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Schiavone: An Un-Fortune-ate Illustration of the Supreme Court's Role As Interpreter of the Federal Rules of Civil Procedure

Joseph P. Bauer
Notre Dame Law School, jbauer@nd.edu

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*Joseph P. Bauer**

Let me identify the two basic theses of this paper. First, I believe that in the recent *Schiavone v. Fortune*[1] case, the Supreme Court gave the Federal Rule of Civil Procedure under consideration there, Rule 15(c), an unduly restrictive reading. In this, the fiftieth year of the effective date of the Rules, it is particularly unfortunate to see any of the Rules given an unnecessarily grudging interpretation. My second assertion is that as a general matter, in interpreting the Federal Rules, courts should recognize that their role is different from the one they play in interpreting statutes or in applying substantive common law doctrines, regardless of whether they are of a federal or state nature. In construing the Federal Rules, the courts are interpreting standards which the Supreme Court itself has promulgated. Therefore, some of the problems which occur during statutory interpretation, such as ferreting out legislative intent, deferring to another branch of the government, or avoiding violations of principles of federalism by deferring to state interests, are in large measure eliminated. As a result, the federal courts are fully justified in taking an expansive view of the Federal Rule under scrutiny, giving it a liberal reading if that is required to fulfill the purposes of the Rule or to do justice between the parties before the court.

The inappropriate view of its role in interpreting the Federal Rules that the Supreme Court took in *Schiavone* is perhaps better understood by contrasting it against an even more recent Supreme Court decision in which the Court was required to examine the federal statutory scheme respecting removal and remand—*Carnegie-Mellon University v. Cohill.*[2] A brief review of the facts of these two cases will illustrate the problem.

In *Schiavone*, the plaintiffs brought a diversity action in the federal district court in New Jersey, asserting that they had been libeled by an article that had appeared in an issue of *Fortune Magazine*, which is published by Time, Incorporated. The offending publication had taken place about May 15, 1982, and New Jersey—whose statute of limitations was applicable to the action—required that the action be brought within one

* Associate Dean and Professor of Law, Notre Dame Law School. A.B. 1965, University of Pennsylvania; J.D. 1969, Harvard University. I wish to express my appreciation to Hon. Robert Miller (U.S. Dist. Ct., N.D. of Ind), Prof. Robert Rodes, and Prof. John Attanasio (Notre Dame Law School) who offered helpful comments on drafts of this paper; and to my research associate, Ms. Kathryn Young, Notre Dame Law School Class of 1989, for her valuable assistance.

1 477 U.S. 21 (1986). This case is discussed in Note, Schiavone v. Fortune: *A Clarification of the Relation Back Doctrine*, 36 CATH. U.L. REV. 499 (1987); Note, Schiavone v. Fortune: *Notice Becomes a Threshold Requirement for Relation Back under Federal Rule 15(c)*, 65 N.C.L. REV. 598 (1987).

2 108 S. Ct. 614 (1988).

year of the publication.[3] The plaintiffs' complaints were filed with the district court on May 9, 1983—well within the statutory period. The complaints were then mailed to Time's registered agent in New Jersey on May 20, and they were received by the agent on May 23.

The complaints had named *Fortune* as the defendant and had described it as a New York corporation. In fact, however, *Fortune* is only a trademark and the name of an internal division of Time, Incorporated. Because Time was not named as a defendant, its agent refused to accept service of process.

Once the plaintiffs learned of their mistake, they amended their complaints to reflect the correct identity of the defendant,[4] and in mid-July, they served the amended complaints on Time, Incorporated. The defendant then made a motion to dismiss the amended complaints, arguing, among other things, that the action was barred by the statute of limitations.

Under Rule 15(c), an amendment which changes the identity of a party is permitted to relate back if, among other requirements—and here close attention to the precise language of the Rule is critical—"within the period provided by law for commencing the action against the party to be brought in by amendment" that new party received notice of the institution of the lawsuit and knew (or should have known) that, but for the mistake, it would have been named as the defendant.[5]

The district court held that the requirements of Rule 15(c) were not satisfied, and so it granted the defendant's motion to dismiss. On appeal, the Third Circuit affirmed and, in a six to three decision, the United States Supreme Court affirmed that decision.

As just indicated, if, as the Supreme Court's majority concluded, the case was deemed to involve a change in the identity of the defendant—as opposed to the mere correction of a "misnomer"—its outcome turned on what was meant by the words "within the period provided by law for commencing the action."[6] One possible interpretation is that this phrase

3 Under New Jersey law, the date on which the statute of limitations begins to run is the first day of substantial publication. Although there were grounds for varying that date by a few days, publication occurred sometime between May 11 and May 19, 1982. *Schiavone*, 477 U.S. at 24 n.4.

4 Under Rule 15(a), since the defendant had not yet answered the complaint, the plaintiffs were entitled to make one amendment as a matter of course, i.e., without receiving permission either from the defendant or with leave of the court.

5 The relevant portion of Rule 15(c) [which was amended in 1987 to make it gender neutral] provided as follows:

> 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 a 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.

FED. R. CIV. P. 15(c) (emphasis added). The first sentence was the original Rule 15(c), dating to 1938. The second sentence was added in 1966.

6 Justice Stevens' dissent first asserted that the case did not even involve this portion of Rule 15(c), but rather only its first sentence, *see supra* note 5, since the plaintiffs were not attempting to "chang[e] the party against whom a claim is asserted," but rather were merely correcting a "misno-

refers to the statutory period for starting the lawsuit—here, for example, the New Jersey one year statute of limitations for libel actions. However, under Rule 3 of the Federal Rules, while an "action is commenced by filing a complaint with the court,"[7] Federal Rule 4(j) provides that a plaintiff has 120 days after the filing of the complaint to accomplish service of process.[8] The laws of the majority of states also allow various additional lengths of time for completing service of process.[9] Thus, since an action is not actually commenced against a defendant until he or she has in fact been served, another interpretation of this disputed phrase in Rule 15(c) is that it refers to the statutory period *plus* the 120 days permitted by Rule 4(j)[10]—or the additional time allowed under state law—for serving the summons and complaint.[11]

In resolving this question, the majority did what courts too often do when there are two different meanings that disputed language may have: It simply stated, *ipse dixit*, that one of those meanings was "plain." Thus, Justice Blackmun declared:

> We do not have before us 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. We accept the Rule as meaning what it says.[12]

However, the fact that at least two courts of appeals had previously upheld the more "liberal" interpretation argued for by the plaintiffs[13] is merely one piece of evidence that the meaning of this phrase in Rule 15(c) was neither clear nor plain.[14]

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mer" or "misdescription" of the defendant's identity. *Schiavone*, 477 U.S. at 35-36 (Stevens, J., dissenting). I agree that the dissent's characterization is correct, since the same person—the agent for Time, Inc.,— received the same notice both before and after the amendment; the amended complaint only changed the defendant's identity from a nonexistent corporate entity to its properly named corporate owner. However, for the purpose of this paper, I will assume, as did the majority, that the case did involve bringing in a "new party" and that disposition of the case required consideration of the standard in the second sentence. I nonetheless argue that the Court's interpretation of the quoted language in Rule 15(c) was needlessly restrictive.

7 FED. R. CIV. P. 3.

8 "If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint . . . , the action shall be dismissed as to that defendant . . . ." FED. R. CIV. P. 4(j).

9 Some states provide specified amounts of time—60 days, 120 days, etc.—for accomplishing service of process. Others permit a "reasonable" amount of time to notify the defendant. *See infra* note 53.

10 In the alternative, since Rule 4(j) was not added until sixteen years after Rule 15(c) was amended, it could include an additional "reasonable" amount of time to accomplish service of process.

11 As the plaintiffs and the dissent in *Schiavone* pointed out, had the original complaints properly identified the defendant as Time, Inc., it would have been permissible under Rule 4(j) for the defendant not to have learned of the commencement of the action until early September of 1983. Since Time in fact received the complaint with the misnomer in late May, 1983, and received the corrected (amended) complaint in July, 1983, it in fact had earlier actual notice than it might have had, had the plaintiffs never made the mistake of identity.

12 *Schiavone*, 477 U.S. at 30.

13 *See* Kirk v. Cronvich, 629 F.2d 404, 408 (5th Cir. 1980); Ingram v. Kumar, 585 F.2d 566, 571-72 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979).

14 *See generally* Lewis, *The Excessive History of Federal Rule 15(c) and its Lessons for Civil Rules Revision*, 85 MICH. L. REV. 1507 (1987) (exploring history and various alternate interpretations of Rule 15(c)).

To bolster its conclusion, the Court then turned to the Notes of the 1966 Advisory Committee, the body responsible for drafting this particular revision of Rule 15(c). In explaining why the Notes were useful for interpreting the Rule, the Court quoted from one of its prior decisions for the proposition that "[a]lthough the Advisory Committee's comments do not foreclose judicial consideration of the Rule's validity and *meaning*, the construction given by the Committee is 'of weight.' "[15]

It is noteworthy that Justice Blackmun's opinion contained no analysis of the merits of either alternative interpretation, nor did it consider the purpose for which Rule 15(c) had been revised in 1966.[16] Instead, relying on a brief line in these Advisory Committee Notes, as well as on the comments of the authors of two civil procedure treatises,[17] to support the "plain meaning" of the Rule, the Court concluded that the more restrictive reading of this phrase was compelled.[18]

In contrast to the Court's inflexible approach to the Rules in *Schiavone*, in *Carnegie-Mellon* the Court found far greater latitude for adding to the scope of the remand provisions of Title 28 of the United States Code. The plaintiff, William Boyle, a citizen of Pennsylvania, had been an employee of the defendant, Carnegie-Mellon University, which is also located in Pennsylvania. After he was fired, Boyle brought an action in a state court in Pittsburgh, asserting that his discharge violated both Pennsylvania state law—including a variety of breach of contract and tort theories—and the federal Age Discrimination in Employment Act

15 *Schiavone*, 477 U.S. at 31 (quoting Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444 (1946)) (emphasis added).

The dissent argued that the Advisory Committee comments to revised Rule 15(c) were far more ambiguous and that other passages in the Notes would support an opposite conclusion. *Schiavone*, 477 U.S. at 37 n.4 (Stevens, J., dissenting). My principal concern here is not for which opinion gave the better reading to the Notes, but rather the extent to which these Notes are controlling on the interpretation to be given to the Rules.

In addition, the quotation from *Mississippi Publishing* must be read in context. There, the defendant was complaining that the Rule in question—Rule 4(c)—was impermissibly broad because it allowed the federal courts to expand the provisions for venue and service of process in ways which went beyond the rulemaking power conferred on the Court by the Rules Enabling Act. In responding to this argument, in the sentence preceding the one quoted in *Schiavone*, the Court had said: "The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency." *Mississippi Publishing*, 326 U.S. at 444. Thus, the quoted sentence means no more than when the Court wishes to rely on the Advisory Committee's Notes, they are available for support; the converse proposition — that the Committee's Notes are something like legislative history, which *must* be given *deferential* weight — does not at all follow.

16 In contrast, Justice Stevens' dissenting opinion addressed these purposes and then pointed out why the Court's result was contrary to these goals. *Schiavone*, 477 U.S. at 38-39 (Stevens, J., dissenting).

17 3 J. MOORE, FEDERAL PRACTICE § 15.15[4-2], at 15-225 (2d ed. 1985); 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1498, at 228 (Supp. 1985).

18 *Schiavone*, 477 U.S. at 31. The *Schiavone* case may also present a number of *Erie*-type issues: To what extent should the federal courts have looked to state law to determine the plaintiffs' right to change the designation of the defendant? Could the federal courts have permitted a *longer* time for commencing an action against Time than the plaintiffs would have had in state court? Should the time limits of Rule 15(c) be extended if there is more expansive state law with respect to the relation back doctrine, under which the amendment would have been permissible? May the federal courts permit relation back if the state law is more restrictive, precluding an amendment under the facts? *See* Lewis, *supra* note 14, at 1507. Since neither opinion in the Supreme Court addressed these questions and since they are not directly relevant to the subject matter of this paper—the Court's role as interpreter of the Federal Rules—they will not be considered further.

("ADEA").[19] Based on the presence of the federal claim, the University filed a timely petition to have the action removed to the United States District Court for the Western District of Pennsylvania. Once in federal court, discovery proceeded, and six months later, the plaintiff determined that there were insufficient grounds to support his age discrimination claim.[20] He therefore made a motion to amend his complaint to delete this claim. Because there no longer was a federal claim, and because there was also no diversity of citizenship between the parties, Boyle simultaneously made a motion to have the action remanded to state court.

The defendant University objected to this second motion, arguing that by this point in the proceedings, the federal removal and remand statutes gave the district court only two options—either to retain the action[21] or to dismiss the plaintiff's lawsuit. The University argued that the removal and remand procedures are purely statutory, and it pointed out that the statutory scheme contains no provision for remand of a removed action once the case has proceeded this far along in federal court.

As in *Schiavone*, close attention to the applicable language is necessary. Section 1447 of Title 28 provides that "[i]f at any time before final judgment it appears that the case was *removed improvidently and without jurisdiction*, the district court shall remand the case."[22] Here, however, the case was *not* removed improvidently nor without jurisdiction, but was removed quite properly. Instead, it was subsequent conduct—and perhaps not totally incidentally, the action of the plaintiff who was seeking remand—that now changed the posture of the action and created the jurisdictional problem. The case raised the question, then, whether a court could remand an action in the absence of any express statutory authority for so doing.

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19 29 U.S.C. §§ 621-34 (1982 & Supp. III 1985). In addition, Boyle claimed that his discharge violated the Pennsylvania state age discrimination statute. *Carnegie-Mellon*, 108 S. Ct. at 616.

20 A prerequisite for the assertion of an ADEA claim is that the plaintiff must first have filed a timely age discrimination charge with a federal or state agency. *See* 29 U.S.C. §§ 626(d), 633(b) (1982). It was apparently only after these six months of discovery that the plaintiff learned that the failure to file a charge with an agency precluded the assertion of his judicial action. *Carnegie-Mellon*, 108 S. Ct. at 623 (White, J., dissenting).

21 The removal statute, 28 U.S.C. § 1441(a) (1982), permits removal of a "civil action brought in a State court of which the district courts of the United States have original jurisdiction." Original federal jurisdiction over the entire action was predicated on the exercise of pendent jurisdiction, the test for which—the existence of a common nucleus of operative fact—is articulated in United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). *Gibbs* also permits a federal court to exercise its discretion to retain jurisdiction over a purely state claim, even after the federal claim disappears. In *Gibbs*, however, the federal claim was not rejected until after the trial had concluded, and the defendant there had made a motion for a judgment notwithstanding the verdict. Here, by contrast, the federal claim disappeared from the action during pre-trial discovery. *Gibbs* was not relevant to the specific issue here—the availability of remand—since it involved an action brought originally in federal court.

22 28 U.S.C. § 1447(c) (1982) (emphasis added). Another statutory section, 28 U.S.C. § 1441(c) (1982), provides for removal of an entire case "[w]henever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action." It further provides that "the district court may determine all issues therein, or, in its discretion, may *remand* all matters not otherwise within its original jurisdiction." (emphasis added). The Court in *Carnegie-Mellon* correctly noted that this particular removal/remand provision was inapplicable here because the plaintiff's federal and state claims were not "separate and independent." *Carnegie-Mellon*, 108 S. Ct. at 621.

The district court in fact did remand the action, and by an equally divided court, the Third Circuit affirmed.[23] On appeal to the Supreme Court, in a five to three decision, Justice Marshall upheld the district court's authority to remand the action.

My purpose here is neither to examine the particular statutory scheme nor to debate the correctness of the Court's decision. Rather, I wish to focus on the instructive comparison between the Court's willingness in *Carnegie-Mellon* and its unwillingness in *Schiavone* to read in an expansive fashion language which controlled the outcome of the decision.

The Court recognized that the removal statutes provide for remand in only two situations.[24] The defendant had argued that Congress' failure to confer any authority on the federal courts to remand actions of this kind—removed cases in which there are pendent state claims—was evidence of congressional intent to *preclude* district courts from remanding such actions.[25] Rejecting this argument, the Court instead concluded that because Congress had not imposed any *limitation* on judicial remand authority—either expressly or otherwise—the congressional silence "cannot sensibly be read to negate the power to remand"[26] in these situations.[27]

As we all know, there are no specific statutory provisions for the pendent jurisdiction doctrine, and the courts have recognized the doctrine as one which can be implied under the broad federal question authority in article III and section 1331 of Title 28, United States Code. In essence, what the Court did in *Carnegie-Mellon* was to expand the scope of this doctrine.[28] Under this view, pendent jurisdiction not only confers authority on the federal courts to hear mixed federal and state claims, whether originally or by removal, but also to remand such actions to state courts when such a step would be consistent with its basic principles.[29]

23 The University sought review of the district court's order by seeking a writ of mandamus. A three judge panel in the Third Circuit, by a split decision, granted the writ. The case was then set down for reargument en banc, and the panel decision was vacated. The Third Circuit divided evenly (five to five) on the district court's right to remand, thereby upholding the order. 41 FEP Cas. 1888 (3d Cir. 1986).

24 *See supra* notes 21-22 and accompanying text.

25 *Carnegie-Mellon*, 108 S. Ct. at 620. Support for this argument was found in Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336 (1976), where the Court held that a district court could not remand a removed case or claim without specific statutory authorization. *Id.* at 344-45.

In addition to the five judges on the Third Circuit who concluded that remand was impermissible absent specific statutory authorization, at least two other courts of appeals had held that the void in the statute precluded remands in a factual setting like *Carnegie-Mellon*. Cook v. Weber, 698 F.2d 907 (7th Cir. 1983); In re Greyhound Lines, Inc., 598 F.2d 883 (5th Cir. 1979).

26 *Carnegie-Mellon*, 108 S. Ct. at 621.

27 In so concluding, the Court was required to do an elegant sidestep around contrary language in *Thermtron*: "[W]e are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute." *Thermtron*, 423 U.S. at 351. The willingness to do just that in *Carnegie-Mellon* is in striking contrast to the Court's refusal to read its own Rule expansively in *Schiavone*.

28 *See Carnegie-Mellon*, 108 S. Ct. at 621 n.11.

29 The Court identified the principles underlying the pendent jurisdiction doctrine as "economy, convenience, fairness, and comity." *Id.* at 619. The Court then asserted that advancement of these principles may require an expansive view of pendent jurisdiction, including the exercise by a district court of discretionary power: "Because in some circumstances a remand of a removed case

As previously indicated, I do not wish to criticize the Court's conclusion in *Carnegie-Mellon*. However, in light of the expansive view the Court found itself free to take of a statute,[30] recognizing judicial authority to remand which is found nowhere in the statutory scheme created by Congress, I would argue that it follows that there is even greater opportunity for liberal interpretation of one of the Federal Rules, which the Court itself was institutionally responsible for promulgating.

The balance of this paper offers some justifications for this approach, as well as some suggestions of guidelines for courts to use in employing this power. My hope, then, is that in the year 2038, when other people are celebrating the hundredth anniversary of the Federal Rules, *Schiavone* will be pointed to as an historical aberration.

My beginning point is the nature of the rulemaking process and the way in which the Federal Rules constituted a departure from the procedural system which they replaced. As we all know, by the 1870's, the common law pleading system—which was largely a hodgepodge of judge-made rules, and which was the result of an evolutionary process over the centuries rather than a unified approach to procedure that was designed to have the various requirements dovetail with each other—had been supplanted in a majority of the jurisdictions in the United States by codes, modelled to a greater or lesser degree on New York's original Field Code. Pursuant to the federal Conformity Act of 1872,[31] at least with respect to common law actions, the rules of procedure in the federal courts were the rules of the state courts in which the federal court was located.[32] The obvious point is that since, by definition, codes are the product of legislative enactment, for the approximately seventy years culminating in 1938, the principal standards for governing procedure in both the federal and state courts were statutes. If doubts arose about the meaning or scope of a controlling provision in a code, it was important to know just what the particular statutory provision indicated.

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involving pendent claims will better accomodate these values than will dismissal of the case, the animating principle behind the pendent jurisdiction doctrine supports giving a district court discretion to remand when the exercise of pendent jurisdiction is inappropriate." *Id.*

This approach is in obvious contrast to *Schiavone*. There, the Court failed to consider the purposes for which the second sentence of Rule 15(c) was added in 1966 and did not even address the question of whether its reading of that Rule would be consistent with the values of the Federal Rules in general.

30 The Court gave an expansive reading to other jurisdictional provisions in Title 28 in another case this Term, K Mart Corp. v. Cartier, Inc., 108 S. Ct. 950 (1988). In dissent, Justice Scalia argued that this liberal interpretation of the statute was contrary to its "plain meaning": "[T]he jurisdictional question, if decided incorrectly, may generate uncertainty and hence litigation into the indefinite future. In my view, the Court's resolution of this question strains the plain language of the statute, and blurs a clear jurisdictional line that Congress has established." *Id.* at 960 (Scalia, J., dissenting).

31 Act of June 1, 1872, ch. 255, §§ 5, 6, 17 Stat. 196, 197 (repealed 1948).

32 In interesting contrast to the conformity requirement with respect to actions at common law, the federal courts followed their own procedure for actions in equity. Moreover, these standards were the product of rulemaking by the Supreme Court. The first equity rules for the lower federal courts were promulgated in 1822, and these were replaced by another set of rules in 1842. In the early twentieth century, the Supreme Court undertook a comprehensive revision of these rules; the Equity Rules of 1912 remained in force, with only minor amendments, until they were superseded by the Federal Rules of Civil Procedure in 1938. H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 578-79 (1953).

The Federal Rules of Civil Procedure marked an important departure from this system. The history leading up to the enactment of the Rules Enabling Act[33] in 1934 has been well described elsewhere[34] and need not be repeated here. As we know, however, the import of that statute was that Congress expressly delegated power—authority—to the Supreme Court to draft and prescribe rules to govern the practice and procedure in the federal district courts and in the courts of appeals.[35]

The reality of rulemaking is that the Supreme Court itself did not, and still does not, actually draft the Rules. Rather, the Court acted as bodies charged with drafting a document often do: It appointed a committee to produce an initial draft. These proposed rules were then published for public comment and were revised, first by the Advisory Committee and then by the Court itself. Finally, however, they were adopted and promulgated by the Supreme Court. Although the Rules Enabling Act also provides that these Rules must be reported to Congress and that a period of time for negative congressional action must elapse before they actually become effective,[36] in 1938 Congress took no such step, and after the expiration of the provided time, the Rules did go into effect.[37]

The Federal Rules of Civil Procedure, then, are, at least in part, the product of the Supreme Court's own activities, and they reflect the Court's view of an appropriate and efficient set of rules for governing practice and procedure in the federal courts. Equally important, as an institutional matter, it is the Supreme Court itself which has been given the responsibility for promulgating and implementing the Rules. That the Court has taken this responsibility seriously, and that it is not merely rubberstamping proposals of the Advisory Committee, is demonstrated in part by the frequent instances in which members of the Court have dissented from proposed amendments to the Rules.[38]

33 Act of June 19, 1934, ch. 651, §§ 1, 2, 48 Stat. 1064, presently codified at 28 U.S.C. § 2072 (1982) (as amended).

34 *See, e.g.*, Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

35 The Act provided in part: "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . . ." 28 U.S.C. § 2072 (1982).

36 As amended, the Rules Enabling Act now provides: "Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported." *Id.*

The Act as passed in 1934 stated: "Such united rules shall not take effect until they have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session." Act of June 19, 1934, ch. 651, § 2, 48 Stat. 1064.

37 Congress has blocked the effective date of proposed revisions to the Federal Rules of Civil Procedure on only two occasions, and neither instance involved Rule 15. In 1973, the Court had promulgated the Federal Rules of Evidence; a few conforming changes in the Rules of Civil Procedure were offered at the same time. The effectiveness of these Rules of Evidence and the conforming amendments was blocked by Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9. More recently, Congress delayed the effective date of proposed amendments to Rule 4, which deals with service of process. Act of Aug. 2, 1982, Pub. L. No. 97-227, 96 Stat. 246.

38 *See, e.g.*, 446 U.S. 997 (1980)(dissenting statement of Powell, J., joined by Stewart & Rehnquist, JJ.); 409 U.S. 1132 (1972)(Douglas, J., dissenting); Order of March 1, 1971 (Black & Douglas, JJ., dissenting); Order of March 30, 1970 (Black & Douglas, JJ., dissenting); 383 U.S. 1031, 1089 (1966)(Douglas, J., dissenting in part); 383 U.S. 1031, 1032 (1966)(Black, J., dissenting); 374 U.S.

Since 1942, the Supreme Court has employed a Standing Committee on Federal Rules of Practice and Procedure, as well as the Advisory Committee on Civil Rules, to consider additions or revisions to the Rules. Since 1958, proposed rules, or amendments to the Rules, are also considered by the United States Judicial Conference before ultimate adoption by the Supreme Court.[39] The version of Rule 15(c) which was at issue in *Schiavone* was in fact the product of such a mechanism for change in the Rules, having become effective in 1966. While the Supreme Court relied on the Advisory Committee for the initial drafting of the revision and for receiving and reacting to public comments, the amended Rule was also promulgated by the Court itself. In short, Rule 15(c), like all of the Federal Rules, is a standard which the Court itself has created. It therefore has broad freedom in its interpretation, since as an institutional matter it is reviewing acts which Congress has authorized it to undertake.[40]

My second point—which contrasts the role of courts in interpreting the Federal Rules with their role in interpreting statutes—flows directly from this first observation. When a court is faced with ambiguous or unclear language in a statute—whether it is a procedural code or the Environmental Protection Act—it is involved in part in the job of discerning the intent of the legislators who drafted and then voted for or against the statute, and perhaps even the views of the executive who signed the bill. Examination of speeches on the floors of Congress or the state legislature, testimony of witnesses before committees, views expressed in committee reports, and many other sources of information can be consulted to make this determination. However, in interpreting the Federal Rules, none of this is necessary. The Supreme Court need ask no more than what the promulgating authority itself sought to accomplish.[41] And, since it is the Supreme Court which had the responsibility for promulgating the Rule under scrutiny, the historical views of the Advisory Committee—which merely drafted the Rule—of its meaning should be entitled only to limited weight. They may properly be given regard along with

861, 865 (1963)(statement of Black & Douglas, JJ.); 368 U.S. 1012 (1961)(statements of Black & Douglas, JJ.). These orders are collected in 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL Appendix B (1973).

39 The system for revising and amending the Rules is described in W. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES 5-34 (Fed. Jud. Center 1981); *see also* Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905 (1976).

40 *See generally* 2 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 1.13 (2d ed. 1987); 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1029 (2d ed. 1987).

41 The Court in *Schiavone* seems to have missed this point. The final paragraph of the majority opinion stated: "The linchpin is notice, and notice within the limitations period. Of course, there is an element of arbitrariness here, but that is a characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process." *Shiavone*, 477 U.S. at 31. It is obvious, however, that the type of arbitrariness about which the plaintiffs were complaining was not the rigid borderline which flows from any statute of limitations, rather than about an allegedly "arbitrary" choice between one of two potentially conflicting interpretations of a Federal Rule. Furthermore, the arbitrary result the plaintiffs challenged would occur only if the relevant phrase in Rule 15(c) was given the more restrictive interpretation, which clearly was something within the control of the Court.

the views of other distinguished scholars or judges, but they should not to be treated as some form of controlling authority.[42]

Taking this principle to the next step, at the later date, when the Court is faced with the task of interpreting a Federal Rule, it should be entitled to determine what it believes to be the problems addressed by the Rule in question, what purposes or goals the Rule sought to accomplish, and which interpretation will best satisfy those needs today.[43] Although the Court admittedly should not use a litigated dispute as the occasion to rewrite one of the Federal Rules, it clearly can and should look both to the purpose and the intended effect of the Rule to aid in interpreting its language and in applying it to the case in dispute.[44]

Other problems are also eliminated when courts are interpreting the Federal Rules rather than statutes. The enactment of statutes is, under article I, a prerogative of Congress; approval of those bills, prior to their becoming effective, is, under article II, the role of the President.[45] Pursuant to the Rules Enabling Act, however, Congress has vested all rulemaking authority in the Supreme Court, subject only to a limited form of potential legislative veto. Therefore, when the Court interprets the Federal Rules, it need not concern itself with issues of separation of powers and deference to the other two branches of the federal government. Through the combination of its own article III powers and these delegated powers,[46] the Court has full and independent authority to decide what rules of procedure are best and which interpretation of an existing Federal Rule will best serve these needs and goals.

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42 *See* C. J. Wieland & Son Dairy Prods. Co. v. Wickard, 4 F.R.D. 250, 252 (E.D. Wis. 1945). *See also supra* note 15 and accompanying text.

43 *See generally* Smith v. Morrison-Knudsen Co., 22 F.R.D. 108, 113 (S.D.N.Y. 1958) ("Rules of procedure, like principles of substantive law, should be interpreted to meet the challenge of changing conditions of life and litigation.").

44 *See* Harris v. Nelson, 394 U.S. 286, 298 (1969) (emphasis added):

> We have no power to rewrite the Rules by judicial interpretations. We have no power to decide [to expand a Rule] unless, on conventional principles of statutory construction, we 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.*

This passage indicates that already in 1969, the Supreme Court misapprehended its role as interpreter of the Federal Rules. Since the Court had itself promulgated the Rule in question, it should not have been necessary to have the support of the Rule's draftsmen to reach a particular result. Even more curious is the Court's reference to "congressional understanding." Once a Rule has been promulgated, it of course must be transmitted to Congress for possible legislative veto before the Rule becomes effective, *see supra* note 36; however, congressional "inaction" certainly indicates little about congressional "understanding" of the interpretation or purpose of a particular Rule.

An analogous problem arises in the administrative agency setting: may an agency articulate a new rule of law in an adjudicatory proceeding, or must it resort to rulemaking? While showing a preference for rulemaking, the Supreme Court has offered agencies the former option as well. SEC v. Chenery Corp., 332 U.S. 194 (1947). *See generally* B. SCHWARTZ, ADMINISTRATIVE LAW 191-96 (2d ed. 1984).

45 Of course, if the president vetoes a bill and the Congress overrides the veto, these powers become exclusively legislative.

46 Although it is possible that the promulgation of a particular Rule may exceed the powers delegated to the Court by the Rules Enabling Act, there appears to be a strong presumption in favor of the propriety of the Rules. *See* Hanna v. Plumer, 380 U.S. 460, 464-65 (1965); Mississippi Publishing Co. v. Murphree, 326 U.S. 438, 443-46 (1946); Sibbach v. Wilson & Co., 312 U.S. 1, 9-16 (1941). In any event, there seems no question that Rule 15(c) is properly within the delegated authority of the Act.

Finally, when the issue before the court involves the meaning of the Federal Rules of Civil Procedure, federalism concerns usually do not arise. When the case before the court involves issues of state law—whether it involves the interpretation of a state statute or involves the interpretation of common law doctrines of tort or contract law—the interests of the state in the interpretation of that law may be implicated. As the Court stated in *Erie Railroad Co. v. Tompkins*,[47] there is no federal general common law; even under the earlier regime of *Swift v. Tyson*,[48] federal courts deferred to state statutory law. Both the Rules of Decision Act[49] and the constitutional principles alluded to in *Erie* compel federal courts to defer to state views about the meaning of state statutes or state common law. As just noted, when the federal courts are interpreting the Federal Rules, however, they are acting pursuant to authority conferred both by article I and article III of the Constitution and need have no fear about trampling on these state interests.[50]

What are the implications of these conclusions for a court's task of interpreting one of the Federal Rules? First, I think it is not inappropriate to bear in mind the general rule of construction found in Rule 1—that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."[51] Although this principle obviously does not provide an answer to any specific question of the interpretation of any of the Federal Rules, it defines a context or, if you will, a predisposition against unnecessarily rigid or grudging interpretations of the Rules.

Second, the Court has often recognized that the Federal Rules are not ends in themselves, merely operating as the rules of a game, the object of which is to cross unscathed from pleadings to judgment without falling into unsuspected traps.[52] Rather, rules of procedure are merely vehicles for the resolution of a dispute on the merits. Naturally, in resolving that dispute, it is important that the parties have an opportunity to present their claims or defenses fully and that the proceedings move forward in a fair, expeditious, and inexpensive manner. If those goals are met, however, additional procedural hoops through which the parties must jump are inappropriate.

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47 304 U.S. 64 (1938).

48 41 U.S. (16 Pet.) 1 (1842).

49 Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73, 92, presently codified at 28 U.S.C. § 1652 (1982).

50 *But see supra* note 18 (noting potential *Erie* questions, which Court did not consider).

Schiavone therefore presents an interesting contrast to such cases as Hanna v. Plumer, 380 U.S. 460 (1965) and Ragan v. Merchants Transfer Co., 337 U.S. 530 (1949). There, the party opposing the application of the Federal Rule was arguing that the Rule was too broad, and that such a broad interpretation would either violate the Court's rulemaking power under the Rules Enabling Act or would violate *Erie* principles by infringing on a state's control of the interpretation of its law. Here, however, the Court's view of the scope of the Rule was unduly timid; the Court gave Rule 15(c) the narrowest possible reading, and it limited its own power to interpret the Rules liberally.

51 FED. R. CIV. P. 1. In addition, Rule 8(f) states: "All pleadings shall be so construed as to do substantial justice." FED. R. CIV. P. 8(f).

52 *See, e.g.*, Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966); Foman v. Davis, 371 U.S. 178, 181 (1962); Conley v. Gibson, 355 U.S. 41, 48 (1957).

Finally, in any decision, the parties, the bench, and the bar are entitled to candor with regard to the explanations for the Court's decision. Hidden agendas, reliance on rigid maxims, or substitution of labeling for analysis are what we academics expose and challenge in our law students. They are far less tolerable when they come from the United States Supreme Court.

Let me apply these principles to the Court's decision in *Schiavone.* Obviously, the function of a statute of limitations is to provide some admittedly arbitrary date by which the plaintiff must commence the action. At some point, defendants are entitled to repose, knowing that the threat of litigation no longer hangs over their heads, and the courts (and legislatures acting on their behalf) are entitled as well to take steps to lessen the likelihood of trials where memories of witnesses grow dim and where evidence is unreliable or unavailable. Two additional considerations are relevant, however. First, the Federal Rules recognize that service of process often takes a bit of time and that it cannot be accomplished simultaneously with the filing of the complaint with the court. Therefore, Rules 3 and 4 provide that if the complaint is filed within the statutory period, the action will still be timely if service of process takes place within 120 days of that date.[53] In *Schiavone,* that time period was indeed satisfied, albeit initially on the wrongly named defendant. Second, in the very process of drafting and adopting Rule 15(c), the Court recognized that on occasion a plaintiff may initially sue a wrong party, but will then recognize and correct the mistake before the intended party has been disadvantaged or prejudiced.

If the purpose of Rule 15(c)—and I emphasize that one should never lose sight of the purposes behind the Rules in interpreting their language—is to ensure that an action should proceed if the intended defendant receives timely notice of the nature and pendency of the action against it and also to ensure that the merits of the claim should not be foreclosed because of this "procedural error," then the Court in *Schiavone* obviously ignored these objectives. Instead, it substituted a rigid requirement which transcended the statute of limitations; adherence to the rules of the game is essential, and failure so to adhere forecloses further consideration of the lawsuit—no matter how meritorious the plaintiffs' claim may have been.

As to candor in explaining the Court's result: I wonder how many other people were struck by the "lineup" of some members of the Court in the *Schiavone* opinion. As noted earlier,[54] the Court indicated that the choice was not between a "liberal" view—which would have allowed the relation back of the amended complaint—and a "technical" interpretation—which led to the majority's result of no amendment and hence dismissal of the action. Two of the members of the Court taking the "technical" approach were Justices Brennan and Marshall, who are usually thought to be the two most liberal members of the Court; on the other hand, former Chief Justice Burger joined the dissent, arguing for

53 The majority of states have similar provisions. *See* Lewis, *supra* note 14, at 1552-53.

54 *See supra* text accompanying note 12.

the so-called "liberal" position. Now, however, note the substantive nature of the claim—an action for libel. By supporting dismissal, the majority prevented the plaintiffs from asserting a claim against *Fortune* Magazine, and so arguably first amendment interests were advanced. Obviously, I do not know if this was a moving factor for some members of the *Schiavone* majority. However, I grope and grapple and speculate, only because the Court's opinion itself is so unilluminating. Other than references to the "plain meaning" of the Rule and quotations of ambiguous language in the Advisory Committee's Notes, there is nothing else to explain or support the Court's result. If readers of opinions are not to look for such alternative, somewhat Machiavellian, explanations, the Court's rationale must be explicated more fully and honestly.

I conclude with the bad pun which forms the basis of the title of this paper—that *Schiavone* is an "un-*Fortune*-ate" decision. Although criticism is both easy and popular, it is my belief that the Supreme Court has generally done an excellent job of undertaking its role of promulgating, revising, and interpreting the Federal Rules. *Schiavone* is a rare exception to this assertion. I only hope that the Court continues its general practice of giving the Federal Rules an expansive reading, recognizing them as an efficient means to the far more important end—resolving litigated disputes on their merits.