¹⁰⁵ or they treated the filing of the complaint as affording some sort of "constructive notice";¹⁰⁶ or they simply ignored whether the intended defendant received notice before a limitations period expired.¹⁰⁷ Both of the principal routes to relaxing the rule 15(c) deadline date — deference to forum state timely-commencement rules or reference to the rule 4 requirements for timely service of process — have their seeds in the Second Circuit's confused opinion in *Ingram v. Kumar*.¹⁰⁸

Mahinpour v. Smith, 35 Fed. R. Serv. 2d (Callaghan) 403 (D.D.C. 1982); *Swiss v. Eli Lilly & Co.*, 559 F. Supp. 621 (D.R.I. 1982); *Davis v. Cadwell*, 94 F.R.D. 306 (D. Del. 1982); *Greenfield v. Kanwit*, 87 F.R.D. 129 (S.D.N.Y. 1980).

103. Strictly speaking, "tolling" refers to any suspension of the running of the statute of limitations, whether occurring before or after the period begins to run. "Commencement" has been confusingly defined as "the activity that permanently tolls the statute of limitations." Note, *Commencement Rules and Tolling Statutes of Limitations in Federal Court: Walker v. Armco Steel Corp.*, 66 CORNELL L. REV. 842, 842 n.2 (1981). It is somewhat more illuminating to consider commencement as the particular event, usually filing or service, which a jurisdiction requires to have been completed before, or within a stated time after, the last day of the period of limitations.

104. *Hunt v. Broce Constr., Inc.*, 674 F.2d 834 (10th Cir. 1982); *Florence v. Krasucki*, 533 F. Supp. 1047 (W.D.N.Y. 1982).

105. *Ingram v. Kumar*, 585 F.2d 566 (2d Cir. 1978), cert. denied, 440 U.S. 940 (1979); *Calabretta v. National Airlines*, 528 F. Supp. 32 (E.D.N.Y. 1981).

106. *Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253 (11th Cir. 1983); *Silva v. American Home Assurance Co.*, 36 Fed. R. Serv. 2d (Callaghan) 1090 (S.D.N.Y. 1982).

107. *Sounds Express Intl. Ltd. v. American Themes & Tapes, Inc.*, 101 F.R.D. 694 (S.D.N.Y. 1984).

108. 585 F.2d 566 (2d Cir. 1978), cert. denied, 440 U.S. 940 (1979).

2. *The Hydra-Headed Ingram Model*

The *Ingram* opinion meanders through most of the loose analytic dead ends to which rule 15(c) decisions have led since the 1966 amendment. Perhaps *Ingram* struck the Second Circuit as an appealing vehicle for expansively interpreting the 15(c) deadline date because the originally served and intended defendants had unusual, identical last names and unusual, almost identical first names.¹⁰⁹ Yet they were geographically separated and had no known connection, so that service on the originally named defendant could not reasonably be said to have afforded any notice to the intended defendant. In any event, although the action was filed two weeks before the limitations period expired, service was not made upon the intended defendant until almost four months thereafter.

The court started by assuming, on the authority of its decision ten years earlier in *Sylvestri v. Warner & Swasey Co.*,¹¹⁰ that the mere filing of a complaint commences a federal diversity action for statute of limitations purposes even if timely service of process is required in the forum's own courts.¹¹¹ *Sylvestri* was arguably in conflict with the Supreme Court's decision in *Ragan v. Merchants Transfer & Warehouse Co.*,¹¹² which had held that federal courts sitting in diversity must follow the timely-commencement rules of the forum state. *Sylvestri* in effect prophesied that the Supreme Court's intervening decision in *Hanna v. Plumer*,¹¹³ which declared in broad terms the superior authority of virtually every applicable federal rule over inconsistent state law, would ultimately demand the overruling of *Ragan*. By finding rule 3 not on point, and thus leaving state timely-commencement provisions as the only remaining source of law, the Supreme Court in *Walker* proved that prophecy false.

The question the Second Circuit faced in *Ingram* was whether the mere filing of a complaint timely commences an action even where the plaintiff has named the wrong defendant and service on the intended defendant is made only after the statute has run. Although the court noted that rule 15(c) was amended in 1966 "to establish criteria that would lead to more uniform and equitable results,"¹¹⁴ it resisted the

109. The original defendant was named "Dr. Vijaya N. Kumar"; the intended defendant was named "Dr. Vijay S. Kumar." 585 F.2d at 567.

110. 398 F.2d 598 (2d Cir. 1968).

111. 585 F.2d at 568.

112. 337 U.S. 530 (1949).

113. 380 U.S. 460 (1965).

114. 585 F.2d at 569 (citing Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 407-10 (1967)).

temptation to let the plaintiff off the hook by classifying the case as a "mere misnomer" and hence allowing relation back pro forma under the first sentence of subsection (c).¹¹⁵ In particular, the court eschewed "mere misnomer" analysis because the intended defendant knew nothing of an aborted attempted service upon the misnamed defendant and had received no notice himself until several months after the statute had run.¹¹⁶

Turning to the heart of the matter, the meaning of the 15(c) notice deadline phrase, the court then seemed to advocate deference to the forum state's timely-commencement rule as a way of avoiding the anomaly of *Martz v. Miller Brothers Co.*¹¹⁷ In this vein the court condemned a "literal interpretation" of the deadline phrase as

unjustified in jurisdictions where timely service of process can be effected after the statute of limitations has run. In those jurisdictions, even an accurately named defendant may not receive actual notice of the action against him prior to the running of the statute of limitations. Yet there is no doubt that the action against him is timely commenced. There is no reason why a misnamed defendant is entitled to earlier notice than he would have received had the complaint named him correctly.¹¹⁸

115. When, as here, the mistaken complaint names an actual person or entity in existence, it is not obvious whether the amendment corrects a "misnomer" or brings in a truly "new" party. Analysis of "relation back" under these circumstances is better accomplished through application of the specific guidelines in the second sentence of Rule 15, than by attempting to draw an arbitrary line between misnomers and changes of party. 585 F.2d at 570.

In support of this point, the court relied on the "weight of authority" as exemplified by six cases. 585 F.2d at 570 n.7. These decisions allowed relation back upon concluding that the intended defendants had received the notice required by the second sentence of rule 15(c). *Wynne v. United States ex rel. Mid-States Waterproofing Co.*, 382 F.2d 699 (10th Cir. 1967); *Travelers Indem. Co. v. United States ex rel. Construction Specialties Co.*, 382 F.2d 103 (10th Cir. 1967); *Horwitz v. Longines Wittnauer Watch Co.*, 388 F. Supp. 1257, 1258-59 (S.D.N.Y. 1975); *Mitchell v. Hendricks*, 68 F.R.D. 564, 566 (E.D. Pa. 1975); *Davis Water & Waste Indus. v. Jim Wilson, Inc.*, 67 F.R.D. 509 (E.D. Tenn. 1974); *Brittian v. Belk Gallant Co.*, 301 F. Supp. 478 (N.D. Ga. 1969). The majority might have added to this list *Craig v. United States*, 479 F.2d 35 (9th Cir. 1973), *cert. denied*, 414 U.S. 1023 (1973) (disallowing relation back because the notice the intended defendant received did not meet the second-sentence standards).

Examination of the cited cases, however, discloses that only two, *Wynne* and *Brittian*, were "true" misnomer cases in the sense that the intended defendant, although misnamed, was the entity first actually served. It is not surprising that the plaintiffs in each of the four other cases were required to meet the difficult standards of the second sentence of rule 15(c), since their proposed amendments changed defendants by almost any standard. But it is not apparent why the four remaining cases constitute significantly weightier authority than the four other cases and the treatise statement cited by the court earlier in the text which had approved the relation back of misnomers under the far more lenient "claim arising out of" test prescribed by the first sentence of rule 15(c). 585 F.2d at 570 (citing *Armijo v. Welmaker*, 58 F.R.D. 553 (D. Ariz. 1973); *Washington v. T.G. & Y. Stores Co.*, 324 F. Supp. 849, 856 (W.D. La. 1971); *Wentz v. Alberto Culver Co.*, 294 F. Supp. 1327, 1328-29 (D. Mont. 1969); *Fricks v. Louisville & Nashville R.R.*, 46 F.R.D. 31, 32 (N.D. Ga. 1968); 6 C. WRIGHT & A. MILLER, *supra* note 63, § 1498, at 513-14).

116. 585 F.2d at 571.

117. 244 F. Supp. 246 (D. Del. 1965); see notes 78-79 *supra* and accompanying text.

118. 585 F.2d at 571 (footnote omitted).

The court fortified this interpretation by referring to a criticism of the *Martz* case, written one year after the rule 15(c) amendment went into effect, by Professor Benjamin Kaplan, who had been a reporter for the Advisory Committee in 1966.¹¹⁹

The state-deference approach, which the court thus approved formally, had the virtue of fulfilling the apparently expansive intent of the 1966 rule amenders and of sidestepping the *Martz* anomaly. Yet the court's interpretation is not evident, to put it mildly, from the face of rule 15(c). The deadline phrase is pegged to "the period provided by law for commencing the action against him," not "the period provided by the law of the forum state (or of some other state to which the forum state might refer) for commencing the action against him, including any grace period for service of process." Further, this approach is not well calculated to promote uniformity among the federal courts, since the states follow several different patterns for timely commencement.¹²⁰ Moreover, as a matter of internal consistency, deference to liberal forum-state law on timely commencement seems somewhat at odds with *Ingram*'s adherence to *Sylvestri*, which lets Federal Rule 3 control timely commencement against defendants named correctly, notwithstanding contrary rules of the forum state.

In any event, after charting this state-deference path, the *Ingram* court abruptly left it. It went on to "hold" in the next paragraph that under Rule 15(c) the period within which "the party to be brought in" must receive notice of the action includes the reasonable time allowed under the *federal rules* for service of process. We think this interpretation is permissible and desirable and carries out the beneficent purpose of the 1966 amendment.¹²¹

But Federal Rule 4 did not at the time specify any fixed deadline within which process must be served.¹²² Accordingly, the court applied twin standards developed by decisions interpreting rule 4(a) and rule 41(b), the involuntary dismissal rule, to assess timeliness: it inquired whether the *Ingram* plaintiff had acted diligently to perfect service after the statute of limitations expired and whether the defendant had been prejudiced by the delay. Under those standards, the court

119. Kaplan, *supra* note 114, at 410 n.204.

120. See text at note 230 *infra*.

121. 585 F.2d at 571-72 (emphasis added) (footnotes omitted).

122. Effective February 26, 1983, Federal Rule 4 was amended to require that service of the summons and complaint must be made upon the defendant within 120 days after a complaint is filed. It provides for dismissal of the action without prejudice for failure to meet that deadline, absent a showing of good cause why service could not have been completed timely. FED. R. CIV. P. 4(j). The question whether this deadline was intended to serve as a marker for statute of limitations purposes, or only to address the independent requirement of prosecuting with due diligence, is discussed in text at notes 129-30 and in note 147 *infra*.

concluded that the “lapse of several months between the time the error was discovered and the time the [intended] defendant was served . . . was not so unreasonable as to justify dismissal of the claim,” even though the delay in service was not “fully explained by the plaintiff.”¹²³

The court did not explain why it ultimately defined the 15(c) notice deadline by reference to the “reasonable” time that rules 4 and 41 then permitted for service of process, instead of by reference to the timely-commencement law of the forum state. The only evident explanation is one the court would probably have been embarrassed to confess: application of New York’s sixty-day grace period in *Ingram* would not have saved the plaintiff’s claim, since the intended defendant first received notice of the action a full two months after that grace period expired.

The Federal Rules/service of process approach which the Second Circuit ultimately applied does largely avoid the *Martz* anomaly. The anomaly would persist only under the few state timely-commencement or relation-back rules so open-ended that they would deem an action timely commenced against defendants who first receive notice more than a “reasonable” time — or now, under Federal Rule 4(j), more than 120 days¹²⁴ — after filing.¹²⁵ The court’s approach also promotes formal — and now, under rule 4(j)’s fixed 120-day service period, actual — uniformity among federal courts on the question of a relation-back notice deadline. Further, by sustaining claims of which an intended defendant receives no notice until months after the limitations period expires, this approach furthers the apparent liberalizing aims of the 1966 amendments.

But the Federal Rules/service of process approach also assumes, oversimply, that the “law” in the phrase “within the period provided by law for commencing the action against him” means federal law. It thus disrespects the timely-commencement rules of the many states that require that the intended defendant be notified of the action earlier than 120 days after the expiration of the statute of limitations.¹²⁶ Implicitly *Ingram*, like *Sylvestri*, rested on the false prediction that *Hanna* overruled *Ragan*; the *Ingram* court therefore somewhat conveniently took for granted that state timely-commencement rules may be disregarded in the face of a combination of federal rules — 15(c), 4,

123. 585 F.2d at 572.

124. See note 122 *supra*.

125. An open-ended state law provision of this type is discussed in text at notes 132-33 & 139-42 *infra*.

126. See text at note 230 *infra*.

and 41 — lightly assumed to be “on point.”¹²⁷ Today, this approach offends *Walker v. Armco Steel Corp.*¹²⁸ by assuming that rule 3 governs timely commencement in diversity actions. It is also at least indirectly at odds with more recent decisions, including one by the Second Circuit itself,¹²⁹ which hold that compliance with the 120-day service deadline of rule 4(j) merely satisfies a separate requirement for prosecuting an action with due diligence and does not by itself commence an action timely for purposes of a state statute of limitations.¹³⁰

127. The Second Circuit was by no means alone in erroneously predicting that *Hanna* betokened the demise of *Ragan*. See, e.g., C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 59, at 277 (3d ed. 1976); *Smith v. Peters*, 482 F.2d 799, 802 (6th Cir. 1973), cert. denied, 415 U.S. 989 (1974); *Manatee Cablevision Corp. v. Pierson*, 433 F. Supp. 571, 575-76 (D.D.C. 1977); *Krout v. Bridges*, 58 F.R.D. 560, 561 (N.D. Iowa 1973); Comment, *A Restrained Adherence to Ragan — State versus Federal Rules when Tolling State Limitation Periods in Diversity Actions*, 18 S.D. L. REV. 185, 199-200 (1973).

128. 446 U.S. 740 (1980). See *Fischer v. Iowa Mold Tooling Co.*, 690 F.2d 155, 157 (8th Cir. 1982) (“*Walker v. Armco Steel* has laid to rest the notion that Rule 3 can ever be used to toll a state statute of limitations in a diversity case arising under state law.”); see also *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984); *Saraniero v. Safeway, Inc.*, 540 F. Supp. 749 (D. Kan. 1982). Some courts, however, have distinguished *Walker* on the ground that the Supreme Court explicitly found there that the Oklahoma timely-commencement rule was “an ‘integral’ part of the statute of limitations.” *Walker*, 446 U.S. at 752. Courts following this distinction say they would feel bound to adhere to state law if state judicial decisions had declared a timely-commencement rule to be integrally related to a statute of limitations. See *Cambridge Mut. Fire Ins. Co. v. City of Claxton*, 720 F.2d 1230 (11th Cir. 1983); *Walden v. Tulsair Beechcraft, Inc.*, 96 F.R.D. 34 (W.D. Ark. 1982); *Foster v. Seattle Tent & Fabric Prod. Co.*, 31 Fed. R. Serv. 2d (Callaghan) 517 (D. Minn. 1981). At least one commentator has concluded that this distinction is spurious, that under *Walker* state timely-commencement rules govern and Federal Rule 3 does not apply regardless of whether the state commencement procedure is considered integrally related to the limitations scheme as a whole. Note, *supra* note 103, at 849-50.

129. *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984); see also *Brown v. Rinehart*, 105 F.R.D. 532 (E.D. Ark. 1985) (treating the statute of limitations defense as distinct from the independent objection that plaintiff had failed to complete service within the 120 days required by rule 4(j)); New York State Law Digest, in FED. PROC. L. ED. § 65:43 (1983) (noting that service must be completed within the statute of limitations period in diversity actions when that is required by the forum state’s law; otherwise the action will be dismissed even if that service was made within the 120 days specified by rule 4).

130. The Second Circuit in *Morse* explicitly rejected the plaintiff’s argument derived from *Sylvestri* that rule 4(j)

effectively adds 120 days to the applicable state statute of limitations if the complaint has been filed within the limitations period. This is a dubious proposition at best in light of *Walker*. Moreover, the legislative history of the amendments shows that Congress recognized the implications of *Walker* when it considered the amendments to Rule 4(c) and that Congress specifically considered and rejected the argument plaintiff now advances.

752 F.2d at 42 (citing 128 CONG. REC. H9850 nn.14 & 15) (daily ed. Dec. 15, 1982) (statement of Rep. Edwards), reprinted in 96 F.R.D. 81, 120 nn.14-15). Rep. Edwards’ analysis of the Federal Rules of Civil Procedure Amendments Act of 1982 states that under new rule 4(j) an action should be dismissed “even if service occurs within the 120 day period, if the service occurs after the statute of limitations has run.” 128 CONG. REC. at H9850 n.15, 96 F.R.D. at 120.

It is somewhat strange that the Second Circuit, having thus effectively recognized that *Walker* overrules its holding in *Sylvestri*, has not also reexamined *Ingram*, as indeed one district court in the Second Circuit has suggested it should. *A.B. Volvo v. M/V Atlantic Saga*, 534 F. Supp. 647, 649 n.3 (S.D.N.Y. 1982). For *Ingram*, like *Sylvestri*, ultimately rests on the view repudiated by *Walker* that filing per rule 3 timely commences an action for limitations purposes notwithstanding forum-state timely-commencement provisions to the contrary. See text at notes 126-27 *supra*.

The fundamental interpretive problem underlying *Ingram's* Federal Rules/service of process approach is its assumption that there exists an on-point Federal Rules definition of the rule 15(c) notice deadline, a proposition which *Walker* casts sharply in doubt. Since when *Ingram* was decided that deadline (drawn from rule 4) was the protean "reasonable" time after filing, the court's assumption resulted in a generous approach to relation back. But the problem is not simply that the court locates a definitional benchmark in federal rather than state law. Complete deference to plaintiff-oriented state law may also substantially undermine the concern with the statute of limitations evident in rule 15(c).

A 1981 district court decision, *Covel v. Safetech, Inc.*,¹³¹ well illustrates that point. Plaintiff in a diversity action sought to add three defendants almost four years and six months after the applicable limitations period had expired. Responding to defendant's reliance on rule 15(c), plaintiff pointed to "an unusually liberal [state] relation-back rule"¹³² which categorically permitted party-changing amendments to relate back to the original pleading "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."¹³³ The state statute after which the rule was patterned had been construed to permit relation back whenever "the plaintiff intended to bring it against the party [actually] liable for the injury."¹³⁴

The district court found "compelling indicia" that the 1966 amendment to rule 15(c) was designed "to prescribe a more liberal rule of relation-back than some federal decisions had applied in construing the less explicit provisions of Rule 15(c) as it stood before amendment."¹³⁵ It therefore fashioned a strained, expansive construction of Federal Rule 15(c) which avoided a direct conflict with the even more liberal Massachusetts rule. The court concluded that rule 15(c), read literally, "states only an affirmative proposition — that an amendment changing a party relates back if prescribed conditions are satisfied. It does not state the negative proposition that an amendment changing a party does not relate back when these conditions are not satisfied."¹³⁶ Because the court doubted that rule 15(c) was "designed

131. 90 F.R.D. 427 (D. Mass. 1981).

132. 90 F.R.D. at 429.

133. MASS. R. CIV. P. 15(c).

134. 90 F.R.D. at 429 (quoting *McLaughlin v. West End St. Ry.*, 186 Mass. 150, 71 N.E. 317 (1904)).

135. 90 F.R.D. at 432.

136. 90 F.R.D. at 432.

to override a more liberal state law provision of relation back,"¹³⁷ it found rule 15(c) inapplicable and concluded that it "should not be applied when to do so would give it the practical effect of preempting a state relation-back rule that is an integral part of the state's law of limitation of actions and is more liberal than the federal rule."¹³⁸

In this respect the district court was following in the footsteps of its court of appeals, which, in *Marshall v. Mulrenin*,¹³⁹ had reached a similar result for a somewhat different reason. The First Circuit gave rule 15(c) a more natural reading, under which the action would have been untimely because the intended defendant did not receive notice of the action until after the limitations period had expired. But the court also found that the open-ended Massachusetts relation-back provision¹⁴⁰ reflected a "discoverable substantive, as distinguished from a merely procedural, state purpose."¹⁴¹ It therefore held, notwithstanding *Hanna v. Plumer*, that the on-point federal rule must yield.¹⁴²

Mulrenin has been subjected to sharp scholarly criticism on the ground that it improperly sidestepped *Hanna's* mechanical preference for "on-point" federal rules in favor of a relatively subjective *Erie* analysis geared to the perceived intensity of a state's limitations policies.¹⁴³ Whatever the merits of this *Erie* debate, the critics themselves unwittingly follow *Mulrenin* in simply assuming the answer to the fundamental question: Does rule 15(c), fairly read, comprehensively stipulate all the standards that govern the relation back of party-changing amendments, or must one key component of the rule, the notice deadline, be borrowed from state law? While it seems more likely that in 1966 the Advisory Committee and the Supreme Court had in mind a wholly national approach to the problem, *Walker* raises a genuine

137. 90 F.R.D. at 432.

138. 90 F.R.D. at 433.

139. 508 F.2d 39 (1st Cir. 1974).

140. At the time, the Massachusetts relation-back rule was codified in MASS. GEN. L. ch. 231, § 51 (1959) (amended 1973), which was later replaced by MASS. R. CIV. P. 15(c), at issue in *Covel*.

141. 508 F.2d at 44.

142. 508 F.2d at 44. The court explained that the state's substantive purpose was no less clear because the legislature had chosen to define timely commencement for relation-back purposes in a separate statute instead of proceeding "within the four corners of the statute of limitations' formal provisions." For other authority on the "substantive" bite of limitations statutes, see Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15, 59 (1977); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 725-27 (1974).

143. See, e.g., Note, *Federal Rules of Civil Procedure — The Erie Doctrine — State Relation-Back Provision Found Controlling Over Rule 15(c) — Marshall v. Mulrenin*, 50 N.Y.U. L. REV. 952 (1975); Note, *Federal Rules of Civil Procedure — Statute of Limitations — State Policy — Relation Back*, 9 AKRON L. REV. 199 (1975).

question whether rule 15(c) succeeded in expressing such a national standard.

3. *The Federal Question Cases*

Several of the approaches taken in the post-*Walker* diversity cases find counterparts in actions based on a federal question. Of course in the federal question setting, interpretation of the 15(c) deadline phrase is unencumbered by conflicts between federal and state law. Still, the fundamental questions have no inevitable answers. First, do the Federal Rules define timely commencement at all? While the Supreme Court held in *Walker* that rule 3 was not intended as a timely-commencement rule in diversity cases, the Court, as mentioned above,¹⁴⁴ explicitly refused to rule on *Ragan's* suggestion that rule 3 filing suffices to "toll" a statute of limitations in suits to enforce rights under a federal statute. Second, if rule 3 filing does have a tolling effect, should the federal courts adopt it as the event that will satisfy the rule 15(c) relation-back deadline, or should they interpret the rule 15(c) notice phrase to demand service of process before the limitations deadline, with the resulting restrictive consequences?

On the surface it seems bizarre for lower federal courts to view rule 3 as a timely-commencement rule for federal question cases, given *Walker's* holding that the same rule was not so intended for diversity cases. In terms rule 3 draws no distinction between the two heads of jurisdiction, and the Advisory Committee's note concerning rule 3 sheds no additional light on this point. The lower federal courts, however, have apparently dismissed this problem as a pedantic quibble. The pre-*Walker* tradition of using rule 3 as a "tolling" rule for federal question cases has survived *Walker* largely intact. The vast majority of courts faced with the question have simply observed that *Walker* did not explicitly reject the view that rule 3 tolls statutes in federal question cases.¹⁴⁵ Indeed, even the few courts that have insisted that both filing and service be completed within the period of limitations

144. See text at note 91 *supra*.

145. See, e.g., *Jordan v. United States*, 694 F.2d 833 (D.C. Cir. 1982); *Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184 (5th Cir. 1980); *Moorehead v. Miller*, 102 F.R.D. 834 (D.V.I. 1984); *Wells v. City of Portland*, 102 F.R.D. 796 (D. Or. 1984); *Prather v. Raymond Constr. Co.*, 570 F. Supp. 278 (N.D. Ga. 1983); *Robbins v. Marine Transp. Lines*, 531 F. Supp. 14 (D.N.J. 1981); *Badillo v. Central Steel & Wire Co.*, 495 F. Supp. 299 (N.D. Ill. 1980); see also 2 J. MOORE, *supra* note 68, ¶ 3.09[2]; Siegel, *Practice Commentary on Amendment of Federal Rule 4 (Eff. Feb. 26, 1983) with Special Statute of Limitations Precautions*, 96 F.R.D. 88, 101 (1983).

All but one of these cases was "commenced" — that is, the complaint was filed — before February 26, 1983, the effective date of rule 4(j). That explains why these decisions conclude that the intended defendant need only receive notice within a "reasonable time," rather than 120 days, after filing. In the action commenced after rule 4(j) became effective, the intended defendant received notice within 120 days after filing, so rule 4(j) would not have changed the result.

for timely commencement of a federal question action apparently rested their decisions on the belief that such service was implicitly required by the particular federal statute at issue, rather than by rule 3.¹⁴⁶

Even after *Walker*, then, filing under rule 3¹⁴⁷ timely commences federal question actions against correctly named defendants. It is therefore not surprising that many post-*Walker* federal question decisions have also allowed relation back under rule 15(c) against misnamed defendants who were first notified of the commencement of actions only after a limitations period expired.¹⁴⁸ What is somewhat surprising is that roughly as many courts have come out the other way.¹⁴⁹ These courts, including most of the courts of appeals that have addressed the point, read the rule 15(c) deadline phrase literally. They require that some form of notice of the institution of the action be communicated to the intended defendant before the federal limita-

146. See, e.g., *Thompson v. Ralston Purina Co.*, 599 F. Supp. 756 (W.D. Mich. 1984) (action under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982)); see also *Ralston Purina Co. v. Barge Juneau & Gulf Caribbean Marine Lines*, 619 F.2d 374 (5th Cir. 1980) (admiralty action). The latter case may not survive the Fifth Circuit's decision handed down six months later in *Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184 (5th Cir. 1980).

147. Rule 4(j) has held no appeal as an alternative measure of timely commencement in cases based on federal questions. As in the diversity cases, see text at notes 129-30 *supra*, rule 4(j), which requires that service of process be complete within 120 days after filing, has been viewed solely as a rule regulating diligent prosecution. See, e.g., *Porter v. Beaumont Enter. & Journal*, 743 F.2d 269 (5th Cir. 1984) (assuming that the facts warranted a rule 4(j) dismissal without prejudice, they also warranted a dismissal with prejudice for failure to satisfy a federal statutory period of limitations); *Burks v. Griffith*, 100 F.R.D. 491 (N.D.N.Y. 1984) (dismissing action without prejudice under rule 4(j) but noting that any attempt at refiling would be met with a successful challenge under a state period of limitations borrowed in a federal civil rights action). Professor Moore has gone so far as to suggest that even if filing alone tolls a statute of limitations, and a complaint is timely filed, a subsequent "dismissal under Rule 4(j) will result in the action being time-barred if the statute has run after the filing of the complaint." 2 J. MOORE, *supra* note 68, ¶ 4.46, at 4-435. See generally *Siegel*, *supra* note 145, at 107-08 (noting the problem but suggesting no definitive answer).

148. See *Kirk v. Cronvich*, 629 F.2d 404 (5th Cir. 1980); *Allen v. Bolger*, 597 F. Supp. 482 (D. Kan. 1984); *Maiden v. Biehl*, 582 F. Supp. 1209 (S.D.N.Y. 1984); *Murray v. United States Postal Serv.*, 569 F. Supp. 794 (N.D.N.Y. 1983); *United States ex rel. Arrow Elec., Inc. v. G.H. Coffey Co.*, 100 F.R.D. 413 (D. Me. 1983); *A.B. Volvo v. M/V Atlantic Saga*, 534 F. Supp. 647, (S.D.N.Y. 1982); *Swann Oil, Inc. v. M/S Vassilis*, 91 F.R.D. 267 (E.D.N.C. 1981); *Bush v. Sumitomo Bank & Trust Co.*, 513 F. Supp. 1051 (E.D. Tex. 1981); *Hart v. Bechtel Corp.*, 90 F.R.D. 104 (D. Ariz. 1981); cf. *Turner v. Winn Dixie, Inc.*, 31 Fed. R. Serv. 2d (Callaghan) 1443 (N.D. Ga. 1981) (adopting the reasonable time approach of *Kirk v. Cronvich*, but finding on the facts that service three weeks after filing and twenty days after the expiration of the limitations period was not made within a "reasonable time").

149. *Allen v. Veterans Admin.*, 749 F.2d 1386, (9th Cir. 1984); *Cooper v. United States Postal Serv.*, 740 F.2d 714 (9th Cir. 1984), cert. denied, 471 U.S. 1022 (1985); *Williams v. United States*, 711 F.2d 893 (9th Cir. 1983); *Hughes v. United States*, 701 F.2d 56 (7th Cir. 1982); *Stewart v. United States*, 655 F.2d 741 (7th Cir. 1981); *Westfield v. Rhodes-Perdue Furniture Co.*, 109 F.R.D. 106 (W.D.N.C. 1985); *Wickfall v. Bolger*, 102 F.R.D. 466 (W.D. Tenn. 1984); *Bruce v. Smith*, 581 F. Supp. 902 (W.D. Va. 1984); *Murray v. United States Postal Serv.*, 550 F. Supp. 1211 (D. Mass. 1982); *Larry v. Penn Truck Aids, Inc.*, 94 F.R.D. 708 (E.D. Pa. 1982); *Robbins v. Marine Transp. Lines*, 531 F. Supp. 14 (D.N.J. 1981).

tions period runs out, even though a correctly named federal question defendant would often have to settle for considerably later notice and even though no state law demands better notice. Some of the opinions recognize expressly that this stingy approach to relation back creates a purely federal anomaly: under rule 15(c), the misnamed defendant will be entitled to better notice — that is, notice before the limitations period expires — than he would be assured by rule 3 had he been named correctly.¹⁵⁰

Still, the slim majority of the reported cases holds, consistent with the dominant interpretation of rule 3, that an intended federal question defendant is never entitled to notice before the limitations period expires, even if he was first named erroneously. This line of decisions simply transplants the holding of *Ingram v. Kumar* to the federal question setting. These courts have determined that the rule 15(c) notice deadline includes the “reasonable time” after filing which, until rule 4 was amended in 1983, most courts applying Federal Rule 3¹⁵¹ allowed for completion of service of process. On their facts these federal question cases are indistinguishable in any significant respect from those that demand notice to the intended defendant before the limitations period expires.¹⁵² Those courts that allow relation back when notice would have been timely against a correctly named federal question defendant place greatest emphasis on avoiding a senseless Federal Rules anomaly or on furthering the apparent goals of the 1966 amendments. The courts opting for the strict approach express greater concern for adhering to the most natural meaning of the critical deadline phrase in rule 15(c).

4. *Shuffles and Sidesteps*

Faced with such massive confusion in the decisions about the meaning and application of the deadline phrase, and mindful of the harsh or merely irrational results attendant upon the state-federal or

150. See, e.g., *Korn v. Royal Caribbean Cruise Line*, 724 F.2d 1397, 1402 (9th Cir. 1984) (Wallace, J., dissenting).

151. I have uncovered no reported decisions which gauge the rule 15(c) notice deadline with reference to the rule 4(j) 120-day period for service. Perhaps this is because both rule 4(j)'s drafters, see H.R. REP. NO. 7154, *supra* note 20, at 4442, and its judicial interpreters in federal question cases, see decisions cited at note 147 *supra*, have unanimously agreed that rule 4(j) has no limitations significance but simply constitutes an independent barrier to the progress of a civil action based on inadequate diligence of prosecution.

152. Most strikingly, compare *Murray v. United States Postal Serv.*, 569 F. Supp. 794 (N.D.N.Y. 1983) (party was “Mary Murray”), with *Murray v. United States Postal Serv.*, 550 F. Supp. 1211 (D. Mass. 1982) (party was “Nancy A. Murray”) (both actions under Federal Tort Claims Act, 28 U.S.C. § 2671 (1982)); compare *Allen v. Bolger*, 597 F. Supp. 482 (D. Kan. 1984), with *Wickfall v. Bolger*, 102 F.R.D. 466 (W.D. Tenn. 1984) (both actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (1982)).

federal-federal anomalies, a number of courts have worked out artful dodges. Three approaches will be mentioned briefly.

Some courts expressly recognize that deference to forum-state law might permit relation back even if the intended defendant first received notice after the limitations period expired. Rather than resolve the potential conflict between state and federal law, these courts recommend further fact-finding in the hope of learning that the intended defendant did receive some sort of notice before the last day of the statute of limitations, the earliest possible notice deadline under any interpretation of the rule 15(c) phrase.¹⁵³

A second tack was taken by a district court¹⁵⁴ sitting in the Third Circuit after that circuit had opted for a strict interpretation of the deadline phrase in *Schiavone*. The district court relied on forum-state decisions which had estopped intended defendants from invoking the statute of limitations when their own fraud or concealment had prevented a plaintiff from discovering their actual identity. Finding such inequitable conduct, the court allowed relation back even though the intended defendant had first received notice of the institution of the action after the limitations period expired.

The court reasoned that because rule 15(c) explicitly referred to the statute of limitations that is "provided by law," the rule implicitly "imports into the federal rules the statute of limitations of the forum state. It must also therefore import those doctrines [like estoppel] that have been judicially created to inform the analysis of statute of limitations problems."¹⁵⁵ By a parity of reasoning, one would also expect the limitations defense to be informed by state timely-commencement and relation-back rules. Yet the Third Circuit in *Schiavone* had explicitly refused to allow a liberal New Jersey relation-back rule to inform its own interpretation of rule 15(c).¹⁵⁶ Thus the district court's technique displays a superficial fidelity to the law of the circuit, while in fact contradicting the court of appeals' ultimate rationale in order to achieve a result the lower court thought just.

A third approach, also used to skirt apparent *Erie* problems, emerged in a jurisdiction that authorizes "John Doe" pleadings. In one diversity action,¹⁵⁷ the forum state's law gave plaintiffs three years from an action's commencement to amend their "Doe" complaints to

153. See *Ringrose v. Engelberg Huller Co.*, 692 F.2d 403, 405 (6th Cir. 1982); *Gabriel v. Kent Gen. Hosp.*, 95 F.R.D. 391, 393-94 (D. Del. 1982).

154. *Layton v. Blue Giant Equip. Co. of Canada*, 105 F.R.D. 83 (E.D. Pa. 1985).

155. 105 F.R.D. at 86.

156. *Schiavone v. Fortune*, 750 F.2d 15 (3d Cir. 1984), *affd.*, 106 S. Ct. 2379 (1986).

157. *Lindley v. General Elec. Co.*, 780 F.2d 797 (9th Cir.), *cert. denied*, 106 S. Ct. 2926 (1986).

reflect a defendant's true identity and to effect service of process. For limitations purposes, the state courts had considered such a "Doe" defendant to be a party to the action from its commencement. Under the state procedure, then, the amended complaint adding the defendant's real identity would have been timely; under the circuit's prevailing strict interpretation of rule 15(c), the action would have been time barred because the defendant had not received any notice of the institution of the action within the period of limitations.

Reviewing the district court's dismissal of the action under rule 15(c), the Ninth Circuit Court of Appeals framed the issue as whether forum-state law or rule 15(c) "applies."¹⁵⁸ The court treated the forum state's relation-back procedure for "Doe" pleadings as effectively extending the underlying period of limitations by three years, and it was undisputed that the amended complaint correctly naming the defendant was served within that expanded period. The court accordingly considered that no relation-back rule, either state or federal, came into play at all. In brief, "the asserted conflict between Rule 15(c) and state Doe practice is 'bogus.'"¹⁵⁹

A variation on this approach has been applied in a jurisdiction that authorizes use of a fictitious name to identify a defendant whose name is then unknown and permits the relation back of amended complaints that reflect the defendant's real identity. Case law treated the date of filing of the original complaint as the date that interrupts the running of the period of limitations.¹⁶⁰ A federal district court, sitting in diversity, recognized that such an action would be time-barred unless the amendment substituting the defendants' correct names were allowed to relate back, but it also concluded that relation back was precluded under rule 15(c).¹⁶¹ Because the district court was within the same circuit that had decided *Marshall v. Mulrenin*,¹⁶² it was apparently bound to hold that a liberal local relation-back law should prevail over rule 15(c), since the application of the federal rule would defeat "substantive state rights."¹⁶³ Avoiding such a direct collision between local law and rule 15(c), the court achieved the same result by concluding that the Federal Rules, including rule 15(c), "do not deal

158. 780 F.2d at 799.

159. 780 F.2d at 800-01 (quoting 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4509, at 158 (1982)).

160. *E.g.*, *Santiago v. Becton Dickinson & Co.*, 539 F. Supp. 1149, 1153 (D.P.R. 1982).

161. *Santiago*, 539 F. Supp. at 1152.

162. 508 F.2d 39 (1st Cir. 1974); see notes 139-43 *supra* and accompanying text.

163. *Santiago*, 539 F. Supp. at 1153 (citing *Mulrenin* and *Covel v. Safetech, Inc.*, 90 F.R.D. 427 (D. Mass. 1981)).

with the particular problem of John Doe defendants.”¹⁶⁴ Consequently, the only relation-back law remaining in the picture was the local law, under which relation back would revive the “Doe” complaint.

E. Schiavone v. Fortune

1. *The Decisions Below*

This cacophony of conflicting opinions culminated in the Supreme Court’s decision in *Schiavone v. Fortune*.¹⁶⁵ Plaintiffs brought suit for libel in United States District Court in New Jersey, grounding jurisdiction on diversity. Although plaintiffs intended to sue Time, Inc. for allegedly defamatory statements contained in an article published in *Fortune Magazine*, an internal division of Time, the caption of the complaint identified the defendant as “Fortune.” In the body of the complaint Fortune was described as “a foreign corporation having its principal offices at Time and Life Building.”¹⁶⁶

The complaint was filed ten days before the running of the applicable New Jersey statute of limitations. Mail service was not made until one day after the statute ran, however, and the complaint was not received by Time’s agent for service until three days after that. Time’s agent forwarded the summons and complaint to Time with accompanying correspondence which reflected the agent’s understanding that the intended defendant was Time, rather than the nonexistent entity “Fortune.” Of course, even the agent did not gain this understanding until it received the mail service, four days after the limitations period had expired. Two months later, plaintiffs filed an amended complaint which the lower federal courts and the Supreme Court all considered adequate to denominate Time as the defendant.¹⁶⁷

Time did not dispute that the action was timely filed under Federal Rule 3. It agreed, or at least did not deny, that service upon its agent several days after the limitations period ran would have been timely if the defendant had been named correctly; service of the original complaint two weeks after filing was not only well within the 120-day period specified by Federal Rule 4(j), but also apparently timely under the rules that would be applied by a New Jersey court. In effect, Time

164. 539 F. Supp. at 1153. *But see* Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 174 (3d Cir. 1977); Sassi v. Breier, 76 F.R.D. 487, 489 (E.D. Wis. 1977), *affid.*, 584 F.2d 234 (7th Cir. 1978) (holding that the standards of rule 15(c) do apply to “John Doe” pleadings).

165. 106 S. Ct. 2379 (1986).

166. 106 S. Ct. at 2381.

167. 106 S. Ct. at 2381-83, 2385 (majority opinion), 2386-87 (Stevens, J., dissenting), *affg.* 750 F.2d 15 (3d Cir. 1984), *affg.* 38 Fed. R. Serv. 2d (Callaghan) 71, 73 (D.N.J. 1983).

stood on the *Martz* anomaly. It argued that as a misnamed defendant it was entitled to notice of the institution of the action before the running of the limitations period even though, had it been named correctly, it would not have been entitled to any earlier notice than it in fact received. On this theory Time moved for summary judgment, contending that the action was time barred.

Plaintiffs' response to the motion was initially limited to two arguments. First, they contended that their amendment corrected a mere misnomer and did not change a party; the requirements of the second sentence of rule 15(c) would therefore be wholly inapplicable. The district court acknowledged the difficulty of choosing between these characterizations of the amendment but found it unnecessary to decide the matter. It relied on the parenthetical phrase from the Advisory Committee's note which suggested that the new standards were designed to cover all amendments, "including an amendment to correct a misnomer or misdescription of a defendant."¹⁶⁸ Accordingly, the court found that the second-sentence standards governed the case.

Turning to those standards, the district judge then noted "an apparent dispute among the courts" as to whether the rule 15(c) notice deadline "includes a reasonable period to effect service."¹⁶⁹ Concluding that the "language of the rule, referring to commencement of the action, does not contemplate an added period for service of process," the judge added that "[t]he parties have not presented this issue to the court."¹⁷⁰ He ruled that the amendment could not relate back under rule 15(c) because Time had not received notice of the institution of the action, through its agent, until several days after the limitations period had expired.¹⁷¹

The court also made short work of plaintiffs' second argument, that Time had inequitably masked its true name in the boilerplate of the *Fortune Magazine* masthead. The editorial pages of the issue which prompted plaintiffs' complaint stated that Fortune was a registered trademark of Time, Inc. The court found "no basis to conclude that Time, Inc. deliberately misled plaintiffs to believe that Fortune was a separate corporation."¹⁷² Summary judgment was therefore entered for Time.

In support of a motion for reconsideration, plaintiffs at last urged

168. 38 Fed. R. Serv. 2d at 75 (quoting Advisory Committee note, *supra* note 43, 39 F.R.D. at 82 (1966)).

169. 38 Fed. R. Serv. 2d at 75 n.1.

170. 38 Fed. R. Serv. 2d at 75 n.1.

171. 38 Fed. R. Serv. 2d at 75.

172. 38 Fed. R. Serv. 2d at 76.

directly that the court construe the rule 15(c) deadline phrase to include the "reasonable" time after filing¹⁷³ which the Second Circuit had permitted in *Ingram v. Kumar*.¹⁷⁴ The district court acknowledged that it had not cited *Ingram* in its earlier opinion. But the court stated that it had considered and rejected the *Ingram* approach and would adhere to the ruling, set out in a footnote of its first opinion, that the rule 15(c) notice period ends on the last day of the statute of limitations.¹⁷⁵

Alternatively, plaintiffs argued that their amended complaint should be permitted to relate back under New Jersey law. They cited several New Jersey cases that permitted amendments adding new defendants to "relate back even though the parties to be added had not received notice of the action within the limitations period."¹⁷⁶ Plaintiffs contended that lower federal court decisions under rule 15(c) which had followed the state-deference approach that *Ingram* espoused (but did not actually apply) were consistent with the permissive New Jersey approach and should therefore control.¹⁷⁷

The court "reluctantly" concluded that it was "bound by the language of Rule 15(c) to adhere to its prior ruling."¹⁷⁸ It read *Britt v. Arvanitis*,¹⁷⁹ a Third Circuit decision, to hold that one of the New Jersey opinions relied on by the plaintiffs interpreted the New Jersey relation-back rule as merely a "procedural" one which therefore, by force of *Hanna v. Plumer*, must give way to Federal Rule 15(c). The court further wrote that the plaintiffs had "conceded" that the New Jersey rulings "are procedural only, not substantive."¹⁸⁰ Yet it is not apparent from the context of the court's letter opinion that plaintiffs' attorney did anything more than prudentially acknowledge the inescapable authority of *Britt* in the Third Circuit.

On appeal, plaintiffs contended that even if an amendment to cor-

173. In fact, when *Schiavone* was filed in May 1983 Federal Rule 4(j) allowed only 120 days to complete service after filing, not the "reasonable" time allowed under rule 4 before it was amended earlier that year. See note 122 *supra*.

174. 585 F.2d 566 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979). See notes 109-25 *supra* and accompanying text for a full discussion of *Ingram*.

175. *Schiavone v. Fortune*, No. 83-1654, slip op. at 3 (D.N.J. Jan. 10, 1984), *reprinted in* Brief of Respondent in Opposition to Petition for a Writ of Certiorari at Appendix A, *Schiavone v. Fortune*, 106 S. Ct. 2379 (1986) (No. 84-1839) [hereinafter Brief of Respondent] (LEXIS Genfed library, Briefs file).

176. *Schiavone*, slip op. at 4 (D.N.J. Jan. 10, 1984).

177. *Schiavone*, slip op. at 4 (D.N.J. Jan. 10 1984).

178. *Schiavone*, No. 83-1654 (D.N.J. Jan. 10, 1984).

179. 590 F.2d 57 (3d Cir. 1978). See also *Lindley v. General Elec. Co.*, 780 F.2d 797, 800 n.7 (9th Cir. 1986) (noting that the Third Circuit, in *Britt v. Arvanitis*, had characterized New Jersey's permissive relation-back scheme as "procedural").

180. *Schiavone*, slip op. at 4 (D.N.J. Jan.10, 1984).

rect a misnomer works a change of party and thus usually falls under the second sentence of rule 15(c), the Advisory Committee contemplated an exception for those misnomer cases where the original and intended defendant share an identity of interest.¹⁸¹ The Third Circuit found “no support in the rule or the advisory committee note for plaintiffs’ proffered exception.” In its view the exception rested on the premise that Time, the intended defendant, derivatively received notice of the action within the deadline specified by rule 15(c). Relying on the Advisory Committee’s note, the court identified that deadline as “the [end of the] applicable limitations period.” The only notice Time had received before the limitations period expired, the court found, was that litigation “might ensue,” and rule 15(c) plainly required notice of the actual “institution of the action.” Time had therefore not received the prescribed notice within the period limited by rule 15(c).¹⁸²

Like the district court, the court of appeals rejected plaintiffs’ argument based on *Ingram v. Kumar* that the notice deadline should be extended to include the time ordinarily permitted by state or federal law for service of process. On this point the court found the language of the rule “clear and unequivocal, requiring that notice to the defendant occur within the statutory period. While we are sympathetic to plaintiffs’ arguments, we agree with the defendant that it is not this court’s role to amend procedural rules in accordance with our own policy preferences.”¹⁸³

Plaintiffs, citing *Erie* and *Walker*, continued to press their position that rule 15(c), even if interpreted to deny relation back, should yield to the more generous relation-back rule of the forum state. The Third Circuit declined to address that argument on the merits, relying entirely on plaintiffs’ purported “concession” that the “New Jersey rule was procedural only.”¹⁸⁴ The court admitted that this concession was “irrelevant to the proper interpretation of New Jersey law” but found it “dispositive of plaintiffs [sic] argument on appeal.”¹⁸⁵ But plaintiffs’ “concession” may in fact have only acknowledged the authority of *Britt v. Arvanitis*. Since *Britt* was decided before *Walker*,¹⁸⁶ which indirectly raised some doubt whether rule 15(c) is “on point” in fixing a

181. *Schiavone*, 750 F.2d 15, 17 (3d Cir. 1984).

182. 750 F.2d at 18.

183. 750 F.2d at 18.

184. 750 F.2d at 18.

185. 750 F.2d at 18-19.

186. *Britt* was decided in 1978, *Walker* in 1980.

notice deadline, the court's disposition of this argument in effect signifies its unwillingness to reexamine *Britt* in light of *Walker*.

2. *The Supreme Court Majority's Opinion*

Plaintiffs petitioned the United States Supreme Court for a writ of certiorari. Time's brief in opposition urged that an expansive definition of the rule 15(c) notice deadline was "properly the subject of the rule-making, and not the adjudicative process."¹⁸⁷ That proposition can be questioned. For example, even without further rulemaking, the Supreme Court could have accepted the expansive interpretation the plaintiffs sought — at least for diversity actions in states that would allow relation back — by placing a *Walker* gloss on the ambiguous language of the notice deadline and attending to the apparent purposes of the 1966 amendments.¹⁸⁸ In any event, Time's argument rings somewhat hollow as applied to a federal rule that had been manhandled through two decades of judicial ministrations without ever gaining the attention of the rulemakers.

Six Justices of the Supreme Court, speaking through Justice Blackmun, began by paying homage to the Rules' overarching goal, expressed in rule 1, of securing "just, speedy, and inexpensive" determinations, and to the particular mandate of rule 8(f) to construe pleadings "so . . . as to do substantial justice."¹⁸⁹ The Court also reaffirmed its previous pronouncement "that the spirit and inclination of the rules [have] favored decisions on the merits, and rejected an approach that pleading is a game of skill in which one misstep may be decisive."¹⁹⁰ Accordingly, the Court might have been expected to spurn an interpretation of rule 15(c) that defeats a plaintiff's entire claim because her lawyer makes a pleading mistake, the correction of which still affords a misnamed defendant fully as much notice as he would be entitled to in federal question and most diversity cases had he been named correctly.

Ultimately, however, the majority was persuaded that the "plain language" of rule 15(c) demands notice to the intended defendant "within the applicable limitations period" — the phrase from the Advisory Committee's note. The Court acknowledged that this deadline

187. Brief of Respondent, *supra* note 175, at 7.

188. Time itself quoted *Harris v. Nelson*, 394 U.S. 286, 298 (1969), to the effect that existing judicial interpretations of a federal rule can be altered if the court, "on conventional principles of statutory construction . . . can properly conclude that the literal language or the intended effect of the Rules indicates that this was within the purpose of the draftsmen or the congressional understanding." Brief of Respondent, *supra* note 175, at 19.

189. 106 S. Ct. at 2383.

190. 106 S. Ct. at 2383 (citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

reflected "an element of arbitrariness" but observed that arbitrariness is "a characteristic of any limitations period. . . . [I]t is an arbitrariness imposed by the legislature and not by the judicial process."¹⁹¹ Indeed, the majority wrote that the rule 15(c) phrase "within the period provided by law for commencing the action against him" was so clear that the Court did not even face "a choice between a 'liberal' approach toward Rule 15(c), on the one hand, and a 'technical' interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language."¹⁹²

In reaching this conclusion, I believe that the Court compounded neglectful rulemaking with slipshod adjudication. It buttressed its strict reading of the deadline phrase through an exercise in selective citation. The Court wrote that the "commentators have accepted the literal meaning of the significant phrase in Rule 15(c) and have agreed with the Advisory Committee's Note."¹⁹³ The accompanying citation quoted a statement contained in the 1985 supplement to a noted treatise coauthored by Professor Wright, to the effect that the intended defendant "must have received notice of the action before the statute of limitations has run."¹⁹⁴ But the Court overlooked the more directly relevant view of the same author expressed in another recently published work. Professor Wright observes in his federal courts hornbook¹⁹⁵ that a court should pause before applying the rule 15(c) notice deadline so as to bar a diversity action which would be considered timely commenced under the law of the forum state. In fact, on the merits, he advances as "the better view" that "the amendment should be allowed, as permitted by state law, even though Rule 15(c) seemingly does not authorize it."¹⁹⁶ Clearly, this construction is more

191. 106 S. Ct. at 2385.

192. 106 S. Ct. at 2385.

193. 106 S. Ct. at 2385.

194. 106 S. Ct. at 2385 (quoting C. WRIGHT & A. MILLER, *supra* note 63, § 1498, at 228 (Supp. 1985)).

195. C. WRIGHT, LAW OF FEDERAL COURTS (4th ed. 1983).

196. *Id.* at 383-85. Professor Wright, noting that the *Erie* problem posed by rule 15(c) "has given the courts much difficulty," wrote that determination of this question presented a "testing case" for the application of *Hanna v. Plumer*. He explained that since, under *Hanna*, a valid Civil Rule is to be applied without more, [there is] an added burden on the Court and those who advise it in the rulemaking process. In formulating a rule the rulemakers must now consider the extent to which application of a proposed rule, in cases where state law is different, is consistent with the proper ordering of the federal system.

Id. at 383. He thus concluded that a federal court's application of a more liberal state relation-back rule would "honor the state's policy decision that a potential defendant's sense of repose is not so important as to prevent resolution on the merits of state causes of action simply because of an excusable mistake in the denomination of the defendant." *Id.* at 383-84. In support of this view Professor Wright cited several of the decisions that led to the intercourt conflict *Schiavone*

closely on point than Professor Wright's general guidance about interpreting the rule 15(c) notice deadline, which might properly have been limited to cases based on federal questions. New Jersey did have a rule which, as construed, may well have allowed relation back on the facts of *Schiavone*. Accordingly, it would appear that the Court misconstrued one of the authorities upon which it relied in determining how much weight to attribute to the "plain meaning" of rule 15(c).

The Supreme Court also failed to mention the permissive New Jersey relation-back law or the resulting *Erie* issue ultimately addressed by the district court and decided, however dubiously, by the Third Circuit. The Court may have been perfectly justified in declining to reach the *Erie* issue. For example, although the order granting certiorari was not limited to particular issues, the petitioners' briefs stressed only two other points.¹⁹⁷ It is precisely such customary constraints of the litigation process, however, which make that process so unsuited for comprehensive treatment of a problem with so many tentacles — even a problem that calls for nothing more than essentially arbitrary solutions.¹⁹⁸

The Court did allude to *Erie* problems indirectly. It noted plaintiffs' protest against a "procedural 'double standard'" whereby Federal Rule 15(c) would bar relation back because of "late notice to a new defendant when a like notice to the original defendant would be timely [under Federal Rule 4(j)]."¹⁹⁹ The reference is apparently to state timely-commencement rules that deem limitations statutes met by filing alone. But the Court made no mention of state rules on relation back, rules obviously more pertinent to the issue in *Schiavone* than rules about timely commencement against defendants named correctly.

Perhaps the Supreme Court, like the Third Circuit, considered the *Erie* question mooted by plaintiffs' "concession." There is at least a

resolved. Yet *Schiavone* decides that issue the other way — New Jersey apparently did have a more liberal relation-back rule — without even confronting the *Erie/Hanna* problem.

197. First, petitioners contended that the initial service of papers naming "Fortune," which was concededly timely under Federal Rule 4, should have been deemed sufficient as against Time under an identity-of-interest exception, which would render the second sentence of rule 15(c) wholly inapplicable. Their fallback position was that even under the second sentence, the deadline for giving notice to the intended defendant should have been construed to include the 120-day period for service provided by Federal Rule 4, as distinct from any grace period allowed by the law of New Jersey. Petitioners' Brief on the Merits, *Schiavone* (No. 84-1839) (LEXIS Genfed library, Briefs file).

198. The Court's explicit refusal in *Walker v. Armco Steel Corp.* to decide whether Federal Rule 3 provides a timely-commencement definition for federal question cases, see text at note 91 *supra*, and the resulting split of authority in applying rule 15(c) to those cases, see text at notes 145-52 *supra*, is another illustration of the point.

199. 106 S. Ct. at 2383.

serious question whether reliance on any such concession would have been justified even had the concession been plain. The Court's strict interpretation of rule 15(c) implicitly overrides the interests of New Jersey in its permissive relation-back rule, and those interests presumably cannot be waived by a party.²⁰⁰ The Court's silence on the *Erie* question in *Schiavone* may reflect its recent inclination to avoid deciding difficult procedural issues by relying on doubtful concessions.²⁰¹ In any event, the Court might at least have explained why it ignored such an apparently substantial issue fairly raised in both the lower courts.²⁰²

As troublesome as the Court's exercise in selective citation is its failure to probe the authority which formed the basis of the Advisory Committee's statement that the intended defendant is entitled to notice within "the applicable limitations period." Isolating this one phrase from a lengthy Advisory Committee note, the Court ignored the specific context in which that phrase appears. Earlier in the same paragraph the Committee had concluded that in "actions between private parties, the problem of relation back of amendments changing defendants has generally been better handled by the courts, but incorrect criteria have sometimes been applied, leading sporadically to doubtful results."²⁰³ In support of that conclusion, the Committee cited, among other works, two popular treatises of the time.²⁰⁴ The cited treatise sections reveal precisely which private-party cases the Committee considered "better handled," as well as the "incorrect criteria" which it believed had produced "doubtful results."

From these decisions which the Committee seemingly endorsed by incorporation, it appears that the dominant judicial tendency before

200. In *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), the Court distinguished the personal jurisdiction from the subject matter jurisdiction defense on the ground that only the former, geared to rights of the individual, is susceptible to waiver. 456 U.S. at 702-03. I am inclined to place *Erie* questions, once timely raised, in the category of nonwaivable objections, since the federal and state interests competing for dominance in any *Erie* calculus more closely resemble the concerns of subject matter jurisdiction than of the purely, or at least largely, individual rights at stake in disputes over personal jurisdiction.

201. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16 & n.10 (majority opinion), 425 n.3 (Brennan, J., dissenting) (1984); Richman, *Book Review*, 72 CALIF. L. REV. 1328, 1339 n.46 (1984); Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEXAS L. REV. 689, 702 n.66 (1987).

202. The Court did say why it rejected plaintiffs' identity-of-interest argument. It found that "there was no proper notice to Fortune that could be imputed to Time" because neither Fortune, the misnamed defendant, nor Time, the intended defendant, received any notice of the institution of the action until after the limitation period had expired. 106 S. Ct. at 2384.

203. Advisory Committee note, *supra* note 43, 39 F.R.D. at 83.

204. 1A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 451 (Wright ed. 1960); 1 *Id.* § 186; 2 *Id.* § 543; 3 MOORE'S FEDERAL PRACTICE ¶ 15.15 (cum. supp. 1962).

the 1966 amendment was to allow relation back in misnomer or misdescription situations whenever the intended defendant was likely to have received reasonably timely notice of an action against him through service of papers denominating him incorrectly. Most important, in many of these cases the original, flawed service was not made on the intended defendant or its agent until *after* the period of limitations had expired. Upholding the effectiveness of corrected service after the limitations period was consistent with the then-prevailing understanding that timely commencement of federal actions required only filing, provided that service was made within a reasonable time thereafter.²⁰⁵

The treatise sections the Advisory Committee cited in turn cite fourteen relevant decisions. In ten of these, relation back was allowed.²⁰⁶ Yet only one of these ten opinions provides facts sufficient to show unequivocally that the intended defendant was served with the original, flawed complaint before the last day of the period of limitations.²⁰⁷ By contrast, in the most recent appellate opinion in this group, it is explicit that service of the original, flawed complaint was *not* made before the last day of the period of limitations, and the defendants were not served with an amended complaint until a month later.²⁰⁸ In other words, the "right party was before the court, although under a wrong name,"²⁰⁹ simply because the complaint had been filed before the expiration of the limitations period; that filing, coupled with notice within a reasonable time after the statute of limitations ran, sufficed for relation back.

With one exception,²¹⁰ each of the other opinions that allows relation back fails to provide facts from which it may be determined whether actual notice, through service of the original flawed complaint or otherwise, was received by the intended defendant before the last

205. See *Harris v. Stone*, 115 F. Supp. 531 (D.D.C. 1953) (for statute of limitations purposes, an action is commenced by the filing of the complaint together with timely delivery of process to the United States Marshal). *But see* note 216 *infra*.

206. *Jackson v. Duke*, 259 F.2d 3 (5th Cir. 1958); *Grandey v. Pacific Indem. Co.*, 217 F.2d 27 (5th Cir. 1954); *United States v. A.H. Fischer Lumber Co.*, 162 F.2d 872 (4th Cir. 1947); *County Theatre Co. v. Paramount Film Distrib. Corp.*, 166 F. Supp. 221 (E.D. Pa. 1958); *Sechrist v. Palshook*, 97 F. Supp. 505 (M.D. Pa. 1951); *Williams v. Pennsylvania R.R.*, 91 F. Supp. 652 (D. Del. 1950); *Stevenson v. Richardson County, Neb.*, 9 F.R.D. 437 (D. Neb. 1949); *Hartford Accident & Indem. Co. ex rel. Silva v. Interstate Equip. Corp.*, 81 F. Supp. 357 (D.N.J. 1948); *Bowles v. Underwood Corp.*, 5 F.R.D. 25 (E.D. Wis. 1945); *Bowles v. Marx Hide & Tallow Co.*, 4 F.R.D. 297 (W.D. Ky. 1945).

207. *Hartford Accident & Indem. Co. ex rel. Silva v. Interstate Equip. Corp.*, 81 F. Supp. at 357, 358.

208. *Jackson v. Duke*, 259 F.2d at 5-7.

209. 259 F.2d at 5-7.

210. In *Williams v. Pennsylvania R.R.*, 91 F. Supp. at 652, 653, completion of service within the limitations period is fairly inferable from the dates mentioned in the opinion.

day of the period of limitations. Nevertheless, the courts permitted relation back in each case on the theory that the proposed amendment sought to correct a mere misnomer or misdescription and that a timely filed complaint was served eventually, either before or after the last date of the period of limitations.²¹¹ The only constant factor in these decisions is that the proposed amendments were not perceived as adding a "new party," which apparently meant a person or entity distinct from the originally misnamed or misdescribed defendant.²¹²

The leading case, which the ten decisions quote extensively, is *United States v. A.H. Fischer Lumber Co.*²¹³ In allowing the relation back of an amended complaint which corrected both a misnomer and a misdescription, the Fourth Circuit observed that process had been served upon an officer of the intended defendant corporation authorized to receive service and that no one was misled by the original mistakes. The court concluded that if process names or identifies the defendant "in such terms that every intelligent person understands who is meant . . . it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else."²¹⁴ Again, the court treated simple filing of the complaint as sufficient to permit relation back.²¹⁵

The Advisory Committee may therefore have understood the "applicable limitations period" to include the reasonable time after the expiration of the limitations statute which the Federal Rules then allowed for timely service of a complaint, at least in federal question cases.²¹⁶ The decisions which the Committee apparently approved

211. Typical of these decisions is *Sechrist v. Palshook*, 97 F. Supp. 505 (M.D. Pa. 1951). It cannot be ascertained from the report of that case whether service was made, or any other form of notice provided, before the expiration of the limitations period. Nevertheless, because service was made (before or after the limitations period expired) on an agent of the intended defendant, the court concluded that the amendment merely sought to correct a misnomer of a "party already in Court" who had received "adequate notice [whenever given] of the pendency of the action" and who therefore "would not be prejudiced in any way" by the relation back of the amended complaint. 97 F. Supp. at 506-07.

212. Three of the four decisions that deny relation back found that the proposed amendment would have added a "new party" against whom no action had been timely commenced before the limitations period ran. *Florentine v. Landon*, 114 F. Supp. 452 (S.D. Cal. 1953); *Kerner v. Rackmill*, 111 F. Supp. 150 (M.D. Pa. 1953); *Sanders v. Metzger*, 66 F. Supp. 262 (E.D. Pa. 1946). In *Kerner* and *Sanders*, the courts concluded that the original summons and complaint fairly gave notice of an intent to sue only an individual affiliated with a corporation rather than the corporation itself. The corporation was correctly named for the first time by an amended complaint which was filed after the statute had run.

213. 162 F.2d 872 (4th Cir. 1947).

214. 162 F.2d at 873.

215. This is implicit in the context of the court's quotation from a treatise, 39 AM. JUR. *Parties* § 124 (1942), to the effect that relation back should be allowed even if a statute of limitations runs after a suit has been commenced by filing. 162 F.2d at 874.

216. Curiously, and perhaps advertently, none of the opinions discusses *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). *Ragan* held that in a diversity case a forum-

either explicitly or implicitly equated timely commencement with filing alone. None suggested that an intended defendant whose name, identity, or capacity is corrected by amendment is entitled to any better notice than that received by a correctly named defendant whose first notice of an action comes through service after a limitations period expires.²¹⁷

Alternatively, the Advisory Committee's reference to the "applicable limitations period" may simply have reflected its recognition of the Supreme Court's decision in *Ragan*²¹⁸ that a federal diversity court must apply the state's own definition of timely commencement: *if* a state requires a defendant to be served with process before a limitations period expires, so must a federal district court. Thus the Committee may have contemplated that in some federal question cases, a federal court would use a federal statute of limitations as well as federal common law to determine whether filing, service, or both are requisite to timely commencement, while in federal question cases for which no period of limitations is provided, or in diversity cases, the federal court would use state limitations periods together with their associated incidents, including state rules of tolling and timely commencement.

On this alternate understanding, the Committee's reference to an "applicable" limitations period works hand in glove with the "against him" language in the text of the rule 15(c). A given state statute of limitations expires on a fixed date after the accrual of a particular claim; but with regard to any particular defendant, a diversity suit relates back "against him," despite service after that date, if the complaint is filed before service and if filing alone satisfies the forum state's rules on timely commencement.²¹⁹ Or "the period provided by law" for purposes of the rule 15(c) notice deadline might be furnished by a state's law on relation back rather than its law on ordinary timely commencement. Yet another possibility is the measure of timeliness used in federal question cases, where lenient federal common law

state law that requires service of process to be completed before the running of the statutory period controls over any contrary implications of Federal Rule 3. See text at notes 90, 112 *supra*.

217. No good reason has been advanced for conferring more repose on intended defendants incorrectly named in an original complaint than on those named correctly. The defendant in *Schiavone* advanced the justification that *plaintiffs* who have caused flawed process to be served at or near the end of a limitations period "are not in the same positions as plaintiffs who have sued a properly named defendant within the limitations period; if they were, there would be no need for Rule 15(c)." Brief of Respondent, *supra* note 175, at 12. This distinction, though, focuses on the relative equities of plaintiffs, ignoring the focus on defendants which is at the heart of the policy of repose. See *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965).

218. 337 U.S. 530 (1949); see note 216 *supra*.

219. *Schiavone*, 106 S. Ct. at 2388 (Stevens, J., dissenting).

marks filing as the critical event and accordingly allows service within any reasonable time thereafter.²²⁰ If this is “the period provided by law” that supplies the rule 15(c) notice deadline, relation back would be as expansive as timely commencement in federal question cases, eliminating the federal/federal anomaly; but in many diversity cases, relation back would be more expansive than the strict approach to timely commencement followed by a significant minority of the states, creating a federal/state anomaly just the converse of the one created by *Schiavone*.

Perhaps, however, the Advisory Committee meant to prefer no one of these plausible meanings of “provided by law” over any other, but rather to refer to whatever timely-commencement rule would apply to the particular kind of case had no naming mistake been made. In other words, by using the phrase “the period provided by law” in the text of the rule, and by explaining in the accompanying note that this phrase denotes the “applicable” period of limitations, the Committee may have intended neither the last day of a statute of limitations nor any universally applicable deadline for giving notice to a misnamed defendant. Instead, it may have incorporated for relation-back purposes whatever notice deadline, with or without grace period, would control the fate of a limitations defense in the ordinary case of a correctly named defendant, either under federal law (in federal question actions) or the law of a particular state (in diversity actions). In diversity cases, the state law referenced by rule 15(c) could theoretically denote either rules about timely commencement or rules about relation back. On reflection, however, this theoretical ambiguity disappears. Since by hypothesis rule 15(c) would clearly include an incorporated (although variable) notice deadline for relation back, it should, by force of *Hanna*, supplant any inconsistent state rule on that subject. The rule 15(c) notice deadline therefore would be supplied by the state’s law on timely commencement.

Whatever the merits of these several interpretations of “the period provided by law,” they suggest sufficient ambiguity in the text of rule 15(c) to draw into question the Court’s conclusion that the rule’s language is “plain.” That ambiguity should have led the Court to seek interpretive guidance in the specific history of the 1966 amendment and in the generally stated goals of the Federal Rules as a whole. Bathed in either of those lights, the Court’s construction is at least doubtful. It expresses more than anything the yearning for a simplicity that just isn’t there.

220. See text at notes 145-52 *supra*.

3. *The Dissent*

Justice Stevens, writing for three dissenters in *Schiavone*, first argued that the amendment substituting "Time, Inc." for "Fortune" did not effect a change of party and therefore ought not be tested against the stringent requirements of the second sentence of rule 15(c). He explained that "the technical correction" made by the amendment "added absolutely nothing to any party's understanding of 'the party against whom' the claims were asserted."²²¹ Because the plaintiffs had alleged in the body of the original complaint that Fortune's principal offices were located at Time's place of business, Justice Stevens found that "the difference between the description of the publisher of Fortune in the original complaints and the description of the publisher of Fortune in the amended complaints is no more significant than a misspelling" or misdescription.²²²

On the assumption that the amendment did change a party and that the second sentence of the rule therefore applied, Justice Stevens then tackled the meaning of the rule 15(c) deadline phrase. He stressed that the words "against him" are crucial because they indicate that the notice deadline does not refer just to the last date of the limitations period, but also to any later time provided by state or federal law for the action to be "implemented by the service of process."²²³ In this connection he noted that the late Benjamin Kaplan, as reporter for the Advisory Committee, had criticized the *Martz* anomaly in an article published a year after the effective date of the amendments. Justice Stevens found it curious that the "majority, in relying on the Advisory Committee interpretation, ignores the reporter's almost contemporaneous understanding."²²⁴

The *Schiavone* holding is equally vulnerable to the criticism that it creates the purely federal anomaly. Service of the original and even the amended complaints against Time would have been timely under Federal Rule 4(j) if Time had been named correctly; that same service, under a strict reading of the rule 15(c) phrase, is held inadequate only because Time was named incorrectly. Time's agent understood from the outset that plaintiffs intended to sue Time. Thus Justice Stevens considered the notice Time received through service of the original

221. 106 S. Ct. at 2387.

222. 106 S. Ct. at 2388.

223. 106 S. Ct. at 2388. From the accompanying footnote, which quotes approvingly from *Ingram v. Kumar*, it appears that Justice Stevens has in mind state rules permitting service of process after a limitations period expires. His point seems equally applicable to federal question cases, which even after *Walker* may be timely commenced by rule 3 filing alone. See text at notes 145-46 *supra*.

224. 106 S. Ct. at 2389 n.4.

complaint, four days after the limitations period expired, "just as timely and just as informative as that which would have been received [under rule 4(j)] if no mistake had occurred."²²⁵ He concluded that the notice Time received would not have prejudiced it in maintaining its defense on the merits, the ultimate standard expressed in the second sentence of rule 15(c).²²⁶

The dissent took the majority to task most strenuously on the question of the amenders' intent. The cases which "gave rise to criticism of the Rule and the addition of the second and third sentences of its present text," Justice Stevens wrote, were the government-defendant cases in which relation back had been denied — not the private-party cases in which relation back had been allowed under the loose "arising out of" test which then constituted the entire text of the Rule. He considered it ironic that "it is the language added by the amendment in 1966 to broaden the category of harmless pleading errors which the Court construes today to narrow that category."²²⁷ As a different majority of the Court was to comment a week later in disapproving a court of appeals' construction of the 1963 amendment to rule 56(e), "an amendment . . . designed to *facilitate* the granting of motions" was thus "interpreted to make it *more difficult* to grant such motions."²²⁸

F. *The Loose Ends of Litigation*

Justice Stevens also identified a loose end that *Schiavone* leaves dangling. He found it quite possible, given the Court's rationale regarding the supposed clarity of the deadline phrase, that the Court "would enforce an equally harsh construction of the Rule if the scrivener's error had been a mere misspelling, or perhaps a reference to Time, Inc. instead of Time, Incorporated."²²⁹ This, however, is not the most important residual uncertainty about the majority opinion. It is not evident that the Court would enforce its narrow reading of the rule in all diversity actions or in any actions based on federal questions.

There are three principal patterns of state timely-commencement rules. About a third of the states accommodate plaintiffs by treating the filing of a complaint, without more, as commencing an action for purposes of limitations. These states require only that service be ac-

225. 106 S. Ct. at 2389.

226. 106 S. Ct. at 2388-89.

227. 106 S. Ct. at 2389.

228. *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2554 (1986) (emphasis in original).

229. 106 S. Ct. at 2389-90.

completed within a specified or reasonable time after filing. Roughly another third erect requirements only slightly more stringent. In these states the plaintiff must not only file the complaint but also issue or deliver the summons to a designated officer before the limitations period runs; service may still be accomplished afterwards. The remaining states follow the strict approach — the one probably most consonant with the principal purposes of a statute of limitations — which demands that the defendant be served with process (or receive some substitute form of notice) before the limitations period expires.²³⁰

The conventions of adjudication erode our confidence that the Court would want the *Schiavone* interpretation of the rule 15(c) deadline phrase to prevail over the more liberal timely-commencement or relation-back rules of a forum state. New Jersey's timely-commencement law was not relied on at all, either in the district court or on appeal, and the Supreme Court alluded to the timely-commencement anomaly only in passing. Moreover, the Third Circuit, citing a supposed concession by plaintiffs' counsel that New Jersey's liberal relation-back rule was merely "procedural," ducked that issue altogether, and the issue of state relation-back law never resurfaced in the Supreme Court. *Schiavone* therefore leaves for still more litigation the question whether rule 15(c), as there construed, should prevail when the forum-state law would unquestionably lead to a different result.

Consider, for example, a diversity case factually on all fours with *Schiavone*, but with the *Erie* conflict raised squarely and not deemed resolved by concession. In *Hanna* terms, the first question would be whether rule 15(c) is "on point." After *Walker* it is arguable that rule 15(c) is not *comprehensively* on point. That rule's definition of timely commencement is only somewhat more pointed than that of rule 3, and the Court in *Walker* found that rule 3 does not speak to limitations at all. Nevertheless, *Schiavone* does find a notice deadline in rule 15(c), the last date of the period of limitations.

From the Court's treatment of rule 3 in *Walker*²³¹ one would not have expected the Court to give rule 15(c) such broad sway. Even though rule 3, certainly more than any other federal rule, appeared on its face to define filing as the event that would timely commence an action against a correctly named defendant, *Walker* concluded that

230. Annotation, *Tolling of Statute of Limitations Where Process is Not Served Before Expiration of Limitation Period*, 27 A.L.R.2d 236 (1953 & Supps. 1970, 1978, 1981 & 1987); 54 C.J.S. *Limitations of Actions* §§ 265-68 (1948 & Supp. 1987). These patterns were well established when the Federal Rules were first adopted. 2 J. MOORE, *supra* note 68, § 3.03.

231. See text at notes 88-91 *supra*.

rule 3 had nothing to say on that subject, at least in diversity cases. Yet *Schiavone* now tells us that a cognate timely-commencement rule is implicit in rule 15(c) with respect to defendants who were not correctly named in the first instance. Putting *Walker* and *Schiavone* together, the Court would have us believe that with rule 3 it did not promulgate a general purpose timely-commencement rule for the usual case of a correctly named defendant, but that with rule 15(c) it did promulgate a timely-commencement rule for the far less common occurrence of misnamed or misidentified defendants.

If the *Erie* issue were squarely on the table, the Court might continue to view rule 15(c) as comprehensively on point and therefore, under *Hanna*, dominant over inconsistent rules of a forum state. But perhaps, with the matter put directly, the Court might look at the rule 15(c) deadline phrase more closely, revert to *Walker's* mode of interpreting rule 3, accordingly decide that the rule 15(c) deadline phrase no more defines timely commencement for relation-back purposes than rule 3 defines timely commencement in the ordinary case, conclude that the federal/state clash is illusory, and ultimately hold that federal law should borrow state timely-commencement law to fill the gap in rule 15(c).

Next, even if we assume that the Court would continue to consider rule 15(c) fully on point, the *Erie* analysis requires us to ask if rule 15(c) should nevertheless yield to state law. The Supreme Court has not yet subordinated to state policies a federal rule which it has expressly found to be on point, but the rule 15(c) deadline phrase could prove a testing case.²³² It is not controverted that a state's interest in the policies underlying the selection of a limitations period is a "substantive" state concern to which a federal diversity court must defer.²³³ Thus the key inquiry would focus on the closeness of the relationship between a state's relation-back law and its underlying limitations policies.

In a related context, the Court itself has twice recently written that state "tolling" provisions are inseparable from the limitations periods they regulate. The Court has accordingly held that federal courts which borrow state limitations periods in federal question cases must also borrow state rules on tolling²³⁴ and its consequences.²³⁵ Further, although *Walker* retrospectively rationalizes the *Ragan* command (that federal diversity courts follow state timely-commencement rules)

232. C. WRIGHT, *supra* note 195, at 384.

233. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

234. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980).

235. *Chardon v. Fumero Soto*, 462 U.S. 650 (1983).

as resting on the absence of any federal law to the contrary, this is surely revisionist history. A dispassionate reading of *Ragan* reveals that the Court at least assumed that Federal Rule 3 dealt with the timely-commencement issue but concluded that stricter state rules must prevail because they are so integrally related to the operation of underlying statutes of limitations.²³⁶

It is difficult to discern why state relation-back rules are any less bound up with basic limitations policy than state rules on tolling or timely commencement. Indeed, the rule 15(c) Advisory Committee wrote that relation back is "intimately" connected with the policy of a statute of limitations.²³⁷ Furthermore, the opposing federal interests in a comprehensive relation-back scheme are conspicuously weak: an uncertain interest in a uniform rule,²³⁸ and a most doubtful interest in erecting formidable barriers to relation back.²³⁹

In other words, the Court could find rule 15(c) comprehensively on point and "procedural" within the meaning of the Rules Enabling Act²⁴⁰ but nevertheless hold that its early notice deadline must bow to more flexible timely-commencement or relation-back rules of a forum state. A substantial question remains, even after *Hanna*, about the constitutionality of applying a federal rule so as to trench on deeply held state limitations policy.²⁴¹ The Court might agree that the subsidiary rules regulating the mechanics of limitations decisions form an integral part of general state limitations policies. If so, it might further conclude that those policies would be substantially undermined by a rule 15(c) override, since the *Schiavone* interpretation would mandate the *Martz* anomaly in the roughly two-thirds of the states that permit suits against correctly named defendants who are first notified of lawsuits only after a limitations period runs out.

The Court would then face the decision whether *Schiavone* so sub-

236. See *Ringrose v. Engelberg Huller Co.*, 692 F.2d 403, 411 (6th Cir. 1982) (Jones, J., concurring) (noting that state commencement of suit rules are essential components of state limitations schemes).

237. Advisory Committee note, *supra* note 43, 39 F.R.D. at 83.

238. After *Walker*, there is no uniform national approach to timely commencement against defendants correctly named. It would therefore seem that a uniform notice deadline for the far fewer cases raising relation-back problems would achieve only patchwork uniformity in this area.

239. In the words of a noted treatise, it was not the purpose of rule 15(c) "to raise a limitations bar that is not supported by the underlying state rule." 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 159, § 4509, at 159. To the contrary, the apparent liberalizing thrust of the 1966 amendment, see text at notes 56-57 & 206-19 *supra*, and the more general encouragement the Rules give to amended pleadings, see FED. R. CIV. P. 15(a), suggest that there is little or no federal interest favoring a rigid approach to relation back.

240. 28 U.S.C. § 2072 (1982).

241. See note 196 *supra*. See also Ely, *supra* note 142, at 726-27 (contending that a federal rule prescribing a period of limitations would offend the Enabling Act's prohibition on rules that abridge substantive rights).

stantially interferes with these state policies as to invoke *Hanna's* hypothetical discussion of situations where even an on-point federal rule should give way.²⁴² On this question the Court could try to distinguish state rules on ordinary timely commencement from state rules on relation back. The Court could point out, for example, that the divergence between a strict approach to rule 15(c) and more liberal state relation-back rules will do less violence to general *Erie* policies than would a divergence between Federal Rule 3 and state rules on ordinary timely commencement — if only because relation back/misnomer problems occur less frequently. But that explanation might not sit too well. Is it entirely coincidental that the Court has respected state policies when, as in *Ragan* and *Walker*, they are conducive to strict limitations enforcement but has disregarded them when, as in *Schiavone*, they have the effect of reviving an action otherwise barred?

There is somewhat more ground for confidence that the Supreme Court would apply the strict *Schiavone* interpretation to federal question cases, despite *Schiavone's* discontinuity with the prevailing interpretation of Federal Rule 3.²⁴³ Applied to federal questions, the Court's niggardly linguistic interpretation of Federal Rule 15(c) would be unopposed by contrary policies of the states. There would therefore be none of the *Erie* impetus for generous judicial handling of relation back that might arguably control this issue in diversity actions in many states. Still, since jurisdiction in *Schiavone* itself rested on diversity, the Court had no occasion to consider such arguments as the desirability of relation back to preserve federal question claims. We therefore cannot be entirely sure that *Schiavone's* holding would extend to cases based on federal law.

If the Court were to extend *Schiavone* to federal question cases, an action against a correctly named federal question defendant would usually continue to be timely commenced by rule 3 filing alone,²⁴⁴ but relation back would be available only against those incorrectly named defendants who receive the requisite notice before a limitations period expires. This haphazard result would echo an existing, even more disturbing discontinuity resulting from the Court's construction of the Rules. The *Schiavone* majority rejected plaintiffs' argument that "the period provided by law" in rule 15(c) should be defined with reference to the 120-day service period of rule 4 by observing that "Rule 4 deals only with process." Instead, the Court borrowed its rule 15(c) gap-filler from rule 3, observing that "[u]nder Rule 15(c), the emphasis is

242. *Hanna*, 380 U.S. at 465-71.

243. See text at notes 145-46 *supra*.

244. See text at notes 145-46 *supra*.

upon 'the period provided by law for commencing the action against' the defendant," and "Rule 3 concerns the 'commencement' of a civil action."²⁴⁵ Yet "commencement" as used in rule 15(c) has meaning only as a component of a limitations scheme, and in *Walker* the Court concluded that rule 3 has no limitations significance whatever — at least for actions which, like *Schiavone*, are founded on diversity.

III. PRESCRIPTIONS

A. Rules Versus Decisions

To observe that *Schiavone* failed to wrap up these loose ends is not to fault the scope of the Court's opinion. Certainly any observations the Court might have made about relation back in federal question cases could be justly branded as dictum. Rather, *Schiavone*'s failure to treat such questions is the inevitable byproduct of an underlying systemic deficiency. The federal judicial system as a whole has failed in trying to resolve a multifaceted problem surrounding the interpretation of an amended federal rule through piecemeal adjudication instead of more rulemaking.

To be sure, even extensive amendment of the terms of a procedural rule will not forestall many potential disputes about its meaning or application. These must be addressed, at least initially, through case-by-case adjudication.²⁴⁶ A recent reporter to the Advisory Committee on the Civil Rules suspects that some number of years of experience

245. 106 S. Ct. at 2385.

246. Adjudication can finally dispose of some loose ends, but it is ill suited to tie up significant numbers of them at once. For example, *Schiavone* does seem to resolve that rule 15(c) requires notice of the actual institution of the action, not merely notice that an action might ensue or that a potential plaintiff was asserting a right. 106 S. Ct. at 2385 (quoting Advisory Committee note, *supra* note 43, 39 F.R.D. at 83). This issue, however, was not in great doubt. The lower federal courts had already generally agreed that newly named defendants must get notice of the institution of the action, not merely of the facts giving rise to litigation. See *Archuleta v. Duffy's, Inc.*, 471 F.2d 33, 35-36 (10th Cir. 1973); *Craig v. United States*, 413 F.2d 854, 858 (9th Cir.), *cert. denied*, 396 U.S. 987 (1969); *Bazzano v. Rockwell Intl. Corp.*, 439 F. Supp. 1167, 1171-72 (E.D. Mo. 1977), *revd. on other grounds*, 579 F.2d 465 (8th Cir. 1978); see also Note, *supra* note 23, at 682 & n.82. *But see* *Patterson v. White*, 51 F.R.D. 175, 177 (D.D.C. 1970) (noting that defendant had received no timely notice either of the institution of the lawsuit or of its involvement with the incident).

Similarly, by quoting approvingly from the Advisory Committee's 1966 note, the Supreme Court made it plain that the required notice "need not be formal." Adequate notice may instead reach the intended defendant wholly outside the channels of a lawsuit or, after an action commences, through documents or events other than service of process. See 106 S. Ct. at 2385. This proposition, too, enjoyed widespread acceptance among the lower federal courts before *Schiavone*, even by courts adopting the strictest approach to the deadline for the required notice. See *Korn v. Royal Caribbean Cruise Line*, 724 F.2d 1397 (9th Cir. 1984); *Trace X Chem., Inc. v. Gulf Oil Chem. Co.*, 724 F.2d 68 (8th Cir. 1983); *Longo v. Pennsylvania Elec. Co.*, 618 F. Supp. 87 (W.D. Pa. 1985); *Deal v. Cincinnati Milacron Mktg. Co.*, 35 Fed. R. Serv. 2d (Callaghan) 138 (S.D. Ga. 1982); *Lerman v. Chuckleberry Publishing, Inc.*, 544 F. Supp. 966 (S.D.N.Y. 1982); *Swartz v. Gold Dust Casino, Inc.*, 91 F.R.D. 543 (D. Nev. 1981); *Kasko v. American Gage & Machine Co.*, 90 F.R.D. 162 (E.D. Pa. 1981). Thus neither of these side issues that *Schiavone*

with litigation may be required before it is appropriate to reevaluate a rule.²⁴⁷ But there comes a time when the accumulated results of adjudication yield diminishing returns. In the case of rule 15(c), that time came many years before *Schiavone*. If, as with rule 15(c), a federal rule presents interpretive difficulties that are susceptible of arbitrary resolution, I see no good reason to consign still more lawyers and judges to wallowing around in the adjudicative abyss when crisp answers are only a statute away.

I am not predicting the likely outcome of further rule 15(c) litigation in the wake of *Schiavone*; while I may be arguing, not too strenuously, that some departures from *Schiavone* may be desirable, that is not the point. The point is that if this procedural morass continues to be handled by judicial decision alone, all the potential escape valves will continue to invite relitigation.

The possibility of such relitigation is not chimerical. Since *Schiavone*, one court of appeals has already been called on to decide a rule 15(c) question far less troublesome than those raised by state relation-back or timely-commencement provisions more generous than the deadline of rule 15(c). The Fifth Circuit, applying *Hanna*, has now held that rule 15(c), which allows for the relation back of transactionally related amendments even if the originally asserted claims were time barred when filed, displaces a forum state rule that restricts relation back to predicate allegations which were themselves asserted timely.²⁴⁸ Given the seemingly liberalizing purposes of the 1966 amendment, it will be even less surprising to encounter challenges to the applicability of rule 15(c) when the rigors of *Schiavone* would deny relation back that the forum state's law would allow.

Quite a few lawyers, confronted with dismissal under *Schiavone*, may be expected to mount heroic and creative efforts to limit its reach or carve out exceptions to its rule. This is particularly likely because, from the plaintiff's perspective, the alternative to making such arguments is the death of a federal lawsuit. I venture that far fewer lawyers would succumb to this temptation if a revised rule 15(c) were to deal with the principal permutations of the problem that are presented by all federal question cases and by diversity actions pending in states with flexible rules about timely commencement or relation back.²⁴⁹

apparently resolved had been seriously controverted. See generally FED. PROC. L. ED. § 62:321 (1984).

247. Arthur Miller Describes Federal Rules Revision Process, *Changes in Law School Environment*, THIRD BRANCH, Nov. 1986, at 1, 10 (interview with Arthur Miller).

248. *Johansen v. E.I. DuPont De Nemours & Co.*, 810 F.2d 1377, 1380 (5th Cir. 1987).

249. A preliminary draft of a proposed amendment to rule 15(c) recently considered by the Advisory Committee makes progress in this direction. It replaces the "period provided by law"

By its very design, a revised federal rule would dictate unitary resolutions of entire classes of cases. Those classes, while sharing some common characteristics, would admittedly be distinguished by others. In this sense it is true that the revised rules, like the existing rules, would be subject to condemnation as "arbitrary." But the arbitrariness of the revised, more particularized rules would be no different in kind from the arbitrariness of the existing, more general rules; if the particularized rules address issues which, like relation back, call peculiarly for arbitrary solutions, the aggregate cost to individualized "justice" should be easily eclipsed by the incremental gain in predictability and efficiency. If, in turn, greater efficiency translates into the speedier disposition of some federal civil actions, it should pro tanto enhance (assuming constant resources) the federal judicial system's capacity to devote greater time and attention to other issues — issues on which the investment of time and attention may in fact improve the quality of justice.

B. Rules Reform and Congestion

The history of rule 15(c) leaves little doubt that a legislative definition of "within the period provided by law for commencing the action against him" would have saved federal judges and their supporting personnel a good deal of time. A broader question is whether reinvention of the federal civil rulemaking process would promote a general easing of calendar congestion. Reform is fine, but ultimately the game may not be worth the candle unless it addresses the most serious and persistent complaint about the federal civil system: judicial delay.

Of all the issues that contribute to delay in civil litigation, surely the least rewarding are those clustered under the general heading of procedural litigation. I have in mind here not just the motion practice generated by such "substantive" procedural defenses as personal jurisdiction, venue, service of process, or limitations. Equally capable of producing delay are such clearly ancillary matters as the bona fides of a lawyer's pleading under amended Federal Rule 11 or calculations of

phrase of the current rule with the "time allowed under rule 4 for service of a summons" in a timely filed federal action. The proposal thus stipulates a fixed, 120-day period after filing within which the intended defendant must receive the notice specified by rule 15(c).

It has already been necessary since *Schiavone* for an appellate court to decide that the 15(c) period, which the Committee's proposed amendment would at last precisely prescribe, prevails notwithstanding a less generous period prescribed by the relation-back law of the forum state. See note 248 *supra* and accompanying text. The proposed amendment should probably also anticipate the mirror-image issue by expressly adding that the Committee favors application of the 120-day service period of rule 4 "irrespective of whether state law provides less time or an open-ended time for relation back in the courts of the forum state." The last question — whether an open-ended state relation-back period prevails over the notice period of rule 15(c) — was the subject of litigation even before *Schiavone*. See text at notes 131-43 *supra*.

reasonable attorneys' fees to prevailing parties, both of which turn on a complicated, unprincipled "balancing" of multiple unweighted factors. It is in this latter realm that Congress (or any legislature) could fashion rules which, while necessarily arbitrary (and hence of a character well suited for legislative mandate), will at the same time promote the efficient regulation of disputes without palpable harm to justice between the parties.

Further, in intervening on such matters; Congress need not fear that it would be poaching on the judicial preserve. On subjects like the relation back of party-changing amendments, there is little or no need, at least after a point, to hatch substantive policy through case-by-case evolution. Nor would legislation on such issues offend the constitutional limits on legislation suggested in *Erie*, or the parallel prohibition of the Rules Enabling Act against rules that abridge, enlarge, or modify substantive rights.²⁵⁰ Finally, aside from serving the end of efficiency, intervention to clear up a rule like 15(c) might also meliorate some of the more obviously absurd diversity wrinkles bequeathed by the common law.

The residue of *Schiavone* is a disturbing instance of the problem. A federal diversity defendant served with process that names and identifies him correctly, but reaches him after a statute of limitations has run, will be subject to liability if (but, after *Walker*, only if) the forum state's law considers suit timely commenced by filing alone. Yet *Schiavone* dictates that this same defendant will elude liability if, fortuitously from his standpoint, the original summons misstates his identity or is mistakenly served on another. The incongruity is even more pronounced in timely filed federal question cases, regardless of where those actions may be brought.²⁵¹ A revised rule, although necessarily arbitrary, would more likely treat like cases alike.

Battle-hardened commentators differ sharply about the capacity of procedure in general, and rules in particular, to ease congestion or delay.²⁵² Judge Weinstein, for example, enunciates the traditional

250. See *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941); C. WRIGHT, *supra* note 195, at 383.

251. Correctly named defendants will be caught (by virtue of the prevailing, post-*Walker* interpretation of Federal Rule 3), while incorrectly named or served defendants will escape (by virtue of the likely application of *Schiavone*). See text at note 244 *supra*.

252. A small sample of the burgeoning literature on this subject includes ABA ACTION COMMISSION TO REDUCE COURT COSTS AND DELAY, *ATTACKING LITIGATION COSTS AND DELAY* (1984); *Symposium: Reducing the Costs of Civil Litigation*, 37 RUTGERS L. REV. 217 (1985); A. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* 2-11 (Federal Judicial Center 1984) (noting the explosion of federal court litigation and attempts by the Advisory Committee on Civil Rules of the Judicial Conference of the United States to address the problem through federal rulemaking proposals); Weller, Ruhnka & Martin, *American Experiments for Reducing Civil Trial Costs and Delay*, 1 CIV. JUST. Q. 151 (1982); T. CHURCH,

view that “rulemaking power . . . extends the reach of judicial power by promoting judicial efficiency and by permitting a single decision — whether in a case or by a rule — to have a wider impact.”²⁵³ The relative disadvantages of litigation have recently been catalogued as follows: “[A] single proceeding can be very expensive and time-consuming. . . . [T]he expensive process of formal adjudication may have to be repeated in subsequent cases. . . . [R]ules of conduct extracted from an adjudication tend to be considerably less clear in scope and content than rules that result from rulemaking.”²⁵⁴ Put more positively, “the rigors of rule making uniformity can be ameliorated by interpretation in adjudication, while the mere existence of a rule will forestall many potential cases or provide the basis for summary disposition of many others.”²⁵⁵

By contrast, Professor Wright, who has been a member of the Advisory Committee’s Standing Committee on Practice and Procedure, reached the “unhappy conclusion” almost twenty years ago that procedural reform should not be expected significantly to reduce court congestion or delay.²⁵⁶ He relied in part on contemporaneous studies conducted by the Project for Effective Justice (under the supervision of Professor Maurice Rosenberg, an Advisory Committee member), which pointed to the lack of evidence that such remedies as the use of masters, the pretrial conference, or adoption of a comparative negligence rule had improved judicial efficiency. Indeed, in Professor Rosenberg’s words, the “chief effect” of procedural devices is “not so much to change the speed of the flow of cases through the courts as to change their results.”²⁵⁷

This pessimistic view echoes today. Chief Judge Wald of the United States Court of Appeals for the District of Columbia Circuit, citing the report of the ABA Commission to Reduce Court Costs and Delay,²⁵⁸ writes that the “legal culture” (more precisely, the culture of lawyers) “easily triumphed over such reforms as appointment of more

A. CARLSON, J. LEE, T. TAN, K. CHANTRY & L. SIPES, *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* (1978). For an earlier look at the “mid-century law explosion” and its consequences, see *THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION* (H. Jones ed. 1965) [hereinafter *THE COURTS*].

253. Weinstein, *supra* note 5, at 911.

254. R. PIERCE, S. SHAPIRO & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 283-84 (1985).

255. Bernstein, *The NLRB’s Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 *YALE L.J.* 571, 592 (1970).

256. Wright, *supra* note 8, at 568, 570, 578, 580, 585.

257. Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies*, in *THE COURTS*, *supra* note 252, at 29, 55, 57.

258. ABA ACTION COMMISSION TO REDUCE COURT COSTS AND DELAY, *supra* note 252.

judges and promotion of faster timetables. Even the enactment of federal rules may not solve a problem when lawyers and judges prefer to ignore them."²⁵⁹ Her example is the infrequent resort by lawyers to the "offer of judgment" provision in Federal Rule 68, whereby a party failing to accept an offer in the form prescribed by the rule, and who then receives a judgment no more favorable than the terms of the offer, becomes liable to the offering party for costs incurred after the offer was rejected. Judge Wald describes this rule as having "obvious potential for promoting settlement," but writes that it has, "for some reason, never been widely used."²⁶⁰ In a similar vein I suppose one could mention that prior to its amendment in 1983 courts seldom invoked Federal Rule 11,²⁶¹ the honesty in pleading rule, and accordingly the judicial system never enjoyed the congestion-easing benefits of its sanctions.

I find this pessimism in part misplaced and in part overstated. Not every rule of procedure posits efficiency as its primary or even as any goal. The Project for Effective Justice concluded that rules providing for discovery were not conducive to settlement.²⁶² At least with the hindsight of the past twenty years, we should hardly be surprised that the federal discovery process has not helped to draw federal lawsuits to speedier conclusions. Dispatch is simply not discovery's main reason for being. Even among the federal civil rules that do seek to hasten the pace of litigation, there are mandatory and voluntary varieties, and only the former are reasonably calculated to attain their desired end.

Judge Wald's example, rule 68, is clearly of the voluntary type. As it is now designed, the success of rule 68 will inevitably depend upon its acceptance by the "legal culture." Lawyers' lack of acceptance of rule 68 may, if anything, suggest that it needs to be refined through more rulemaking. Rule 68 has been under repeated attack of late for its relatively modest incentives to settle and its failure to offer even those incentives to defendants. After decades in which the rule was chronically underused, the Advisory Committee and the Committee on Rules of Practice and Procedure belatedly advanced a proposal to address these deficiencies.²⁶³

259. Wald, *Teaching the Trade: An Appellate Judge's View of Practice-Oriented Legal Education*, 36 J. LEGAL EDUC. 35, 37 (1986).

260. *Id.*

261. 5 C. WRIGHT & A. MILLER, *supra* note 63, § 1334 (1969 & Supp. 1987).

262. Rosenberg, *supra* note 257, at 43.

263. The Advisory Committee on the Federal Rules of Civil Procedure concluded that rule 68 has not provided an effective incentive to encourage settlement, for two reasons. First, unless the "costs" allowed by the rule are defined to include attorneys' fees, there is insufficient incen-

Similarly, rule 11, until its amendment effective August 1983, may well have failed to screen out frivolous pleadings because of its serious substantive infirmities. As originally written, rule 11 failed to specify the nature of the lawyer's honest pleading obligation, left the imposition of sanctions to the trial court's discretion, and tended to ensure that the court's discretion would not be exercised in favor of punishing a litigant by specifying only the draconian sanction of striking pleadings.²⁶⁴ Indeed, since rule 11 has been fortified in these respects, the advance sheets have been peppered with decisions imposing sanctions under the circumstances prescribed by the amended rule.²⁶⁵

One distinguished observer concerned with what he calls the caseload "crisis" in the federal courts overlooks the salutary potential of rules revision altogether.²⁶⁶ Judge Posner eschews some of the most sweeping approaches to the litigation explosion (for example the total abolition of diversity jurisdiction) but broaches a wide variety of incremental proposals. His immediate "modest and achievable reforms"²⁶⁷ run a by now familiar gamut which includes assessing attorneys' fees against litigation losers, raising the minimum amount in controversy

tive for settlement. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure* (Sept. 1984), reprinted in 102 F.R.D. 407, 432-33 (1985); see *Marek v. Chesny*, 473 U.S. 1, 8-9 (1985). The Supreme Court was able to remedy this deficiency only incrementally in *Marek*, by defining the rule 68 "costs" shiftable to a claimant-offeree to include attorneys' fees if the underlying federal claim-creating statute itself defines attorneys' fees as part of the costs recoverable by a prevailing party. 473 U.S. at 9. As the Advisory Committee noted when it published a tentative draft proposal to amend rule 68, the instances of such federal statutory definitions are "rare." 102 F.R.D. at 433-34.

Second, rule 68 cost-shifting, including such attorneys' fees as are shiftable under *Marek*, works in favor of defending parties only. See Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93, 121-23 (1986). The Committee proposed that the rule be amended to subject all offerees, defendants as well as claimants, to appropriate cost sanctions when settlement offers have been unreasonably rejected. 102 F.R.D. at 433, 435.

The Committee's proposal to amend rule 68 foundered and has now been withdrawn. Congress continues to include attorneys' fees as part of the costs recoverable by a prevailing party under selected federal substantive statutes. See, e.g., Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 2(B), 100 Stat. 796, 796. These statutes nick away at the incentive problem à la *Marek* but make no headway toward sanctions against defendant-offerees.

264. See FED. R. CIV. P. 11 advisory committee's note on amendment effective August 1, 1983, reprinted in 97 F.R.D. 165, 198-201 (1983). For these reasons the Committee concluded that "in practice Rule 11 has not been effective in deterring abuses." *Id.* at 198.

265. See Oliphant, *Rule 11 Sanctions and Standards: Blunting the Judicial Sword*, 12 WM. MITCHELL L. REV. 731, 739 (1986). The October 1986 newsletter of the Association of American Law Schools Section on Civil Procedure reports the conclusion of one study that 335 reported decisions on rule 11 sanction motions appeared between August 1983 and March 1986, compared to only 40 between 1975 and 1983. Newsletter of Assoc. of Am. L. Schools, Oct. 1986, at 1. See also S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 6, 45 (Federal Judicial Center 1985) (study finding increased willingness by federal judges to impose rule 11 sanctions in response to the 1983 amendments).

266. See R. POSNER, *supra* note 1, at 317-21.

267. *Id.* at 321.

for diversity cases, creating new specialized courts, expanding the appellate capacity of federal administrative agencies, repealing limited classes of federal question jurisdiction, promoting various forms of arbitration, and, most modestly, exhorting the federal judiciary to rededicate itself to "the principles of judicial self-restraint and institutional responsibility."²⁶⁸

In his search for a solution, Posner chastises the law schools for their lack of hospitality to the social sciences. Nevertheless, he holds out more hope for traditional "disinterested doctrinal analysis" than for "critical legal studies," which he feels offers "little payoff in solving any of the practical problems of the legal system."²⁶⁹ At least the "doctrinal analysts are in a good position to spot some of the growing deficiencies of federal judicial performance as a result of caseload pressures."²⁷⁰

Given these views, it is puzzling that Judge Posner fails to consider whether more conscientious monitoring and revision of the Federal Rules might also contribute to streamlining federal litigation. He is so attuned to efficiency concerns that his discussion of proposals to curtail federal subject matter jurisdiction dwells as much on "externalities" as on flaws in the traditional justifications for diversity.²⁷¹ Yet his exhaustive canvass of remedies to cure the bloated federal judicial docket makes no mention of what is theoretically the most direct path of all — improving the performance of federal rulemakers.

Consider the likely scenario had the *Schiavone* interpretation of the second sentence of Federal Rule 15(c) instead been announced by an amended rule shortly after the interpretive problems attending the 1966 amendment first surfaced in the lower federal courts. Lawyers probably would not have litigated — today might not dare to, faced with amended rule 11 — whether the phrase "within the period provided by law for commencing the action against him" includes the additional time for service allowed by a particular forum state. For rule 15(c), unlike rules 68 or 11, is not addressed to the mere tactical or economic calculations of practicing lawyers or the individualized fairness notions of federal district judges. When the requirements of rule 15(c) are met relation back is mandatory,²⁷² and if properly re-

268. *Id.* at 319-20.

269. *Id.* at 331. One is inclined to agree with Judge Posner that, on this subject at least, the Critics have little to offer. We have not yet realized their vision of a "communitarian" world where we can afford for rules to be "the subjects of constant negotiation." Menand, *Radicalism for Yuppies*, NEW REPUBLIC Mar. 17, 1986, at 20, 23.

270. R. POSNER, *supra* note 1, at 330.

271. *Id.* at 176-77.

272. So long as the several requirements of rule 15(c) are satisfied, the party-changing

drafted the rule could be virtually self-executing on the question of a notice deadline. One may therefore reasonably anticipate that rules revision of this kind would conserve the resources of litigants and the federal judicial system.

C. *Who Should Monitor the Rules?*

Schiavone illustrates the built-in conflict the Supreme Court faces when it construes a federal rule of civil procedure. With the sole exception of the 1983 amendments to rule 4,²⁷³ these are rules which the Court itself once approved and recommended to Congress. One commentator, noting the resulting potential for conflict, has observed that, consciously or not, the Court has strained to sustain federal rules in cases challenging their validity.²⁷⁴ Indeed, challenges to federal rules have resulted in an unbroken string of decisions sustaining them.²⁷⁵ Most revealing on this point are the Court's own words in *Hanna v. Plumer*.²⁷⁶ The justices felt obliged to uphold a federal rule because they could not conclude that "the Advisory Committee, this Court and Congress erred in their prima facie judgment" that the rule comported with the Rules Enabling Act and any applicable constitutional constraints.²⁷⁷

At first blush it would seem that the Court in *Schiavone* approached the interpretation of rule 15(c) rather modestly, without regard to the Court's own role as the rule's promulgator. After all, the decision is narrow in scope, and it gives the most cramped possible reading to the notice deadline phrase. Thus the decision is calculated to render relation back available in very few federal cases. But the

amendment "relates back," and traditionally the matter is not considered to be discretionary with the trial court.

273. See text at notes 16-21 *supra*.

274. Lesnick, *supra* note 6, at 582. See also W. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES 75-78 (1981) (terming this lack of "objectivity" the "most frequent and serious argument against the role of the Supreme Court"); Clinton, *supra* note 142, at 78; J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 96, 98-99 (1977). Indeed, the potential for conflict in the Court's roles as promulgator and construer of the Rules was alluded to by the chairman of the original Advisory Committee even before the rules were enacted. Letter from William D. Mitchell to the Hon. George Wharton Pepper (Dec. 19, 1937), quoted in Burbank, *supra* note 26, at 1134 n.530. But cf. Clark, *supra* note 14, at 252-53 (applauding the Supreme Court's decisions that have upheld challenged federal rules as commendable judicial "support" for the concept of uniform national rules of procedure).

275. See, e.g., *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (application of rule 35 to plaintiffs); *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946) (rule 4(f)); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956) (rule 54(b)); *Cold Metal Process Co. v. United Engg. & Foundry Co.*, 351 U.S. 445 (1956) (same); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (application of rule 35 to defendants); *Hanna v. Plumer*, 380 U.S. 460 (1965) (rule 4(d)(1)).

276. 380 U.S. 460 (1965).

277. 380 U.S. at 471.

Court also concludes that the deadline phrase has a unitary meaning, rather than one that varies with the different periods prescribed by the several kinds of available limitations periods "provided by law." Barring a retreat from *Schiavone* in the form of the *Erie* or federal question exceptions discussed above,²⁷⁸ therefore, the net effect of the decision is to ensure that the Court's narrow construction of rule 15(c) will have the widest possible application.

Aside from the "inherent dangers in granting rulemaking powers to the highest appellate court in a judicial system,"²⁷⁹ there are significant practical obstacles to a rules promulgation process dominated by the Supreme Court. The primary problem is that the justices are simply too busy to propose or draft rules changes.²⁸⁰ Since the Judicial Code was amended in 1958 to shift primary responsibility from the Court to the Judicial Conference, the Supreme Court's review of rules changes proposed by the Judicial Conference has been relatively perfunctory.²⁸¹ Professor Friedenthal writes that the Court scrutinized rules change proposals more carefully before 1956 when it exercised exclusive control over a standing Advisory Committee.²⁸² He views the intense congressional dissatisfaction with the proposed Rules of Evidence which the Court submitted to Congress in 1972 as a symptom of the Court's declining performance as a rulemaker.²⁸³

The existing process is also attacked on the grounds that the Advisory Committee is unrepresentative of nonelite or nonspecialized constituencies,²⁸⁴ denies meaningful opportunity for public participation, for example by holding too few public hearings or making major amendments too late in the process to permit effective response;²⁸⁵ and fails to discuss fully the reasons behind its major proposals.²⁸⁶ Similarly, Professor Miller, until recently a reporter to the Advisory Committee on Civil Rules, speculates that "one of the reasons that Congress is very much involved in thinking about federal rule making these days is that there have been accusations that it is a closed process."²⁸⁷ Professor Friedenthal asserts that the Advisory Committee,

278. See text at notes 230-45 *supra*.

279. Friedenthal, *supra* note 19, at 675.

280. See W. BROWN, *supra* note 274, at 70-73; Clinton, *supra* note 142, at 78.

281. See, e.g., J. WEINSTEIN, *supra* note 274, at 99-100; Clinton, *supra* note 142, at 77-78.

282. Friedenthal, *supra* note 19, at 676-77.

283. *Id.* at 675-76.

284. See W. BROWN, *supra* note 274, at 64-66; Clinton, *supra* note 142, at 77; Lesnick, *supra* note 6, at 579-80.

285. See W. BROWN, *supra* note 274, at 51-53; Friedenthal, *supra* note 19, at 677.

286. See Friedenthal, *supra* note 19, at 677; W. BROWN, *supra* note 274, at 53-54.

287. Interview with Arthur Miller, *supra* note 247, at 8. On the "closed nature of the pro-

in part because of this isolation, has been "guilty of careless draftsmanship and . . . insufficient analysis and . . . the Supreme Court [has] failed to remedy these deficiencies before approving" Rules amendments.²⁸⁸ Other recent commentary has also questioned the efficacy of the Rules in reaching their main goals.²⁸⁹

One might have expected that these trenchant criticisms of the current Court-centered process would have led to calls for a return to congressional control. After all, Congress' ultimate constitutional authority to declare procedural rules is now substantially unquestioned; the only remaining issue concerns which, if any, delegee body is best suited to exercise that authority.²⁹⁰

For the most part, these calls have not come from even those critics most skeptical that the Supreme Court can dispassionately assess rules of its own devise. For example, in 1980 Justice Powell, dissenting from the Court's approval of certain amendments to the discovery rules, observed that "*Congress* should bear in mind that our approval of proposed Rules is more a certification that they are the products of proper procedures than a considered judgment on the merits of the proposals themselves."²⁹¹ Professor Friedenthal, notwithstanding his several sharp criticisms of the Supreme Court's rulemaking performance, condemned this dissent as inviting congressional intervention. He rejoined that it is "far better to leave procedural reform in the hands of the Supreme Court and its advisory committees, whose members are chosen for their dedication to the improvement of the judicial process, than to rely on elected politicians who must satisfy many constituents on a variety of issues."²⁹² Disturbed by the unseemly prospect of judges advancing their own desired rules changes through partisan legislative lobbying, and fearful that pressure from nonjudicial lobbyists will jeopardize proposed reforms,²⁹³ he urged the Court to reestablish its own firm control rather than permit Congress to fill the void.²⁹⁴

cess," see Clinton, *supra* note 142, at 77; see also W. BROWN, *supra* note 274, at 15, 23, 27, 30; J. WEINSTEIN, *supra* note 274, at 101.

288. Friedenthal, *supra* note 19, at 680 (discussing amendments to FED. R. CIV. P. 26(b)(3) concerning the "work product doctrine" of *Hickman v. Taylor*, 329 U.S. 495 (1947)).

289. See generally Holland, *The Federal Rules of Civil Procedure: A Policy Evaluation*, 3 LAW & POLY. Q. 209 (1981); McKinstry, *Civil Discovery Reform*, 14 FORUM 790 (1979).

290. See text at notes 8-11 *supra*; J. WEINSTEIN, *supra* note 274, at 89-90, 104; W. BROWN, *supra* note 274, at 37-39.

291. Order Adopting Amendments to the Federal Rules of Civil Procedure, 446 U.S. 997, 998 n.1 (Apr. 29, 1980) (Powell, J., dissenting) (emphasis added).

292. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 814-15 (1981).

293. See Friedenthal, *supra* note 19, at 673.

294. *Id.* at 685-86.

This distrust of Congress is prevalent among the Court's critics. The rulemaking reform proposals they advance thus leave primary rulemaking authority in the hands of the Supreme Court, or confide it to the Judicial Conference, or a committee of the Judicial Conference, or a congressionally appointed independent commission, rather than the Congress itself.²⁹⁵

None of these proposals addresses the defect that lies at the heart of the history of rule 15(c): the lack of a systematic monitoring mechanism to fulfill the charge of 28 U.S.C. § 331 that the Judicial Conference "carry on a continuous study of the operation and effect of the general rules of practice and procedure." Of course, the very premise of this statute may be called into question. Professor Rosenberg, for example, argues that it is the rules themselves which often run counter to their general goals of promoting just, speedy, and inexpensive litigation outcomes.²⁹⁶ He terms a "gallant illusion" the assumption that these goals are "attainable by a monolithic set of rules applied to virtually all the varied types of civil actions filed in the federal district courts."²⁹⁷ In his view, "more and 'better' rules may not be the an-

295. Professor Friedenthal urges the Court itself to devote "more diligence" to its review of the rules. *Id.* Professor Weinstein views this suggestion as "unrealistic in view of the Court's heavy workload." J. WEINSTEIN, *supra* note 274, at 192 n.382.

Professor Weinstein would authorize the Standing Committee on Rules of Practice and Procedure of the Judicial conference to perform the main work of identifying, initiating, drafting, and justifying proposed rules changes. *Id.* at 110-11. This proposal would serve his main goal of removing the Supreme Court from the rules promulgation process so that it can judicially review civil rules independently and impartially. *Id.* at 149. Professor Weinstein's specification of the Judicial Conference's Standing Committee rather than the Judicial Conference itself is advertent. He views the Judicial Conference as "unwieldy and passive" and "heavily dominated by the Chief Justice." *Id.* at 110. *See also* W. BROWN, *supra* note 274, at 68-69, 78-79 (noting the centralization of rulemaking power in the Chief Justice). Thus Professor Weinstein would have the Judicial Conference place its imprimatur on proposals of its Standing Committee so as to lend them prestige — the role now performed by the Supreme Court vis-à-vis the Judicial Conference. The Judicial Conference's final recommendations would go directly to Congress. J. WEINSTEIN, *supra* note 274, at 110-11.

Professor Cramton proposes that a congressional commission initiate new rules, but he would have that commission report to the Court or the Judicial Conference rather than to Congress. *See* W. BROWN, *supra* note 274, at 84. Professor Clinton, while shifting the "burden of inertia" by requiring rules change proposals to be submitted as bills "to be enacted through the normal lawmaking processes," would give Congress no direct role in the initiation or drafting of rules changes. Clinton, *supra* note 142, at 80.

Professor Lesnick advocates a "legislative" process through which rules changes would be drafted by committees of an independent legislative commission with members to be chosen by judges and members of Congress. The Commission's drafts would then be submitted directly to Congress, which would engage in "meaningful" review. *See* Lesnick, *supra* note 6, at 579-80. In form, this proposal more than any other has Congress play the central part in the process. Still, Winifred Brown, author of the Federal Judicial Center's comprehensive survey of the current rulemaking process, suggests that under Lesnick's system the Commission's proposals "would presumably receive less detailed review [by Congress] than do rules promulgated under the present system." W. BROWN, *supra* note 274, at 83.

296. Rosenberg, *The Federal Civil Rules After Half a Century*, 36 ME. L. REV. 243 (1984).

297. *Id.* at 243.

swer. Rules require sanctions. Sanctions require enforcement proceedings. These absorb resources of time, energy, and money that it is the very purpose of the rules to spare."²⁹⁸ Advisory committees labor in vain, he writes, when they "strive constantly to meet criticisms of the way the rules work by filling their gaps, strengthening their weak spots, curing their uncertainties and increasing their precision."²⁹⁹ Three justices of the Supreme Court have also worried that proposed rules amendments often really amount to "tinkering changes" that delay more fundamental reforms.³⁰⁰

Experience does teach that the process of changing federal rules is "tortuous and contentious."³⁰¹ With this in mind Professor Rosenberg recommends that the Advisory Committee, instead of directing "its main efforts to improving rules in which particular flaws have appeared," should attempt "a global evaluation and overhaul of the rules as a totality."³⁰² However, as informed by the history of rule 15(c), my own tentative view is that there is much that particularized rules revision can accomplish, that the existing apparatus under the control of the Court may be able to accomplish it, and that the process suffers most from the absence of a formal, adequately funded mechanism within the Judicial Conference for identifying and acting on needed proposals for Rules reform. Bringing suitable subjects for improvements in the Rules to the attention of the Advisory Committee may be at least as important as the substance of the Committee's deliberations.

D. *Spotting Candidates for Federal Rules Revision*

At the root of the wasteful litigation over rule 15(c) is the lack of an effective institutional watchdog. The federal courts cannot fulfill that function by themselves. It is ultimately the responsibility of Congress to perform what is, in the end, a legislative function.³⁰³

The questions raised by some Federal Rules will of necessity be decided, often without opinion, by federal district judges or magistrates. Discovery disputes are the classic example. They are rarely resolved by final orders eligible for interlocutory appeal,³⁰⁴ nor do they often figure prominently in the review of final judgments. Such ques-

298. *Id.* at 244.

299. *Id.*

300. Order Adopting Amendments to the Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (Apr. 29, 1980) (Powell, J., dissenting, joined by Stewart & Rehnquist, JJ.).

301. *Id.*

302. Rosenberg, *supra* note 296, at 244-45.

303. *See* text at notes 8 & 290 *supra*.

304. C. WRIGHT, *supra* note 195, at 550-51.

tions will therefore seldom surface in the courts of appeals and in turn will seldom qualify for certiorari review as issues on which those courts are in conflict. Even where such squabbles result in published opinions, an advisory committee would have to scour the advance sheets assiduously to unearth the decisions that signal the desirability of reassessing a federal rule.

Some Federal Rules issues do become the subject of competing decisions at the circuit court level. Occasionally — Judge Friendly's opinion for the Second Circuit in *Arrowsmith v. United Press International*³⁰⁵ is an example — a federal appellate court speaks so articulately or authoritatively that an issue under the Rules which might have been expected to generate ceaseless controversy becomes, for all practical purposes, settled.³⁰⁶ More typically, though, dozens of lower federal courts plough through the murky waters of Federal Rules litigation, hardly speaking to one another. As the history of rule 15(c) suggests, at least some of the litigated issues are not worth the costs of ongoing judicial debate.

Moreover, rules-related cases decided by the courts of appeals may present issues which fail to impress the Supreme Court with sufficient national importance to merit review by certiorari. The saga of rule 15(c) again provides an example. Justice White, dissenting in 1985 from the denial of certiorari in *Cooper v. United States Postal Service*,³⁰⁷ discussed various interpretations of the rule 15(c) notice deadline announced by six courts of appeals.³⁰⁸ Although the split of authority Justice White called to the Court's attention had arisen as early as 1982,³⁰⁹ it was not until *Schiavone* that the Court considered the issue on the merits. In the meantime many trees gave their lives to record the struggles of the scores of lawyers and judges who wrestled with the definition of the rule 15(c) deadline.

305. 320 F.2d 219 (2d Cir. 1963) (law of the forum state, rather than federal law, governs the amenability of nonresident defendants in diversity cases, since F. R. Civ. P. 4 prescribes only the manner, not the reach, of service).

306. The *Arrowsmith* result has been adopted unanimously by the circuit courts. See cases cited in J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 163 n.14 (1985).

307. 471 U.S. 1022 (1985).

308. 471 U.S. at 1024.

309. Compare *Ingram v. Kumar*, 585 F.2d 566 (2d Cir. 1978), cert. denied, 440 U.S. 940 (1979) (relation back allowed if misnamed intended defendant served within a "reasonable" time after limitations period expires), with *Hughes v. United States*, 701 F.2d 56 (7th Cir. 1982) (intended defendant, the United States, must separately receive notice of suit within the limitations period even though originally named defendants, two U.S. government agencies, were timely served). Indeed, a related conflict had surfaced as early as 1978, between *Marshall v. Mulrenin*, 508 F.2d 39 (1st Cir. 1974) (state relation-back rule "substantive" and prevails over federal relation-back rule), and *Britt v. Arvanitis*, 590 F.2d 57 (3d Cir. 1978) (state statute "procedural" and not controlling in federal diversity action). See text at notes 76-78 *supra*.

Even those Federal Rules cases that do come to be heard and decided by the Supreme Court may not settle closely related questions. *Schiavone* and *Walker v. Armco Steel Corp.*, which left dangling the possibility that Federal Rule 3 does define timely commencement in federal question actions, furnish two vivid illustrations.

Of course the Court itself will sometimes continue to be the first to glimpse a Federal Rules interpretive problem, as it sifts through petitions or reviews cases on the merits. When it does, the Court should have a mechanism in place for automatically calling the problem to the attention of a subcommittee of Congress, the Standing Committee, or the Advisory Committee. But some rules-related issues will elude Supreme Court scrutiny, and it is important that those issues, too, be identified and studied before repetitive litigation yields diminishing returns. If Congress, the Standing Committee, or the Advisory Committee were to monitor Federal Rules litigation systematically, we would not have to count so heavily on the Supreme Court's certiorari docket to serve a screening function.

Because the inner workings of the Advisory Committee on Civil Rules have remained hidden from public view, relatively little is known about the sources of proposals for civil rules reform. At least in the case of the amendments to the discovery rules effective August 1, 1980, we know that the primary source of the proposal which became the working basis of the recommendations ultimately approved by the Judicial Conference and the Supreme Court was a study by a special committee of the American Bar Association.³¹⁰ The Committee's current Reporter, Dean Carrington, advises that the process is quite informal. He writes that "[t]he Committee does receive suggestions from judges, lawyers, Congressmen, members of the Standing Committee, the Justice Department, the American Bar, local bar groups, and perhaps other sources." He adds that "these have sometimes been the subject of close study and response, but not always."³¹¹

It is clear that the burden of identifying needed changes and initiating the amendment process now rests with the advisory committees and, especially, their reporters.³¹² The committees do continually receive suggestions from varied sources.³¹³ Nevertheless, while it was "the original intention and early practice that reporters engage in con-

310. See Friedenthal, *supra* note 292, at 807 (citing LITIGATION SECTION, ABA, REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE (1977) and *id.*, SECOND REPORT (1980)).

311. Letter from Dean Paul D. Carrington to the author (Nov. 24, 1986) (on file with the *Michigan Law Review*).

312. W. BROWN, *supra* note 274, at 59.

313. *Id.* at 13, 59 n.139.

tinuing comprehensive study of the rules and of their operation in both federal and state courts," and "submit periodic reports on all matters . . . such a program of periodic reports based on continuing study has not proved achievable."³¹⁴

Perhaps the problem is one of resources; the Advisory Committee membership may not include enough persons with sufficient time to pore over the importance or merits of each proposal received.³¹⁵ One proposal calls for "hiring a full-time secretariat to engage in constant oversight and report frequently to the advisory committees."³¹⁶ Others recommend the hiring of more reporters and the sponsoring of institutes to study, analyze, and discuss the desirability of rules changes.³¹⁷ A more modest suggestion is simply to publicize more widely that "the committees are receptive to comments and suggestions at all times — not only in connection with the proposed rules."³¹⁸

The matter warrants Congress' attention, although obviously that attention need not lead to its direct intervention in the rules-drafting process. It may suffice for Congress to beef up the resources at the Committee's disposal for securing more members or staff by contract or hire. Additional personnel should certainly improve the Committee's bird-dogging capacity; one happy by-product might be improved handling of proposals on the merits. The divergence between the Committee's apparent intentions when it reshaped rule 15(c) in 1966 and its ultimate work product suggests that more time and attention should be devoted to rules proposals not just at the critical input stage but throughout the drafting process. A House-passed bill pending before the current Congress³¹⁹ does address the representativeness³²⁰ and openness³²¹ criticisms of the rules promulgation process and affords Congress at least seven months, instead of three, in which to exercise its veto of proposed rule changes.³²² Unfortunately, the bill provides no additional support to the several advisory committees and

314. *Id.* at 12-13.

315. *See id.* at 59.

316. *Id.* at 59.

317. *Id.* at 60.

318. *Id.* at 131.

319. H.R. 1507, 100th Cong., 1st Sess. (1987).

320. H.R. 1507, 100th Cong., 1st Sess. § 2 (1987), proposed new 28 U.S.C. § 2073(a)(2) (specifying that committees appointed to assist the Judicial Conference shall "consist of a balanced cross section of bench and bar, and trial and appellate judges").

321. H.R. 1507, 100th Cong., 1st Sess. § 2 (1987), proposed new U.S.C. § 2073(c) and (d) (prescribing, with some exceptions, open meetings and, in addition to official explanatory notes, written reports explaining committee action, including minority views).

322. H.R. 1507, 100th Cong., 1st Sess. § 2 (1987), proposed new 28 U.S.C. § 2074(a).

prescribes no measures that would improve their capacity to monitor litigation.³²³

CONCLUSION

The history of rule 15(c), especially after its amendment in 1966, demonstrates that adjudication has proved a wasteful way to resolve the ambiguities of that rule. While a few years of common law "conversation" may have been necessary to flesh out the infirmities of the 1966 amendment, the principal interpretive difficulties were fully elaborated in appellate court conflicts long before the Supreme Court finally granted certiorari to resolve a piece of the problem in *Schiavone*. Rules which, like 15(c), treat subjects that are amenable to essentially arbitrary solutions can more efficiently be refined by amendment than by incremental litigation, with little if any cost to substantial justice.

Further, the complex of institutions charged with continuous study of the Federal Rules, under the aegis of the Supreme Court, has not consistently responded in timely fashion to well identified problems of this character. Specifically, it would appear that obvious candidates for rules revision either do not reach the Advisory Committee or that the Committee pares its agenda to the bone for lack of resources or undisclosed reasons of principle.

Congress has recently reentered the civil rulemaking arena on an ad hoc basis to shape the substance of a proposed Rules amendment. It could discharge its fundamental rulemaking responsibility more effectively by reassessing the amendment process. It should then redesign or reinvigorate the existing institutional machinery to make it more responsive to litigation developments that warrant consideration of Rules amendments.

323. H.R. 1507, 100th Cong., 1st Sess. § 2 (1987), proposed new 28 U.S.C. § 2073(a)(2), authorizes the Judicial Conference to appoint committees to recommend proposed rule changes or additions. The section then enjoins the Standing Committee to review, for ultimate recommendation to the Judicial Conference, the recommendations that any committees so appointed might make. It does not appear that this appointment authorization would alter the existing rulemaking process, since the Judicial Conference, without formal legislative authority, has long used the advisory committees in just the way that this section describes. See *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure*, 102 F.R.D. 413 (1984).