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Standing to Intervene

Carl W. Tobias

University of Richmond, ctobias@richmond.edu

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I. INTRODUCTION

The Supreme Court has rarely considered what applicants must show to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) since the Court amended the provision in 1966.¹ This dearth of Supreme Court treatment has meant that primary responsibility for interpreting Rule 24(a)(2) has devolved upon the lower federal courts. Many of these courts and numerous commentators have recognized that it is very difficult to identify precisely what the Rule demands of those that seek to intervene of right. During much of the last quarter century, however, the federal judiciary agreed about one important proposition: Rule 24(a)(2) does not require that intervention applicants possess standing to sue. An increasing number of circuit and district courts, however, recently demanded or suggested that applicants have an “interest” greater than, or equal to, that necessary for standing or comply with certain standing requirements. Indeed, in 1986, the Supreme Court acknowledged that the “Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing.”² The Court, nonetheless, expressly declined to decide whether an applicant “must satisfy not only

¹ Rule 24(a)(2) provides in pertinent part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:

   . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24(a)(2) governs non-statutory intervention of right. Rule 24(a)(1) covers statutory intervention of right, when Congress prescribes intervention of right in substantive legislation, and Rule 24(b) applies to permissive intervention, intervention which courts have discretion to grant. Fed. R. Civ. P. 24.

the requirements of Rule 24(a)(2), but also the requirements of Article III.”

The Court’s reservation of the question for future decision and the increasing disagreement among lower federal courts regarding the relevance of standing to intervention have created confusion in the application of Rule 24(a)(2). The courts’ interpretations have complicated, and even precluded, participation in lawsuits by certain applicants, particularly public interest litigants, such as the National Association for the Advancement of Colored People (NAACP) and the Sierra Club. The treatment has prevented affected interests from being heard, while the federal judiciary has lost helpful expertise, information and perspectives needed to make the best substantive decisions. The invocation of standing in the intervention of right context has been inadvisable, and its effects recently have worsened. Until the Supreme Court resolves the question of standing’s relevance to intervention of right, litigants increasingly will ask that federal courts find standing applicable to Rule 24(a)(2), and these requests will engender greater uncertainty, cost, and hardship. It is important, therefore, to analyze this issue.

The first section of this Article explores the background and judicial application of standing to sue and the history of intervention of right. The ideas have different origins and serve dissimilar purposes, although both implicate what entities need to participate in litigation. Standing basically entails what a plaintiff must demonstrate to initiate suit and Article III’s requirement that there be a case or controversy between the parties. In comparison, intervention of right involves what an absentee must show to participate in ongoing litigation, as to which the plaintiff has standing and whose resolution may prejudice the applicant, and Rule 24(a)(2)’s requirements that an applicant have an inadequately represented interest which will be impaired.

The second part assesses the enforcement of Rule 24(a)(2) since its revision in 1966. The federal judiciary has experienced considerable difficulty in delineating exactly what applicants must demonstrate to intervene of right, but few courts have mentioned standing. Over the last decade, a growing number of judges has insisted that applicants possess an interest more substantial than, or identical to, that necessary for standing or satisfy various standing requirements. That enforcement has restricted, and occasionally prevented, the participation of public interest litigants and has deprived courts of valuable input. Until the Supreme Court resolves the issue, plaintiffs and defendants increasingly

3. Id. at 69.
Standing to Intervene

will request that judges consider standing relevant to intervention of right, and this will create mounting confusion, expense and hardship.

The third section analyzes the opinions of those courts that have stated or suggested that standing implicates Rule 24(a)(2). The federal judiciary has provided little justification for the invocation of standing, and the Rule’s history, language and underlying policies lend minimal support to such application. Moreover, the evaluation shows that the standing and intervention inquiries essentially are, and should remain, discrete. The courts, therefore, should sharply circumscribe their reliance on standing. These conclusions do not necessarily mean that standing is wholly irrelevant. Indeed, standing is critical to intervention of right in one sense: the policies that underlie standing help to define the idea of a case and to identify appropriate parties to participate in litigation. A case is a vehicle for facilitating the federal judiciary’s performance of its quintessential responsibilities—explicating public values in the Constitution and statutes and requiring compliance with them by governmental entities. The party structure of a case, accordingly, should include litigants that can facilitate the efficacious discharge of these judicial duties.

The final part of the Article offers suggestions for future application of standing to Rule 24(a)(2). The segment recasts intervention of right jurisprudence, drawing on transformed conceptualizations of the idea of a case and of the federal judiciary’s role in public law litigation. The approach is a pragmatic, fair, and sensitive adjustment of the traditional intervention mechanism to the practicalities of modern litigation. Its implementation should enable courts to improve their substantive decisionmaking and achieve judicial economy.

II. Public Law Litigation and the “Liberalization” of Standing and Intervention

Many developments, certain of which are interrelated, occurred throughout the twentieth century that implicate standing and intervention of right. A number of these events led to the transformation of considerable federal civil litigation and to new ways of conceptual-

4. See Tobias, Public Law Litigation and the Federal Rules of Civil Procedure, 74 CORNELL L. REV. 270, 271-96 (1989). From approximately the mid-1960s until the late 1970s, the federal judiciary “liberalized” standing and intervention of right in the sense of being more willing to permit participation in litigation by entities that sought to initiate suit or intervene in cases. Since around 1980, courts generally have been less willing to grant standing or intervention and have invoked standing in the intervention of right context specifically to limit intervention. The restrictions on standing and intervention appear primarily to be responses to the litigation explosion, but they also may reflect a lack of solicitude for public interest litigants or the interests they seek to vindicate in litigation.
izing standing and intervention between the mid-1960s and the mid-
1970s. This part initially examines those general developments most
important to standing and intervention of right and then considers the
background and judicial application of standing and the history of in-
tervention of right.

A. Growth and Development of Public Law Litigation

From approximately 1965 to 1975, a multitude of developments
altered the nature of much federal civil litigation and the understand-
ings of what entities seeking to institute or intervene in these lawsuits
needed to show. Public interest litigants increased their participation
in federal cases, and public law litigation grew. Federal judges created
novel substantive rights and expanded those previously recognized,
while they were more receptive to citizen involvement in agency pro-
cedings and courtroom litigation. Congress enacted "social" legislation
that fostered such participation by the statutes' intended beneficiaries.
Public interest litigants capitalized on certain aspects of the equity-
based Federal Rules of Civil Procedure that facilitated their involve-
ment in lawsuits, and courts applied the Rules in ways that were so-
licitous of these parties' needs.

Public interest litigants are individuals or groups that pursue in
the administrative sphere or in the courtroom rights and interests of
unrepresented persons adversely affected by the activities of large public
or private entities. Public interest litigants differ in several important
respects from parties they typically oppose, such as the government
and members of regulated industries, namely corporations. Nearly all
public interest litigants have considerably less time and money to spend
than their opponents, and the resource deficiencies of numerous public
interest litigants, such as civil rights plaintiffs, can make them risk-
averse.

The most significant precursors of modern public interest liti-
gants—the NAACP, the American Civil Liberties Union (ACLU), and
legal aid offices created to furnish urban poor persons with legal ser-

5. See id. at 279-87; Tobias, Rule 19 and the Public Rights Exception to Party
6. See Tobias, supra note 5, at 745 n.1, 756; Tobias, Of Public Funds and Public
Participation: Resolving the Issue of Agency Authority to Reimburse Public Participants in
Administrative Proceedings, 82 COLUM. L. REV. 906, 941-45 (1982). See generally N. ARON,
7. Public interest litigants typically opposite regulated industries in public interest
litigation, but the litigants may oppose government in all forms of public law litigation. See
infra notes 13-18 and accompanying text.
8. See Tobias, Rule 11 and Civil Rights Litigation, 37 BUFFALO L. REV. 485, 495-
98 (1988-89) (civil rights plaintiffs); N. ARON, supra note 6, at 52-62 (public interest litigants).
vices—pursued civil lawsuits in the early twentieth century. It was not until the 1960s, however, that these entities and today’s public interest litigants, such as the Natural Resources Defense Council (NRDC), became actively involved in the kinds of cases that typify modern public law suits.

The rights and interests that public interest litigants normally seek to vindicate are relatively intangible, abstract, ideological, collective or public in character, such as concern for liberty or air quality. These often contrast markedly with other parties’ rights and interests, which are concrete, common law, individual or private in nature, such as real property or a contract. Public interest litigants also provide unique expertise, information and perspectives and the input of public interest litigants can improve administrative and judicial decisionmaking.

Public law litigation comprises lawsuits that vindicate significant social values affecting large numbers of people. Many aspects of this litigation are unlike traditional private, two-party cases. For instance, the subject matter of public law litigation may be the practices or policies of enormous units of government or multinational corporations, while the cases can be exceedingly complex, involving hundreds of issues and thousands of parties.

“Institutional reform” litigation was one important form of public law litigation experiencing considerable growth between 1965 and 1975. Institutional suits seek to improve the operation of substantial agencies or governmental institutions, such as prisons and schools. Another type of public law litigation increasing considerably both dur-

10. See Houck, With Charity for All, 93 Yale L.J. 1415, 1439-41 (1984); Rabin, supra note 9, at 212, 216-17.
12. See Tobias, supra note 6, at 941-45 (agency decisionmaking); Tobias, supra note 4, at 329 (judicial decisionmaking).
14. See, e.g., United States v. City of Chicago, 870 F.2d 1256, 1260 (7th Cir. 1989) (police lieutenants’ examination as subject matter); Geier v. Richardson, 871 F.2d 1310, 1315-17 (6th Cir. 1989) (complex party structure); opinions in In re “Agent Orange Product Liability Litigation,” 611 F. Supp. 1221 (E.D.N.Y. 1985) (complex issues); see also Chayes, supra note 13, at 1302.
15. See Tobias, supra note 4, at 279-82; see also Chayes, supra note 13.
ing that time and since is "public interest litigation." These cases vindicate the political, moral or ideological interests of many individuals in trying to guarantee proper governmental decisionmaking. A prototypical, and the predominant, kind of public interest litigation challenges administrative determinations of federal agencies. Many of these suits now have at least a tri-polar party structure, which typically includes the government, public interest litigants, and regulated interests or their representatives, such as trade associations.

When resolving public law suits, judges assume different roles than in private litigation. Perhaps most important, they give substantive content to public norms in constitutional or statutory provisions that underlie the cases and attempt to prevent or correct inappropriate governmental behavior. Judges also manage the litigation more closely in several ways. In institutional reform cases, for example, courts may undertake major responsibility for fact-gathering, even appointing adjuncts such as special masters, to fulfill what essentially are "quasi-legislative" or "quasi-administrative" decisional duties.

The expansion of public law litigation resulted from numerous factors, including the federal judiciary's recognition of new substantive rights, its extension of those rights formerly recognized, as well as courts' flexible application of procedural requirements and increased control over the civil litigation process. The Supreme Court broadly interpreted the Equal Protection and Due Process Clauses of the Fourteenth Amendment, developing, for instance, the concept of "New


Another conceptualization of "managerial judging," which partially responds to the "litigation explosion," involves close judicial supervision of civil lawsuits not only before trial but even from filing to disposition. See, e.g., In re San Juan Dupont Plaza Hotel Fire Litigation, 859 F.2d 1007 (1st Cir. 1988). See also Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 Calif. L. Rev. 70 (1981); Resnik, Managerial Judges, 96 Harv. L. Rev. 374 (1982). The litigation explosion is the perception that a substantial number of civil cases are filed, too many of which lack merit or exploit procedural mechanisms for tactical advantage. See Tobias, supra note 4, at 287-92 (more discussion of managerial judging and litigation explosion).

Property." The Supreme Court and lower federal courts also evinced enhanced receptivity to public participation in administrative proceedings and courtroom litigation by, for example, enforcing the Federal Rules in ways that promoted public interest litigants' active involvement in civil cases.

Federal legislative activity contributed to a number of the developments. From the mid-1960s to the mid-1970s, Congress passed many statutes that certain observers dubbed "social regulation" or "social legislation." Some statutes were intended to improve the environment or to protect consumers, while other measures were meant to rectify discrimination. Congress bestowed substantive rights and procedural advantages—such as liberalized standing and intervention, lenient burdens of proof, and reduced requirements for securing attorney's fees—on intended beneficiaries that Congress anticipated would vindicate the statutory interests by participating in agency processes or litigation.

The equity-premised Federal Rules and the federal courts' generous application of them were important to these developments. In the first decade of the twentieth century, growing dissatisfaction with common law and code practice and procedure led some leaders of the bench and bar to advocate change. Support for reform gradually increased, and after decades of controversy, Congress enacted the Rules

24. See infra notes 40-42 and accompanying text.
25. See Rabin, Federal Regulation in Historical Perspective, 38 STAN. L. REV. 1189, 1278-95 (1986); Tobias, supra note 4, at 284-85.
Enabling Act of 1934.\textsuperscript{30} That legislation empowered the Supreme Court to adopt procedural rules for civil litigation in the federal trial courts that became effective in 1938.\textsuperscript{31}

The Advisory Committee that drafted the Rules had numerous objectives for the Rules as a whole and as to specific procedural areas and rules.\textsuperscript{32} The Committee favored resolution of disputes on the merits and non-technical procedural approaches, evidenced by provision for liberal pleading, open-ended discovery, and substantial attorney and party control over litigation, especially prior to trial.\textsuperscript{33} The drafters' decision to merge equity and law was particularly important.\textsuperscript{34} This meant that equity, not common law, was the source of the Rules' underlying philosophy, while the Rules even exceeded equity's permissiveness and flexibility in pleading, discovery and joinder.\textsuperscript{35} It is impossible to discern whether the Advisory Committee that wrote the Federal Rules in the mid-1930s actually intended to provide specifically for modern public law litigation. Nonetheless, the Committee's purposes were consistent with, and probably even fostered, the institution and vigorous pursuit of this litigation.\textsuperscript{36}

From 1938 until the early 1960s, courts and commentators found that the Rules functioned rather well, and the federal judiciary experienced comparatively little difficulty applying them.\textsuperscript{37} There were relatively few amendments, and many of these were characterized as "clarifying" changes.\textsuperscript{38} Some revisions made the Rules even more permissive and flexible. Indeed, the Advisory Committee, in crafting the liberalized 1966 party joinder amendments, admonished federal courts to apply flexibly and pragmatically the requirements governing


\textsuperscript{31} See Subrin, supra note 29, at 973; Tobias, supra note 4, at 273.

\textsuperscript{32} See Resnik, supra note 21, at 508-15; Subrin, supra note 29, at 922, 973-78. Although the Supreme Court has formal statutory authority for promulgating and amending the Rules, the Advisory Committee develops proposals for revision which the Court rarely changes. See Amendments to Rules of Civil Procedure, 383 U.S. 1029, 1032 (1966) (dissenting statement of Justice Black). I recognize that reality here by referring to the Committee rather than to the Committee, the Court and Congress.


\textsuperscript{34} See Clark & Moore, A New Federal Civil Procedure-I. The Background, 44 YALE L.J. 387, 415-35 (1935 (contemporaneous advocacy of merger).

\textsuperscript{35} See Subrin, supra note 29, at 922, 925-26.

\textsuperscript{36} For analysis of relevant materials that reaches the conclusions in the text, see Tobias, supra note 4, at 276-77.


compulsory party joinder (Rule 19), class actions (Rule 23), and intervention of right (Rule 24(a)(2)). Many members of the federal bench followed this admonition between 1965 and 1975. Some federal judges created a "public rights exception" to compulsory party joinder, and a number of courts granted intervention of right quite liberally; while numerous other judges evidenced greater willingness to certify class actions, so that they experienced much more widespread, albeit controversial, application. Judges generously interpreted additional rules, especially those pertaining to pleading and discovery. Moreover, the "liberal ethos," which pervaded the Rules as a set of litigation principles, and the flexibility that equity promoted, permitted public interest litigants to initiate lawsuits, defeat preliminary motions, undertake thorough discovery, and reach the merits as plaintiffs, and to gain intervention rather easily as applicants.

In short, the Federal Rules as written and as enforced, together with the other developments explored, offered a conducive environment in which public law litigation could grow and mature. Crucial to what happened was the gradual, sustained liberalization of citizen access across a broad spectrum of doctrinal areas, including public participation in agency proceedings, standing to commence litigation, and the right to intervene in lawsuits. Against this backdrop, the specific concepts of standing and intervention of right will be analyzed more closely.

**B. Standing**

Throughout much of the country's history, there was no discrete body of standing law, and the question of standing turned on whether

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40. See Tobias, supra note 5, at 757-59 (public rights exception); Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem", 92 Harv. L. Rev. 664 (1979) (class actions).

41. See Miller, supra note 21, at 8-9; Subrin, supra note 29, at 968.


43. See Miller, supra note 21, at 14-15; Subrin, supra note 29, at 968.

44. Standing warrants comparatively less treatment here because others have competently chronicled relevant developments and because intervention of right is the predominant concern of this Article. I principally treat standing to seek judicial review of agency action, supplementing that with analysis of additional areas when they are pertinent to the Article's central concerns. In discussing standing, I thus rely substantially on Sunstein, Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432 (1988). For recent valuable examination of standing, see Fletcher, The Structure of Standing, 98 Yale L.J. 221 (1988); Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan. L. Rev. 1371 (1988). Cf. Nichol, Rethinking Standing, 72 Calif. L. Rev. 68, 68 n. 3 (1984) (catalog of earlier scholarship). See also J. Vining, Legal Identity (1978).
positive law recognized a cause of action.\textsuperscript{45} The requirement that plaintiffs possess something in the nature of a common law right to sue meant that regulated interests, such as public utilities, were able to challenge governmental activity in court but that competitors and regulatory beneficiaries, such as purchasers of consumer goods, could not.\textsuperscript{46} This private law construct of standing reflected the convergence of two distinct groups of concepts: first, that federal courts were to prevent governmental intrusions into common law interests and second, that justiciability doctrines, namely standing, should be employed to minimize the judiciary's intervention in governmental decision-making.\textsuperscript{47}

Over time, the federal courts repudiated this private law approach to standing in two fundamental ways. One was to find that statutorily-protected interests were cognizable.\textsuperscript{48} The other was the development of the notion of "surrogate standing," whereby Congress permitted specific individuals or groups that lacked interests protected by legislation to vindicate the interests of the public, essentially serving as private attorneys general.\textsuperscript{49} Congress codified these premises for standing in the Administrative Procedure Act (APA), adopted in 1946: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."\textsuperscript{50} Congress intended "legal wrong" to encompass injury to constitutional, common law, and statutory interests, and "adversely affected or aggrieved" to permit surrogate standing, provided that the substantive measure so prescribed.\textsuperscript{51} Neither the APA's language nor its legislative history clearly stated if, and when, regulatory beneficiaries would have standing.\textsuperscript{52} Nonetheless, in the mid-1960s, numerous circuit courts read the statutorily protected interest component of the legal wrong idea in ways that permitted the beneficiaries to challenge the legality of agency decisionmaking.\textsuperscript{53}

\textsuperscript{45} See J. Vining, supra note 44, at 55; Jaffe, supra note 18, at 1044; Winter, supra note 44, at 1395-96.
\textsuperscript{46} See Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1723 (1975); Sunstein, supra note 44, at 1436.
\textsuperscript{47} See Stewart, supra note 46, at 1724 (first group); Sunstein, supra note 44, at 1438 (both groups).
\textsuperscript{48} See, e.g., J.I. Case Co. v. Borak, 377 U.S. 426 (1964); The Chicago Junction Case, 264 U.S. 258, 262-69 (1924); see also Stewart, supra note 46, at 1725-30.
\textsuperscript{49} See, e.g., FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476-77 (1940); see also Sunstein, supra note 44, at 1439.
\textsuperscript{51} See Sunstein, supra note 44, at 1440-41.
\textsuperscript{53} See, e.g., Office of Communication of the United Church of Christ v. FCC, 359
The federal judiciary could have employed these concepts to elaborate the legal wrong test in a manner that would have provided statutory beneficiaries expansive standing. Nevertheless, the Supreme Court adopted a different approach to standing in the 1970 landmark case of Association of Data Processing Service Organizations v. Camp.\(^54\) The Court required that plaintiffs suffer an injury in fact which was arguably within the zone of interests protected by the applicable constitutional or statutory command.\(^55\) The Court thus substituted for the legal interest test a factual inquiry into whether injury existed.

For a number of years, the *Data Processing* articulation appeared to work reasonably well, facilitating the development of a standing doctrine of considerable coherence. The "arguably within the zone" requirement functioned pragmatically as a feasible, liberal threshold test.\(^56\) In time, however, sharp criticism of *Data Processing* arose.\(^57\) The injury-in-fact test alone eventually became inadequate to the task of determining who, of the substantial number of people and interests affected by agency decisions in an integrated economy, should have standing.\(^58\)

In the mid-1970s, the Supreme Court employed several concepts to restrict open-ended access to the courts.\(^59\) Ultimately the Court developed requirements to supplement the injury-in-fact test. Plaintiffs now must show that they have suffered some actual or threatened harm, which is "distinct and palpable," not abstract, conjectural or hypothetical.\(^60\) Second, the injury must be fairly traceable to the challenged unlawful behavior of the defendant.\(^61\) Finally, there must be a substantial likelihood that plaintiff’s injury will be redressed by a favorable determination.\(^62\) The Court presently characterizes these

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\(^{54}\) F.2d 994, 1000-06 (D.C. Cir. 1966); Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 615-17 (2d Cir. 1965).


\(^{56}\) Id. at 153.


\(^{59}\) See Clarke, 479 U.S. at 395-97; see also J. VINING, *supra* note 44, at 32.

\(^{60}\) See, e.g., United States v. Richardson, 418 U.S. 166 (1974). The concepts were not especially applicable to administrative law and plausible arguments underlie most of them. See Sunstein, *supra* note 44, at 1451.


\(^{63}\) See, e.g., *Simon*, 426 U.S. at 41; accord County of Riverside v. McLaughlin,
restrictions as constitutional in nature.\textsuperscript{63}

The Supreme Court also has imposed a set of prudential limitations, essentially to protect the judiciary’s prerogatives and resources, and plaintiffs must meet the restrictions, even when they have satisfied the constitutional requirements.\textsuperscript{64} Plaintiffs generally must assert their own legal interests and rights, rather than those of third parties.\textsuperscript{65} Plaintiffs cannot vindicate “abstract questions of wide public significance” [amounting to] ‘generalized grievances,’ pervasively shared and most appropriately addressed in the representative branches.”\textsuperscript{66} The Court essentially considers the zone of interest test a prudential requirement.\textsuperscript{67}

The Supreme Court and lower federal courts have more readily found that plaintiffs possess standing in the major category of cases that challenge agency decisionmaking under Section 702 of the APA.\textsuperscript{68} For instance, the Court recently observed that the zone of interest requirement is “not meant to be especially demanding” and characterized it as a guide for determining whether, in light of “Congress’ evident intent to make agency action presumptively reviewable,” a specific plaintiff should be heard to challenge a particular administrative judgment.\textsuperscript{69} Indeed, until this Term, the Court had never rejected standing because a plaintiff failed to satisfy the zone test.\textsuperscript{70}

The Supreme Court has articulated numerous justifications for standing, although the opinions do not always clearly state how standing’s requirements effectuate its ostensible purposes.\textsuperscript{71} The Court has observed that Article III standing law is “built on a single basic idea—the idea of separation of powers.”\textsuperscript{72} Correspondingly, the Court has

\textsuperscript{63} See, e.g., Gollust v. Mendell, 111 S. Ct. 2173, 2180 (1991); Allen, 468 U.S. at 751; Valley Forge, 454 U.S. at 472.

\textsuperscript{64} See, e.g., Valley Forge, 454 U.S. at 474-75.


\textsuperscript{67} This category is in comparison to cases that invoke constitutional provisions or implicate taxpayer or citizen standing. See, e.g., Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

\textsuperscript{68} See Air Courier Conf., 111 S. Ct. at 915; See also Lujan, 110 S. Ct. at 3186-87; Sunstein, supra note 44, at 1445 n.56. Of course, the lower courts have followed the Supreme Court’s articulation of standing. Recent examples are North Shore Gas Co. v. EPA, 930 F.2d 1239 (7th Cir. 1991); Albuquerque Indian Rights v. Lujan, 930 F.2d 49 (D.C. Cir. 1991).

\textsuperscript{69} See, e.g., Sunstein, supra note 44, at 1438 (standing restrictions justified on basis of policies having minimal or no relationship to standing).

recognized that the exercise of judicial power affects relationships among the co-equal branches of the federal government, most profoundly when the judiciary declares activity of the political branches unconstitutional.\textsuperscript{73} The Court also has remarked that standing helps to insure that legal issues presented to federal courts will be resolved "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."\textsuperscript{74} Moreover, the Court has intimated that standing reflects respect for the autonomy of people who are likely to be affected most directly by a judicial determination.\textsuperscript{75} Another justification for standing is that it guarantees efficacious or sincere advocacy.\textsuperscript{76} Standing restrictions are said as well to be mechanisms for reducing the civil caseload.\textsuperscript{77}

Some judges and many commentators have criticized the Supreme Court's standing jurisprudence.\textsuperscript{78} The Court's enunciation of standing requirements has been unclear and inconsistent, aspects the Court itself has been compelled to admit.\textsuperscript{79} The Supreme Court has granted standing in cases when it should have been denied and rejected standing in situations when it should have been found, results which often appear to reflect a majority's views on the merits.\textsuperscript{80} Moreover, the Court has supported certain standing limitations with policies only minimally related to standing.\textsuperscript{81} Furthermore, the Court, in articulating the standing requirements, has evinced little concern that they be consistent with closely related justiciability concepts, such as mootness, or with additional relevant court access doctrines and ideas pertaining to a case's structure, like pendent jurisdiction and intervention of right.\textsuperscript{82}

\textsuperscript{74} Id. at 472; accord Secretary of State v. Joseph H. Munson, Co., 467 U.S. 947, 955 (1984); Sierra Club v. Morton, 405 U.S. 727, 740 (1972).
\textsuperscript{76} See, e.g., Valley Forge, 454 U.S. at 472-73.
\textsuperscript{77} See, e.g., Chayes, The Supreme Court, 1982 Term—Foreword: Public Law Litigation and the Burger Court, 96 HARV. L. REV. 4, 18-26 (1982); Sunstein, supra note 44, at 1448 n. 74.
\textsuperscript{78} See, e.g., sources cited in Nichol, supra note 44, at 68 n.3.
\textsuperscript{79} "We need not mince words when we say that the concept of 'Art. III Standing' has not been defined with complete consistency in all of the various cases decided by this Court..." Valley Forge, 454 U.S. at 475; accord Allen v. Wright, 468 U.S. 737, 751 (1984).
\textsuperscript{80} See Chayes, supra note 77, at 14-22; Sunstein, supra note 44, at 1448.
\textsuperscript{81} For instance, although standing limitations are said to insure efficacious or sincere advocacy, public interest litigants, like the Sierra Club, that have not suffered injury in fact, are especially likely to be effective advocates. See Jaffe, supra note 18, at 1044; Meltzer, Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 COLUM. L. REV. 247, 295-313 (1988). See generally supra note 76 and accompanying text.
\textsuperscript{82} See Bandes, supra note 11, at 227-29, 235-55.
Standing, therefore, has traditionally been viewed as what the federal judiciary demands of those who wish to commence litigation. The Supreme Court has observed: "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." 83 Intervention of right, by comparison, is what judges require of an applicant that wishes to participate in litigation, in which the plaintiff has standing, before the court enters an order that may prejudice the applicant.

C. Intervention of Right

The history of intervention of right prior to the amendment of Rule 24(a)(2) in 1966 needs only brief examination here. 84 In a path-breaking article published during 1936, Professors Moore and Levi identified two classifications of cases in which judges seemed to assume that applicants were entitled to intervene, and these categories underlie original Rule 24 promulgated by the Supreme Court in 1938. 85

Paragraph (a)(3) of the Rule mandated intervention when applicants would be affected adversely by the disposition of property within a court’s control. 86 The Advisory Committee intended that the paragraph codify existing intervention practice, whereby courts had broadly interpreted the idea of property so as to grant intervention liberally. 87 Thus, some judges treating intervention petitions filed after the Rule’s adoption "virtually disregarded the language of this provision." 88

Paragraph (a)(2) provided for intervention of right by an applicant that might be bound, and whose interests could be represented inade-

85. The first involved cases in which the absentee asserted an interest in property the court controlled whose distribution would prejudice the absentee. The second included cases in which possible resolution of the original litigants’ dispute would bind an absentee’s later effort to protect its interest which the parties inadequately represented. See Moore & Levi, supra note 84, at 581, 582-95; see also FED. R. CIV. P. 24, 1 F.R.D. xciv-xcv (1938).
86. "Upon timely application, anyone shall be permitted to intervene in an action when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court. . . ." See FED. R. CIV. P. 24(a)(3), 1 F.R.D. xciv (1938).
87. See ADVISORY COMM. ON CIVIL RULES, NOTES 25 (Mar. 1938); see also Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 508 (1941).
equately, if the litigation proceeded in its absence. 89 Although numerous courts read the “bound” language to mean practical prejudice, 90 a majority of judges interpreted it in a res judicata sense. 91 The Supreme Court, in the 1961 case of Sam Fox Publishing Co. v. United States, 92 subscribed to the res judicata reading, found that application inconsistent with the inadequate representation requirement, and rendered paragraph (a)(2) a nullity in class actions. 93

This interpretation was the major reason for the amendment of Rule 24 in 1966, and it was included in a package of party joinder amendments that substantially revised Rules 19, 23 and 24. 94 The Advisory Committee intended that the changes promote more flexible, practical judicial application generally and rectify specific difficulties federal courts had encountered when interpreting the Rules’ terminology. The drafters also purportedly meant to include criteria for party joinder decisionmaking, not definitional classifications, although they apparently failed to execute this intent in writing Rule 24(a)(2). 95

The 1966 amendment of Rule 24 collapsed the requirements of paragraphs (a)(2) and (a)(3) into one provision. Revised paragraph (a)(2) states that potential intervenors with an interest in the property or transaction that is the subject of the litigation which may suffer practical prejudice shall be permitted to intervene, unless existing parties represent them adequately. 96 Precisely what the Advisory Committee intended to achieve with the changes in Rule 24(a)(2) remains unclear and controversial. Nonetheless, it is possible to afford an account of those considerations most relevant to the issues discussed here.

91. See, e.g., Sutphen Estates, Inc. v. United States, 342 U.S. 19, 21 (1951); see also Shreve, supra note 84, at 904. See generally Cohn, supra note 88, at 1229 (many courts ignored question of adequate representation).
93. Id. at 691-93.
94. See Cascade Natural Gas Corp v. El Paso Natural Gas Co., 386 U.S. 129, 153-54 (1967) (Stewart, J., dissenting); Cohn, supra note 88, at 1204, 1230; see also supra note 39 and accompanying text.
96. See supra note 1.
The Committee certainly meant to remedy problems—especially rendering paragraph (a)(2) a nullity in class actions—that the Supreme Court's interpretation in *Sam Fox* had created. The drafters also sought to foster more flexible, pragmatic judicial treatment of intervention of right and its three principal specific requirements—interest, impairment and inadequate representation.

Less clear is exactly what the Advisory Committee intended with respect to the interest criterion. Some judges, including members of the Supreme Court, have maintained that the Committee meant to leave the interest idea unchanged. Nevertheless, the drafters seemed to contemplate some modification, albeit limited. In 1967, Professor Benjamin Kaplan, who had served as the Reporter for the Advisory Committee at the time of the Rule's amendment, wrote that the altered phraseology was supposed to "drive beyond the narrow notion of an interest in specific property [although] interest . . . in the new rule finds its own limits in the historic continuity of the subject of intervention and in the concepts of new Rule 19, to which intervention looks for analogy." Moreover, the drafters deleted the requirement that applicants have an interest in property in the court's custody, perhaps evincing cognizance that less tangible interests might suffice; however, the 1966 version states that applicants must have an interest "relating to the property or transaction which is the subject of the action."

Another area of ambiguity involves the question of whether the Committee intended to provide specifically for public law litigation when reformulating the provision. Some courts and writers have contended that the drafters revised all three party joinder amendments or at least Rule 24 with public law cases in mind. Professor Kaplan

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97. *See* Advisory Committee Notes for Rule 24, 39 F.R.D. 89, 109 (1966); *see also* Kaplan, *supra* note 88, at 401-02.
98. *See* Advisory Committee Notes for Rule 24, 39 F.R.D. 89, 109 (1966); *see also* *Hooker Chems.*, 749 F.2d at 982 n. 13.
101. Professor Bandes states that the 1966 amendment abandoned the property restrictions "in keeping with the trend toward recognizing less tangible interests." Bandes, *supra* note 11, at 252 n. 164 (citing *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686-89 (1973); *Sierra Club v. Morton*, 405 U.S. 727 (1972)). The Court decided those cases, however, a decade after the Advisory Committee had "essentially finished writing the party joinder amendments." *See infra* note 107 and accompanying text.
103. *See*, e.g., *Lelsz v. Kavanaugh*, 710 F.2d 1040, 1047 (5th Cir. 1983); Chayes, *supra* note 13, at 1292.
alluded, although obliquely, to this possibility in 1968, by observing that the amendment of Rule 23 was meant to foster more vigorous invocation of the class action device as a mechanism for vindicating the interests of large numbers of people who individually would be unable to litigate.104

Certain judges and commentators, however, have asserted that the Advisory Committee drafted the three party joinder amendments principally for private law suits.105 Professor Arthur Miller, another former Reporter, has argued persuasively that the importance of Rule 23's revision to public law litigation and to the "litigation explosion" has been overstated.106 He also has observed that the Committee had essentially finished writing the party joinder amendments in 1962—prior to the substantial expansion of public law litigation, Congressional passage of much "social" legislation, and the relatively widespread recognition of new ways of conceptualizing the "interest" idea, such as liberalization of standing discussed above.107 In short, the drafters probably did not specifically anticipate or expressly provide in Rule 24(a)(2) for public law litigation in a number of the forms it presently assumes.108

Courts and writers have criticized the amendment of Rule 24(a)(2) and its quartercentury of judicial application. Shortly after the Committee revised the provision in 1966, two respected scholars claimed that Rule 24(a)(2) was flawed in the amendment process.109 Professor John Kennedy observed that the drafters had not followed through on their commitment to provide decisional criteria, rather than definitional categories, in the party joinder amendments, leaving the revision incomplete.110 Professor David Shapiro, essentially concurring in that assessment, suggested numerous relevant criteria to fill this gap and recommended that the Advisory Committee combine intervention of right and permissive intervention under Rule 24 (b).111

104. See Kaplan, A Prefatory Note, 10 B.C. IND. & COM. L. REV. 497, 497 (1968). In 1989, he observed that "there was a sense in which the amended rule was not neutral: it did not escape attention at the time that it would open the way to the assertion of many, many claims that otherwise would not be pressed; so the rule would stick in the throats of establishment defendants." Kaplan, Comment on Carrington, 137 U. PA. L. REV. 2125, 2126-27 (1989).


106. See Miller, supra note 40, at 664-76.

107. See id. at 670 n. 31. See generally supra notes 4-5, 9-20, 102 and accompanying text. But see supra note 101 and accompanying text.

108. This is particularly true of institutional reform litigation. See supra notes 15-16 and accompanying text. See generally supra note 36 and accompanying text.

109. See Kennedy, supra note 95; Shapiro, supra note 95.

110. See Kennedy, supra note 95, at 374-75.

111. See Shapiro, supra note 95, at 757-64.
Emma Coleman Jordan and Professor Gene Shreve subsequently identified inconsistencies in the judicial application of intervention and waste of judicial resources in intervention decisionmaking, especially concerning appeals. The commentators made suggestions similar to those of Professors Kennedy and Shapiro, such as recommending that all non-statutory intervention of right decisionmaking be committed to trial court discretion. The next part analyzes judicial application of Rule 24(a)(2) over the last twenty-five years.

III. JUDICIAL APPLICATION OF RULE 24(a)(2)

Federal judges have encountered many problems delineating precisely what applicants must show to intervene of right. The complications entailed in treating the interest requirement, however, are paradigmatic and most important to standing’s relevance to the question of intervention of right. The interest requirement, therefore, will be the focus of this part, while the remaining three requirements—impairment, inadequate representations and timeliness—will be examined when relevant.

Numerous courts and commentators have recognized that the federal judiciary has experienced considerable difficulty in defining the interest necessary to satisfy Rule 24(a)(2) since the time of its 1966 amendment. Some have observed that an authoritative definition has yet to be enunciated, while others have considered futile attempts to elaborate the interest idea. The Supreme Court has rarely addressed Rule 24(a)(2), and when it has, the opinions have been peculiarly fact-bound, affording minimal guidance, especially as to the meaning of interest. In the 1967 case


113. See Jones, supra note 112, at 62-78, 83-86 (suggesting flexible application solicitous of civil rights litigants); Shreve, supra note 84, at 924-27 (suggesting commitment to trial court discretion).

114. Interest is part of the impairment and inadequate representation requirements and implicates timeliness, while judicial application of interest is typical of the other three criteria. Moreover, judicial invocation of standing implicates the interest condition much more than the remaining requirements.


116. See, e.g., Panola Land Buying Co. v. Clark, 844 F.2d 1506, 1523 (11th Cir. 1988) (Clark, J., dissenting); Nuesse v. Camp, 385 F.2d 175, 700 (D.C. Cir. 1967).


118. See Panola, 844 F.2d at 1523; Bradley v. Milliken, 828 F.2d 1186, 1192 (6th Cir. 1987); FEDERAL PRACTICE, supra note 113, § 1908, at 265-66, 270.
of *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, the Court read the Rule broadly and granted intervention of right, implying that a particular equitable or legal interest is unnecessary to satisfy the Rule. Judges and writers have ascribed the Court's determination to its "spleenetic displeasure" with the federal government's handling of the natural gas antitrust case and to the Court's desire to facilitate the vindication of substantive rights considered to have national consequence by potential intervenors which included the State of California and companies that were dependent on competition.

The Court interpreted Rule 24(a)(2) narrowly by requiring that an applicant have a "significantly protectable" interest in the 1971 opinion, *Donaldson v. United States*. Courts and commentators have observed, however, that the quoted language has "not been a term of art in the law of intervention and provides "little more guidance than does the bare term 'interest'" in the Rule while stating that there is considerable disagreement about its meaning. Some writers also have criticized the Court's interpretation of the Rule, principally because it was allegedly manipulating procedure to protect the government's substantive interest in effective enforcement of the tax statutes.

In the 1972 decision *Trbovich v. United States*, the Supreme Court found that the Labor-Management Reporting and Disclosure Act did not proscribe union members' intervention in litigation that the Secretary of Labor commenced in an effort to set aside the election of officers of the union. The Court seemed to imply that intervention applicants need not have standing and explicitly recognized the "distinction between intervention and initiation," but the Court limited the intervention granted and the opinion probably should be restricted to its facts and the peculiar statutory scheme involved.

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121. See Smuck, 408 F.2d at 179 n. 16; accord Hooker Chems., 749 F.2d at 986 n. 15. Cf. Shreve, supra note 84, at 923 n. 124 (Court's desire to facilitate intervenor's vindication of rights); *Federal Practice*, supra note 115, § 1908, at 264-68 (helpful analysis of case).
122. 400 U.S. 517, 531 (1971).
123. See id. at 536. The Court held that a taxpayer could not intervene of right in a summary proceeding by the Internal Revenue Service to enforce a third party's compliance with the Service's subpoena seeking records that implicated the taxpayer's tax liabilities. *See Donaldson*, 400 U.S. at 528-30.
124. 400 U.S. 528 (1972).
125. The Court so held, even though the statute expressly barred union members from initiating suit. *Id.* at 531.
126. See id. at 536.
127. See id. at 536-37. The Court restricted intervention to the claims of illegality...
The Supreme Court expressly acknowledged that some lower federal courts were invoking standing in their intervention of right decisionmaking and that others were not in the 1986 determination in *Diamond v. Charles.* A majority of the Court specifically refrained from deciding whether potential intervenors "must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Article III," while holding that "an intervenor’s right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." Three concurring justices observed, however, that the 1966 amendment did not change the provision’s interest criterion, claiming that Rule 24(a)(2)’s "requirement of a significantly protectable interest’ calls for a direct and concrete interest that is accorded some degree of legal protection.”

This relative dearth of Supreme Court precedent and its fact-intensive nature have meant that the lower federal courts have assumed primary responsibility for articulating the interest requirement and for applying Rule 24(a)(2). Circuit and district judges have exhibited great difficulty defining interest with sufficient clarity, despite the thousands of opportunities available to them. Indeed, Professor Susan Bandes recently identified some half-dozen formulations of the interest requirement, several of which are defined inconsistently, a finding my research essentially confirms.

Judicial articulation of the interest requirement ranges across a broad spectrum. At one end, there is a cluster of ideas that may fairly included in the Secretary's complaint. *Id.* at 537. Courts rely on *Trbovich* today mostly for its articulation of the adequate representation requirement: the condition "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Id.* at 538 n.10 (citation omitted).

129. 476 U.S. 54, 68 n.21 (1986). For a description of the facts in *Diamond* and an explanation of how a district court should have resolved Dr. Diamond's request to intervene of right, see infra notes 211-24 and accompanying text.


132. *See Bandes,* supra note 11, at 251. My research includes earlier analyses of broader application of Rule 24(a)(2) in ways that disadvantaged public interest litigants and of intervention in abortion litigation. See Tobias, *supra* note 4, at 322-29; Tobias, *Intervention After Webster,* 38 U. KAN. L. REV. 731 (1990). It also includes analysis of all opinions mentioning standing-research undertaken for this piece. My conclusion is that Professor Bandes may have underestimated the number of formulations and the degree of inconsistency.
be characterized as flexible or even open-textured; the principal proponents of these views have been judges in the United States Courts of Appeals for the District of Columbia and Ninth Circuits. 133 A few of these judges effectively read the interest idea out of Rule 24(a)(2) or even ignore it. 134 Most of the courts, however, expend little energy attempting to extract meaning from the term interest. Rather, they examine the pragmatic implications of denying intervention and the policies underlying the 1966 amendment, occasionally stating that the Advisory Committee meant to liberalize intervention of right. 135 Insofar as the courts rely on any definition of interest, they subscribe to Judge Harold Leventhal’s 1967 enunciation: “the ‘interest’ test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” 136 A number of these judges concomitantly consider interest a threshold requirement, finding Rule 24(a)(2)’s impairment and inadequate representation criteria preferable mechanisms for resolving intervention controversies. 137 Moreover, many of the courts expressly reject the notions that interest means a specific equitable or legal interest 138 or connotes a “direct, substantial, legally protectable interest in the proceedings.” 139

These formulations—especially ones cast in terms substantially similar to the latter articulation in the sentence above—are employed by many judges, principally in the Fifth, Seventh and Eleventh Circuits, whose treatment of the interest requirement lies at the more restrictive end of the spectrum. 140 Numerous courts apply tests that are equally,
if not more, stringent, demanding that applicants be real parties in interest or be able to state a claim for relief. 141

In short, the lower federal courts have had primary responsibility for applying the interest condition since the 1966 revision of Rule 24(a)(2). One salient feature of the several thousand intervention opinions that these judges issued between 1966 and 1980 was that almost none required applicants to have standing. 142 Nevertheless, since 1980 an increasing number of judges has demanded that potential intervenors possess something greater than, or equal to, standing or satisfy certain constituents of the standing inquiry. The Supreme Court recently acknowledged that lower federal courts were invoking standing in their intervention determinations but refused to address the propriety of that practice. 143 Since 1986, numerous judges have relied on standing to resolve intervention requests, some have rejected its applicability, and the vast majority has not mentioned standing in ruling on intervention motions. The invocation of standing has created conflicts within the federal judiciary while imposing uncertainty and hardship on litigants and applicants. These difficulties will worsen, until the Supreme Court resolves the relevance of standing to intervention of right. The next section considers the cases which have said or indicated that standing implicates the Rule 24(a)(2) inquiry.

IV. APPLICATION OF STANDING TO INTERVENTION OF RIGHT

A. Standing as Relevant to Intervention of Right

Many circuit and district court judges with differing degrees of explicitness have stated how standing implicates the intervention of right inquiry. Moreover, a significant number has subscribed to different combinations of the formulations, adopting, for example, certain constituents of the constitutional requirements or various aspects of the prudential limitations.


142. A few courts mentioned standing, but virtually none required that applicants possess standing. See, e.g., Du Pree v. United States, 559 F.2d 1151, 1153-54 (9th Cir. 1977); Illinois v. Sarbaugh, 552 F.2d 768, 772 (7th Cir. 1977); Providence Journal v. F.B.I., 460 F. Supp. 762, 766 (D.R.I. 1978); Arvida Corp. v. City of Boca Raton, 59 F.R.D. 316, 321 (S.D. Fla. 1973); United States v. Int'l Tel. & Tel. Corp., 349 F. Supp. 22, 26-27 (D. Conn. 1972). Of course, some of these cases involved private law litigation in which standing has considerably less relevance.

Several courts have expressly demanded that intervention applicants possess something more substantial than standing. One of the most specific articulations appears in the 1985 Seventh Circuit opinion, *United States v. 36.96 Acres of Land*. In that case, Congress had authorized the Secretary of the Interior to condemn a power company's real property for inclusion in a National Lakeshore. The Seventh Circuit upheld the trial judge's rejection of an intervention request filed by a public interest litigant whose members had lobbied Congress to create the Lakeshore, had used it for recreation, and had sought to challenge the Department's tepid commitment to condemnation. The circuit court stated that the interest of an intervention applicant "must be greater than the interest sufficient to satisfy the standing requirement." The panel found a "qualitative difference between...the 'direct, significant legally protectable interest' required to intervene in a condemnation action [and] the 'interest' which is sufficient for standing to bring an action under the APA," because the latter interest only must be one that is arguably within the zone of interest protected by applicable legislation.

Numerous courts have demanded that applicants possess an interest equivalent to standing. One prominent example is the 1984 opinion of the District of Columbia Circuit in *Southern Christian Leadership Conference v. Kelley*. *Kelley* involved Senator Jesse Helms' attempt to intervene of right in litigation over electronic surveillance by the Federal Bureau of Investigation of Dr. Martin Luther King, Jr. The Senator reportedly sought to participate so that he could cast an informed vote on the proposal to establish a national holiday honoring Dr. King. The court affirmed the district judge's denial of the intervention motion, "because the movant lack[ed] a protectable interest sufficient to confer standing." The *Kelley* court observed that Rule 24(a)(2) implicitly refers to a legally protectable interest, remarking that "such a gloss upon the rule is in any case required by Article III of the Constitution." Judges in, or on, the Fifth and Eleventh Circuits have adopted similar formulations, stating, for example, that the "would-be
intervenor must demonstrate at least the interest required to assert standing to initiate a lawsuit" or must possess an interest identical to that of parties.154

Many courts have invoked particular standing requirements articulated by the Supreme Court. Some judges, for instance, apparently advertting to prudential limitations on standing, have demanded that applicants assert their own rights, not those of third parties, that potential intervenors have a "particularized interest rather than a generalized grievance," or that their claims be closely related to the interests that relevant legislation is intended to protect.155 A few courts, seemingly drawing on the constitutional component of standing doctrine, have insisted that applicants' injuries be fairly traceable to defendants' allegedly unlawful conduct or that there be a substantial likelihood that a favorable judgment will redress the harm.156

Additional courts when resolving intervention requests or considering the Rule's four specific requirements, especially the interest criterion, have mentioned standing, have imposed on applicants requirements which are functional equivalents of standing, or have otherwise indicated that standing somehow implicates Rule 24(a)(2).157 A number of these judicial determinations are unclear, with numerous courts seemingly employing standing in a "loose" or colloquial sense of being heard to make an assertion, including the idea of a right to, an interest in, or an entitlement to, a claim.158


157. These courts principally are in the Fifth, Seventh and Eleventh Circuits. Recent opinions from these circuits which include most of the relevant case law are Clements, 884 F.2d 185; American Nat'l Bank & Trust v. City of Chicago, 865 F.2d 144, 146 (7th Cir. 1989) and Manasota-88, Inc. v. Tidwell, 896 F.2d 1318, 1321 (11th Cir. 1990). See also supra notes 139-41 and accompanying text.

158. Even judges who otherwise champion quite flexible, pragmatic application of Rule 24(a)(2) speak of "standing to intervene." See, e.g., 36.96 Acres, 754 F.2d at 860, 861 (Cudahy, J., dissenting); Nuesse v. Camp, 385 F.2d 694, 700 n.5 (D.C. Cir. 1967). These judges seem to be using standing in this loose or colloquial sense, as do the authors of most opinions not already mentioned in this subsection. See Whitmore v. Arkansas, 110 S. Ct. 1717, 1722 (1990); Bryant v. Yellen, 447 U.S. 352, 366-68 (1980); United States v. Yonkers...
Nearly all of the judges who make standing relevant to the intervention of right inquiry offer little, if any, explanation for such treatment. Nonetheless, a few courts have been relatively forthcoming. For instance, one provided that standing case law helps to “define the type of interest that the intervenor must assert,” perhaps evincing appreciation of how standing should be considered relevant to Rule 24(a)(2). That court and others specifically differentiate standing to initiate litigation from what applicants must show to intervene of right in ongoing lawsuits, apparently recognizing that these are discrete inquiries.

Notwithstanding this relative lack of justification for invoking standing, some plausible, if not compelling, reasons for doing so can be posited. After all, standing and intervention of right are not completely unrelated ideas: both concepts implicate what courts require of entities that wish to participate in litigation. Concomitantly, certain policies that underlie standing are very important to Rule 24(a)(2), as will be seen below, and judges may have been so applying standing, although their opinions do not leave that impression.

Standing also might have seemed to afford a convenient solution for problems that the 1966 amendment created or left unresolved or for difficulties that have arisen in the federal courts during the last quarter century, such as the litigation explosion. For example, judges

Bd. of Educ., 902 F.2d 213, 217 (2d Cir. 1990); United States v. Napper, 887 F.2d 1528, 1533 (11th Cir. 1989) (Johnson, J., concurring specially); N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1349 (2d Cir. 1989); Howard v. McLucas, 871 F.2d 1000, 1004 (11th Cir. 1989); Eng v. Coughlin, 865 F.2d 521, 527 (2d Cir. 1989) (Mahoney, J., concurring); Bethune Plaza, Inc. v. Lumpkin, 863 F.2d 525, 531 (7th Cir. 1988); Cook v. Boorstin, 763 F.2d 1462, 1470 (D.C. Cir. 1985); Baker v. Wade, 743 F.2d 236, 241 (5th Cir. 1984); United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1291 (D.C. Cir. 1980); Hickey v. NCNB Texas Nat'l Bank, 763 F. Supp. 896 (N.D. Tex. 1991). There also is a line of cases, typified by Panola, that speaks of a lawyer’s “standing to intervene” to recover an attorney’s fee. For helpful treatment of this narrow problem, see Note, Fee As the Wind Blows: Waivers of Attorneys Fees in Individual Civil Rights Actions Since Evans v. Jeff D., 102 HARV. L. REV. 1278, 1282-91 (1989). Other cases not examined or treated tersely above which mention standing are: Gould v. Alleco, Inc., 883 F.2d 281, 285 (4th Cir. 1989) (generalized interest); Portland Audubon Soc’y, 866 F.2d at 308 n.1 (standing requirement implicitly addressed by interest requirement); New Orleans Pub. Serv. v. United Gas Pipe Line, 732 F.2d 452, 464 (5th Cir. 1984) (third party standing); Rosebud Coal Sales Co. v. Andrus, 644 F.2d 849, 851 (10th Cir. 1981) (generalized interest); Allard v. Frizzel, 536 F.2d 1332, 1334 (10th Cir. 1976) (same); Lac Courte Oreilles Band of Indians v. Wisconsin, 116 F.R.D. 608, 610 (W.D. Wis. 1987) (generalized interest). The cases treated to this point in the Article are not an exhaustive compilation but include most of the major cases.

159. See Chiles, 865 F.2d at 1213. Of course, many of the cases treated above apparently apply the standing case law in that way. See, e.g., New Orleans Pub. Serv., 732 F.2d at 464-65; Santiago Collazo, 721 F. Supp. at 388-89; cf. infra notes 196-97 (how standing should be considered relevant to Rule 24(a)(2)).

160. See, e.g., Chiles, 865 F.2d at 1212-13; Howard v. McLucas, 782 F.2d 956, 962 n.1 (11th Cir. 1986) (Clark, J., dissenting); see also supra note 127 and accompanying text.

161. See infra notes 196-97 and accompanying text.
concerned about the increasingly unwieldy party structure of cases may have found standing an efficacious basis for excluding intervention applicants that would expand the number of litigants in a lawsuit.\(^{162}\)

Many courts apparently have employed standing to deny intervention by applicants that looked like intermeddlers or which asserted interests that the judges might have considered intangible, tenuous or indirectly related to the litigation's subject matter, particularly as compared with more traditional interests.\(^{163}\) Numerous courts also seem to have substituted standing for one of Rule 24(a)(2)'s specific criteria, namely interest or inadequate representation.\(^{164}\) Furthermore, most judges who invoked standing may well have correctly resolved the intervention of right inquiry, although this is unremarkable. Courts have a number of means of treating intervention requests, especially in ways that reject them, such as by demanding that applicants fully satisfy all four Rule requirements or imposing strict burdens of proof on them.\(^{165}\)

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162. See supra note 14 and accompanying text (cases involving hundreds of parties); Resnik, supra note 21, at 502 n. 30 ("Calder-like configurations we call 'cases' today"). Standing also might seem to be an effective mechanism for limiting what some judges may perceive as open-ended intervention made possible by the "liberalizing" 1966 amendment. See supra note 77 and accompanying text.

163. Examples of applicants that courts might have viewed as intermeddlers were Dr. Diamond in Diamond v. Charles, 476 U.S. 54 (1986), and Senator Helms in Southern Christian Leadership Conference v. Kelley, 747 F.2d 777 (D.C. Cir. 1984). These, and other, intervention denials also may have been motivated by political considerations, which some may consider appropriate, depending on their political perspectives. For example, excluding Diamond or the Illinois Right to Life Coalition from Keith v. Daley, 764 F.2d 1265 (7th Cir. 1985), would enable pro-choice plaintiffs to pursue their claims to reproductive rights free from the substantial costs that some intervenors have imposed in abortion litigation. See Tobias, supra note 132. Of course, this does not exactly yield "neutral principles" of application. Correspondingly, some courts have excluded industry applicants from litigation brought by public interest litigants. See, e.g., Manasota-88, 896 F.2d 1318; Portland Audubon Soc'y, 866 F.2d 302. See also United States v. South Fla. Water Management Dist., 922 F.2d 704 (11th Cir. 1991). In fairness, some applicants have appeared "one step removed" from the litigation. See Chayes, supra note 13, at 1292. That does not necessarily mean that they should be barred from intervening. See infra notes 196-210 and accompanying text.

164. See, e.g., 39.36 Acres and Kelley, discussed supra notes 144-52 and accompanying text. Indeed, many courts link standing to interest and inadequate representation, often seeming to employ the following colloquial formulation: an applicant has no standing to complain that its interests are being prejudiced when it is adequately represented, especially by the government. The majority and concurring opinions in Diamond, 476 U.S. 54, 71 (O'Connor, J., concurring), convey that impression. See also United States v. Yonkers Bd. of Educ., 902 F.2d 213, 217-19 (2d Cir. 1990). These uses of standing, especially to amend Rule 24(a)(2) informally or as a surrogate for other components of the Rule, although perhaps understandable, are inadvisable. They essentially substitute a rather crude instrument for more appropriate ones, although I may be vulnerable to similar criticisms in my formulation of a preferable approach to intervention of right. See infra notes 196-257 and accompanying text.

165. See, e.g., Manasota-88, 896 F.2d at 1321-23; Keith, 764 F.2d at 1268-71.
B. Standing as Irrelevant

This is not to say that clearer explanations have been provided by the vast majority of judges who have failed to mention standing in their intervention decisionmaking and the small number stating that standing should have limited or no relevance. Of course, judges writing the thousands of opinions that omit any reference to standing offer little justification for their silence, and that silence does not necessarily mean that the courts found standing irrelevant or even considered the issue. Nevertheless, the sheer volume of cases that do not allude to standing may testify to the minimal relevance that standing should receive, while silence in many of the opinions could fairly be interpreted as indicating judges' belief that standing was irrelevant.

The relatively few courts that have explicitly found standing irrelevant or of limited relevance to intervention have been no more expansive than judges who invoke standing. Trbovich, discussed earlier, could be read as an implicit rejection by the Supreme Court of the application of standing to intervention of right, and an analogous allusion appears in the Court's 1980 decision, Bryant v. Yellen. Similarly, in Diamond, the majority's phrasing of the relevant question as whether applicants "must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Article III," and its observation that Dr. Diamond might have relied on the state's standing, had Illinois chosen to appeal, could be endorsements of intervention at the trial court level by entities without standing. Nonetheless, the Court's express reservation for future decision of the standing question in Diamond probably should be interpreted as the most recent indication of the Court's belief that it has yet to resolve the issue.

Lower federal court treatment also has been comparatively terse. Some judges have asserted that an "intervenor need not have the standing necessary to initiate the lawsuit" or that the "intervention re-

166. 447 U.S. 352 (1980); see also supra note 127 and accompanying text; supra note 131.


168. See Diamond, 476 U.S. at 68-69; cf. Whitmore v. Arkansas, 110 S. Ct. 1717, 1724 (1990) (characterizing Court's rejection in Diamond of physician's attempt to defend state law restricting abortions because fewer abortions would lead to more paying patients on basis that "unadorned speculation' insufficient to invoke the federal judicial power").

quirements are more liberal than those for standing.”

These courts have provided little substantiation for their pronouncements, often citing only to case precedent. Panels of the Ninth and Eleventh Circuits recently refused to require that potential intervenors demonstrate standing, although both courts stated that standing implicates Rule 24(a)(2).

Judges from the Eleventh and District of Columbia Circuits and elsewhere have recognized or emphasized the difference between what entities must show to institute federal court litigation and to intervene of right in an ongoing case. For example, Judge David Bazelon, writing for the District of Columbia Circuit, stated that “in the context of intervention the question is not whether a lawsuit should be begun, but whether already initiated litigation should be extended to include additional parties.” Concomitantly, the judges have partially premised their determinations that intervention applicants need not have standing on the existence of a case or controversy between the plaintiffs and the defendants.

Despite the rather limited judicial treatment, there is considerable support for the courts’ refusal to invoke standing to deny intervention. The history and judicial application of standing and intervention of right show that they had different origins and were intended to serve dissimilar, albeit not totally distinct, purposes. As discussed earlier, standing involves certain constitutional and prudential requirements that courts impose on those wishing to commence suit. Intervention of right involves what judges demand of entities seeking to join litigation already initiated, before the court makes a substantive decision.

170. See 36.96 Acres, 754 F.2d at 861 (Cudahy, J., dissenting); United States v. Bd. of School Comm’rs, 446 F.2d 573, 577, (7th Cir. 1972), cert. denied, 410 U.S. 909 (1973). See generally supra note 160 and accompanying text.
171. Purnell, 925 F.2d at 948; Wynn, 599 F.2d at 196; USPS, 579 F.2d at 190; Imperial Irrigation Dist., 559 F.2d at 521; Evans, 130 F.R.D. at 310 n. 5; Indian River Recovery Co., 108 F.R.D. at 386; Avery, 584 F. Supp. at 316 n. 3.
172. See Portland Audubon Soc’y v. Hodel, 866 F.2d 302, 308 n.1 (9th Cir. 1989); Chiles v. Thornburgh, 865 F.2d 1197, 1212-13 (11th Cir. 1989).
173. See supra note 160. Indeed, the Supreme Court acknowledged the “distinction between intervention and initiation” in Trbovich v. United Mine Workers, 404 U.S. 528, 536 n. 7 (1972). Cf. United States v. $129,374 in United States Currency, 769 F.2d 583,586 (9th Cir. 1985) (district court erroneously confused standing and Rule 24’s intervention requirements).
175. See, e.g., Chiles, 865 F.2d at 1212-13; Brennan, 579 F.2d at 190; New York State Energy Research & Dev. Auth. v. Nuclear Fuel Servs., 34 Fed. R. Serv. 2d 1377, 1378 (W.D.N.Y. 1982).
176. See supra notes 44-113 and accompanying text.
that might adversely affect the applicants. Numerous courts and commentators have convincingly contended that there is little, if any, reason to demand standing of an absentee in this situation, because the plaintiff has satisfied the case or controversy requirement, the judicial machinery has been mobilized, and the applicant should be permitted to have its say prior to entry of a potentially prejudicial order. 177 Neither the phrasing of Rule 24(a)(2) nor its underlying policies support imposition of the standing requirements. Moreover, the application of standing is inadvisable for numerous policy reasons. For instance, the desirability of full and fair public access to the federal courts, the judiciary's need for the experience, data, viewpoints and arguments that will enable it to reach the best determinations, and considerations of judicial economy strongly argue against invoking standing as courts have.

Many of these ideas and others apply with special force when public interest litigants seek to intervene in public law litigation, especially institutional reform cases. 178 Much of this litigation will present complex questions of law, implicating constitutional and statutory interpretation; complicated issues of fact, relating to technology, science and economics; and difficult problems of policy, involving management of large bureaucracies and trade-offs among competing interests for scarce societal resources. 179 Moreover, the governmental or private activity at issue and the judicial decision responding to it often will be controversial and will have unclear impacts that affect large numbers of people, many of whom will not be parties to the litigation. 180 In these situations, judges, who are generalists, will need a broad range of expertise, information and perspectives to render the most accurate determinations. 181 These factors are peculiarly applicable to institu-

177. See, e.g., Chiles, 865 F.2d at 1212-13; Smuck, 408 F.2d at 178; Shapiro, supra note 95, at 726. Several sharply divided opinions could be read to suggest that the Supreme Court may be unwilling to expand the size of a suit, a part of which will continue because it meets Article III. Different majorities of the Court apparently believe that the new part needs an independent justification, although it satisfies the Federal Rules. See Finley v. United States, 490 U.S. 545 (1989); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978); Aldinger v. Howard, 427 U.S. 1 (1976). These cases indicate that some justices may view certain of the propositions differently. However, the Court has not applied the differing approach above to the precise concepts treated here. Moreover, Congress recently altered Finley. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 310, 104 Stat. 5113 (1990) (codified at 28 U.S.C. § 1367 (1990)).

178. I rely most here on Tobias, supra note 4, at 279-83, 328-29.

179. See id. at 279-83; supra notes 13-20 and accompanying text.


181. See, e.g., Keith v. Daley, 764 F.2d 1265, 1272 (7th Cir., 1985) (Cudahy, J.,
tional reform litigation, particularly during its remedial phase, when courts are attempting to formulate workable structural decrees that will improve the functioning of substantial governmental entities and which will affect many individuals and institutions.182 The judges must have the views of those intimately familiar with the bureaucracies, persons whose cooperation probably will be essential to the efficacious implementation of any order entered.183 In institutional reform, and much additional public law, litigation, citizen participation in the form of intervention might promote governmental accountability for its decisionmaking184 and could make both the governmental decision and the judicial determination more palatable to those who must live with them.185 Involvement in litigation also can foster a sense of community and may have certain intrinsic value,186 and permitting that participation can manifest the judicial system's respect for the worth of persons.187

In short, numerous federal circuit and district judges have made standing important to their enforcement of Rule 24(a)(2). Most of the ways that courts have applied standing in resolving intervention requests have been unnecessary, if not improper, causing confusion and hardship, especially for public interest litigants. The next section, therefore, offers suggestions for future treatment of standing and of intervention of right.


184. See, e.g., Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466, 469 (9th Cir. 1986) (National Park Service admitted violating own regulations and National Environmental Policy Act when it allowed mining in Alaska's national parks).


187. Many commentators have expressed this idea. A prominent example is R. DWORKIN, TAKING RIGHTS SERIOUSLY 223-39 (1979). For research that explores the meaning of, and values intrinsic to, participation in modern courtroom processes, see Burbank, supra note 40, at 1466-71; Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I, 1973 DUKE L.J. 1153.
V. SUGGESTIONS FOR THE FUTURE

A. Introductory Consideration of Standing

As discussed above, the federal judiciary’s invocation of standing to resolve intervention of right requests has been inadvisable. Demanding that potential intervenors possess standing and substituting standing or certain of its elements for the interest or other Rule 24(a)(2) criteria have been unwarranted in nearly all situations. Applicants should be required to have standing or to comply with some standing component in very few circumstances. One clear instance in which standing would be appropriately invoked is the peculiar factual context presented by Diamond v. Charles. The Supreme Court instructed that, when neither the plaintiff nor the defendant in the court below chooses to appeal to the Supreme Court, an intervenor in the lower court must have standing to continue the lawsuit. This determination did not mean, however, that the intervenor must have satisfied standing to intervene of right at the district court level.

Another situation that might require standing is when an applicant wants to vindicate claims that the plaintiff and the defendant do not assert. Some courts apparently invoke standing to deny intervention in this context, although a few judges and commentators have stated that an applicant satisfying the criteria of Rule 24(2)(a) should be permitted to intervene and pursue its claims. Correspondingly, public interest litigants typically seek relief similar to the party on whose side they wish to intervene. Even when public interest litigants request different relief at the remedial stage, they probably not need standing, because the court has made the liability determination and needs all the relevant input it can secure to fashion efficacious relief.

189. See supra note 167 and accompanying text.
192. See, e.g., United States v. Oregon, 839 F.2d 635, 638-39 (9th Cir. 1988); United States v. Stringfellow, 783 F.2d 821, 827 (9th Cir. 1986); see also supra notes 181-83 and accompanying text. See generally Bandes, supra note 11, at 254-55, 312-13.
Courts have less reason to demand standing of applicants that promise to raise new issues for resolution, as they have already mobilized the judicial machinery. Intervention of right has been characterized as an “exercise of federal ancillary jurisdiction,” which allows participation by entities that lack independent jurisdiction. Virtually no courts, however, have imposed jurisdictional requirements on applicants, especially public interest litigants, apparently because there is an existing case or controversy between the plaintiffs and the defendants. In short, judges rarely should apply standing as they have to Rule 24(a)(2).

B. The Preferable Approach to Intervention of Right.

1. EXPLANATION OF THE PREFERABLE APPROACH

Standing is crucial, nevertheless, to the intervention inquiry. The policies that underlie standing help to define the idea of a case and to designate proper entities to participate in lawsuits. A case is a device for fostering the federal courts’ performance of their preeminent duties: enunciating public norms in the Constitution and legislation and encouraging compliance with the law. The party composition of litigation, therefore, should encompass the individuals and groups that can enable the judiciary to fulfill those responsibilities. These factors mean that in considering intervention requests courts should treat as paramount applicants’ potential contributions to issue resolution.

193. See, e.g., Oregon, 839 F.2d at 638; Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983); see also Shapiro, supra note 95, at 754-55. But see Torrington Co. v. United States, 731 F. Supp. 1073 (Ct. Int’l Trade 1990). See generally supra note 177.


195. My research revealed virtually no cases that mentioned jurisdiction. See Bandes, supra note 11, at 252 n. 161 (currently “lower courts rarely discuss why” independent jurisdiction’s relevance does not occur); cf. Shapiro, supra note 95, at 726-27 (intervention does not raise jurisdictional questions, if plaintiff has standing). A closely split majority of the Supreme Court recently suggested that supplemental jurisdiction is much narrower than it had previously indicated. See Finley v. United States, 490 U.S. 545 (1989). Congress altered Finley in the Judicial Improvements Act of 1990. See supra note 177; see also H.R. REP. No. 101-734, 101st Cong., 2d Sess., 28-29 (1988), reprinted in 1990 U.S. CODE CONG. ADMIN. NEWS at 7874-75. The statute minimally affects the issue in the text and others in this Article. Nearly all public law litigation is premised on federal question jurisdiction, while exceptions from the statute in Rule 24 govern cases based solely on diversity of citizenship.

196. I rely substantially in this paragraph and in much of this subsection on Professor Bandes’ valuable, recent work. See Bandes, supra note 11, especially at 227-35, 250-55, 311-14. I also draw on my earlier work on public interest litigants and the Federal Rules; see Tobias, supra note 4; Tobias, supra note 5, and on public participation in agency proceedings, see Tobias, supra note 6.
The essential intervention inquiry should be whether an applicant promises to help resolve issues that warrant consideration before the court makes a decision on the merits of the dispute. This may be ascertained by examining numerous relevant factors that comprise particular factual contexts. Although the significance of these considerations will vary, thus necessitating case-specific analysis, it is possible to identify the factors that will be most important and to afford a sense of how to treat them.197

The most significant consideration is the potential quality of the applicant's proposed participation. Is the applicant likely to provide expertise, information, or legal or policy perspectives that contribute to a court's understanding of questions already in issue? Correspondingly, will the applicant raise, and help resolve, new questions that the judge should consider? An example may be found in litigation challenging administrative agency decisionmaking that could have a significant impact on many consumers of a specific product or on employees of a chemical manufacturer. In such a context, a public interest litigant—which has run experimental tests on the product or chemicals in the workplace and whose members used that product or were exposed to the chemical—may enable the court to appreciate exactly how the agency determination and the judge's ultimate decision reviewing that determination will affect those individuals.198 This type of potentially valuable involvement contrasts with the participation of applicants that will only offer experience or viewpoints that the plaintiff or the defendant supply, will merely introduce a substantial quantity of marginally relevant data, or will simply seek to inject issues that are not germane.199

A court may want to analyze whether, and if so how much, the applicant's involvement promises to improve its substantive decisionmaking. For instance, will the potential intervenor help give specificity to a statutory standard that asks which agency choice will best effectuate the "public interest"?200 Correspondingly, is the applicant likely to pro-

197. For somewhat similar treatment in the context of compulsory party joinder, see Tobias, supra note 5, at 769-92. The treatment below relies partially on administrative practice and procedure and public participation in agency proceedings. Many of these concepts are transferable from the administrative sphere to courtroom litigation. Moreover, reliance on these ideas comports with certain realities in much public law litigation, especially the notions that judges are "quasi-administrative" decisionmakers who need the most accurate input to render the best determinations. See, e.g., United States v. Reserve Mining Co., 56 F.R.D. 408 (D. Minn. 1972); see also supra note 20 and accompanying text.

198. See, e.g., Center for Auto Safety v. Thomas, 806 F.2d 1071, 1073, 1078-80 (D.C. Cir. 1986); Public Citizen Health Research Group v. Tyson, 796 F.2d 1479 (D.C. Cir. 1986).

199. For examples drawn from abortion litigation, see Tobias, supra note 132, at 732-34, 757 n. 163; infra notes 221-23 and accompanying text; cf. Tobias, supra note 6, at 946-47 (examples derived from public participation in agency proceedings).

200. This is what the plaintiffs sought to do in the classic case of Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). Cf. Tobias, supra note 6, at 942 n. 210 (example in governmental agency context).
vide facts that other participants do not or cannot, thereby increasing the court's understanding of how challenged governmental practices allegedly injure citizens or violate pertinent constitutional commands.\(^201\)

A court may encounter difficulty assessing if, and precisely how much, a potential intervenor will enhance the quality of judicial determinations. Moreover, insisting that an applicant's input contribute substantially to the lawsuit's ultimate disposition is too demanding. Thus, the most appropriate inquiry remains whether the potential intervenor's participation promises to help the court take into account, view differently, or reconsider relevant issues.\(^202\)

Once the court evaluates what the applicant will offer, it should permit intervention by an applicant that clearly will contribute to issue resolution, unless the involvement will impose undue costs on the judicial system or the original parties, and, even then, the judge should seriously consider allowing intervention and conditioning it.\(^203\) If the court is less certain that an applicant will facilitate issue resolution, the judge should estimate as accurately as possible the value of the applicant's projected participation and attempt to ascertain the disadvantages, especially in terms of expenditures of time, money and effort, that intervention will occasion for the civil justice system and the existing litigants.\(^204\)

An important consideration in many cases will be how much the intervention is likely to delay the dispute's resolution, potentially undermining judicial economy and prejudicing parties. The court might want to consult the nature of the applicant's involvement, what form the participation will assume, at which stage of the litigation the involvement will occur, and how much it promises to complicate the lawsuit. For example, will such a substantial amount of data be tendered or the information be so tangentially related to the central questions in dispute that the material inundates the judge, obfuscating, rather than clarifying, the issues and protracting the litigation?\(^205\)

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201. I mean here an applicant's possible provision of the factual predicate in cases involving civil rights or the behavior of law enforcement officials. See generally Meltzer, supra note 81; Tobias, supra note 8.

202. This is similar to the standard that I have suggested should govern awards of participant compensation in agency processes. See Tobias, supra note 6, at 950.

203. "An intervention of right . . . may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." Fed. R. Civ. P. 24 advisory committee's note; see also Shapiro, supra note 95, at 761-62; infra notes 209-10 and accompanying text.

204. Both the value and costs will be difficult to estimate. See Tobias, supra note 5, at 765 n.105 (sources on litigation's costs); Brunet, A Study in the Allocation of ScarcJudicial Resources: The Efficiency of Federal Intervention Criteria, 12 GA. L. REV. 701 (1978) (helpful example of how to estimate value and costs).

205. For a thorough analysis of these problems in the administrative and courtroom
The court then should informally balance the benefits and disadvantages of granting intervention.\(^{206}\) This task is problematic, principally because it is virtually impossible to assign values to the relevant considerations in a way that permits refined comparison. Discerning whether certain factors should be treated as benefits or costs may be difficult. For instance, if an applicant will provide much new data or offer incisive insights on contested legal issues, those contributions should be deemed advantages, but the submissions might be considered disadvantages, if they were to prolong the dispute’s disposition.\(^{207}\) Even when the court can identify benefits and costs with comparative ease, assigning the advantages and disadvantages precise values and balancing them, when appropriate, may be problematic. For example, exactly how much weight should a judge accord to an applicant’s proposed input that probably will enhance somewhat the court’s appreciation of certain pertinent, but non-critical, issues in comparison with the apparently significant, although ultimately indeterminate, expenditures of time that the judge and the litigants must devote to the intervention.

Despite these complications, many circumstances will be clear, and courts should be able to make accurate estimates in numerous others. For instance, if an applicant appears likely to contribute much to issue resolution, this should outweigh all but the greatest disadvantages. In contrast, if a potential intervenor promises to submit a large quantity of irrelevant material or to consume considerable time, delaying the dispute interminably, intervention probably should be denied or severely conditioned.

The problems, especially the difficulty of making the assessments with exacting precision, mean that in situations where the advantages and disadvantages seem relatively comparable, and even in some circumstances when intervention is more clearly warranted, the court should consider the possibility of conditioning intervention. The judge, in close cases thus may want to grant intervention motions rather flexibly but adjust the participation permitted to factors, such as the court’s perceptions of its need for the intervenors’ decisional input, the po-

\(^{206}\) I essentially use “cost” and “disadvantage” synonymously. I am not, however, advocating a strict “cost benefit analysis,” but rather the type of informal balancing Rule 19(b) requires. See Tobias, supra note 5, at 779-92.

\(^{207}\) Nonetheless, delay which is attributable to the submission of novel information or new arguments that improve a judicial decision cannot fairly be characterized as detrimental. Correspondingly, inaccurate judicial determinations which are premised, for example, on too little data can be very expensive, by leading to unnecessary appeals or the unwarranted expenditure of resources to comply with the judicial mandate. See Tobias, supra note 6, at 945 n.229, 953.
tential quality of contributions, and the time required and available to treat the involvement.

There are many specific ways of conditioning any intervention allowed. For example, a judge could exclude an applicant's information that apparently will duplicate data the original parties would offer or may require cooperation among multiple applicants that will adopt similar policy positions or appoint a representative to speak for them.\textsuperscript{208} A court may also impose restrictions that track the stages of litigation. The judge may use a scheduling order to condition an intervenor’s pretrial involvement, might restrict the direct testimony an intervenor can present or the cross-examination it can conduct during trial, or could permit participation only during the remedial phase.\textsuperscript{209} The court may even limit involvement to certain types of issues, such as legal questions. For instance, in litigation challenging the constitutionality of a federal or state statute, implicating issues of constitutional or statutory interpretation, the judge might restrict applicant participation to those questions, thus effectively making the intervenor an amicus curiae.\textsuperscript{210}

2. APPLICATION OF THE APPROACH

A better understanding of the above-described approach may be afforded by applying it in the concrete context of one of the most difficult intervention cases. \textit{Diamond v. Charles}, as discussed earlier, presented the questions of whether the trial judge should have granted Dr. Diamond’s request, premised principally on his status as a pediatrician opposed to abortions and as the father of a minor daughter, to intervene of right in litigation brought by other physicians challenging the constitutionality of a restrictive Illinois abortion statute.\textsuperscript{211} A ma-

\textsuperscript{208}. The classic example is United States v. Reserve Mining Co., 56 F.R.D. 408, 417-20 (D. Minn. 1972).

\textsuperscript{209}. For helpful discussion and citation to relevant cases, see United States v. South Fla. Water Management Dist., 922 F.2d 704, 707, 710-11 (11th Cir. 1991); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 529, 530-31 (9th Cir. 1983) (Wallace, J., dissenting). \textit{See also} Tobias, supra note 132, at 747.

\textsuperscript{210}. \textit{See} Tobias, supra note 132, at 764-65 (propriety of this type of judicial treatment in context of abortion litigation); \textit{cf.} Shapiro, supra note 95, at 752-56, 759 (proposing concept of "litigating amicus").

\textsuperscript{211}. The Supreme Court aptly describes one difficulty with the case:

The District Court did not indicate whether the intervention was permissive or as of right, and it did not describe how Diamond’s interests in the litigation satisfied the requirements of Federal Rule of Civil Procedure 24 for intervenor status. \textit{Diamond v. Charles}, 476 U.S. 54, 58 (1986); \textit{cf.} Tobias, supra note 132, at 732-33 (additional information on Dr. Diamond’s participation in Illinois abortion litigation). Of course, the district judge will never have perfect information in the sense of knowing before the fact exactly what applicants will contribute.
Standing to Intervene

The Supreme Court majority reserved this question for future decision, although it dismissed Diamond's appeal to the Court on the basis of standing. Justice Blackmun, writing for the majority, observed that the government alone has an interest in enforcing its legislation, and he characterized Diamond's interest in securing more patients as overly speculative, his interest in physicians' standards as too generalized, his interest in protecting his minor daughter as a third party claim, and his interest in fetal rights as one only the state could assert.

The concurring opinion found that Diamond's alleged interests fell "well outside the ambit of Rule 24(a)(2) [which requires] a direct and concrete interest that is afforded some degree of legal protection." Justice O'Connor considered "Diamond's speculative claim that his practice" might benefit from the abortion law a "highly contingent financial interest, far less tangible than that of the taxpayer in Donaldson," found his interests as a parent and a father indistinguishable from those of all beneficiaries of criminal statutes, and concluded that "only the State has a 'significantly protectable interest' in" defending its criminal law.

The majority and concurring opinions facilitate understanding of the interests Diamond sought to assert and of the justices' views of their relevance to standing and intervention. However, the majority and concurring opinions have limited applicability to the appropriate inquiry: whether Diamond could contribute to issue resolution. Whether Diamond's interest was generalized, speculative, or contingent, for example, does not answer, and has little relevance to, that inquiry.

The relative paucity of material available, especially regarding precisely what Dr. Diamond might have contributed, complicates thorough application of the suggested approach. Nonetheless, there is sufficient information to afford a sense of how a trial judge might apply...

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212. See Diamond, 476 U.S. at 68-71.
213. See id. at 64-69.
214. See id. at 71, 75 (O'Connor, J., concurring).
215. See id. at 76.
216. See id. at 76.
217. See Bandes, supra note 11, at 314.
218. I am simply saying that there may be little correlation between an applicant's technical "interest" in litigation and that applicant's ability to contribute to issue resolution. The Supreme Court majority and concurring opinions also seem to emphasize the idea that only the state has an interest in prosecuting a person for violating its criminal law or in the enforcement of its legislation. See Diamond, 476 U.S. at 64-65, 76. The preferable way of phrasing the inquiry is to ask whether an applicant can contribute to issue resolution, or if the interest concept is considered relevant, whether an applicant has an interest in defending the constitutionality of a challenged statute.
the approach advocated here to the physician's intervention motion.218 Dr. Diamond, as a licensed, practicing pediatrician, apparently could have provided experience, data, or viewpoints arguably relevant to the district court litigation challenging the abortion legislation.

Several opposing factors, however, dilute the strength of his apparent ability to contribute. Close scrutiny of the major questions at issue in the lawsuit reveals that they principally involved questions of constitutional and statutory interpretation. These are areas in which the Illinois Attorney General and the Cook County State's Attorney, both statutorily required to defend the legislation's constitutionality, would have special expertise and Diamond would be unlikely to have much relevant experience.219 Even as to some of the more tangential questions, such as how abortions are conducted, Diamond would have had little to offer, because he was opposed to abortions and presumably did not perform them. In short, Dr. Diamond probably would have provided minimal pertinent expertise, little relevant information, and few insights that the parties did not promise to supply.

A judge, analyzing these factors, could reasonably make a preliminary determination that the applicant would not contribute to issue resolution. Were the court to reach that conclusion, it would end the inquiry and deny intervention of right. Even if the judge initially decided that an applicant may somehow contribute, the court should then consider the potential costs of permitting intervention.

At this juncture, the judge might properly consult some factors gleaned from the controversial history of Illinois abortion litigation. A review of that litigation reveals that Dr. Diamond had actively participated in a number of cases since the mid-1970s, that he had made few substantive contributions to the resolution of pertinent questions, that he was not paying the costs of participating in certain suits,220 and that he was willing to prolong for a decade the litigation that bears his name.221 These considerations could lead the court to question Dia-
 mond's reasons for seeking intervention and even to suspect that he was primarily interested in delay or in obstructing plaintiffs' efforts to vindicate their rights to reproductive freedom. In any event, the judge might find that the pediatrician's intervention would be too costly for the justice system and for the original parties.

Another relevant factor that the judge could have considered is the governmental defendants' commitment to defense of the legislation's constitutionality. In certain situations, applicants may have been justifiably concerned about entrusting their hard-fought legislative victories to the vagaries of courtroom representation by defendants who are, after all, elected officials. For instance, some observers accused Illinois Attorney General Hartigan of prematurely settling another Illinois abortion case, *Turnock v. Ragsdale*, and sacrificing the "public interest" in stringent abortion regulation, to foster his own gubernatorial candidacy. These considerations might lead a court to question the strength of the defendants' commitment to defending the statute, a factor that may warrant comparison with the advantages and disadvantages of Diamond's participation.

In short, an informal balancing of the advantages and disadvantages indicates that the costs of allowing Dr. Diamond's participation would have been greater. Intervention could have entailed significant disadvantages, especially in terms of time expenditures, with little promise that the applicant would have contributed substantially to the resolution of any relevant issues in the case. Moreover, the governmental defendants had considerable expertise as to the most important questions, although they arguably lacked sufficient commitment to the defense of the legislation. These factors would seem to favor the denial of intervention or perhaps permitting severely conditioned participation or amicus involvement on certain issues as a hedge against the possibility of lukewarm governmental defense.

Legal Defense Fund, and the ACLU, typically finance much of the "local" abortion litigation. This representation also illustrates that Diamond might have possessed special legal expertise that was not otherwise apparent. I realize as well that what an applicant promises to contribute should be more important than prior participation, although the latter certainly has relevance in this context.

222. This apparently has been true of some Illinois abortion litigation and certainly has been true of such litigation in other states. See, e.g., Akron Center for Reproductive Health v. City of Akron, 604 F. Supp. 1268 (N.D. Ohio 1984); see also Tobias, supra note 132, at 734.

223. See *Turnock v. Ragsdale*, 492 U.S. 916 (1989) (juris. postponed); see also Illinois Accord Approved, N.Y. Times, Mar. 23, 1990, A12, Col. 1. The reason why Dr. Diamond appealed to the Supreme Court was, after all, that the State of Illinois chose not to appeal. See *Diamond*, 476 U.S. at 56.

224. For an analysis that reaches similar conclusions while recognizing the benefits and disadvantages that are implicated, see Tobias, supra note 132, at 758-65.
3. JUSTIFICATIONS FOR THE APPROACH

This approach is preferable and the federal judiciary should implement it for many reasons. Perhaps the most compelling reason is that many judges actually have already applied all elements of the approach in their intervention of right decisionmaking. Several influential judges candidly recognized that Rule 24(a)(2) has a discretionary dimension, and some courts have exercised this discretion. Indeed, Judge Bazelon, joined by Judge Leventhal and Judge Spottswood Robinson, remarked that "while the division of Rule 24(a) and (b) into 'Intervention of Right' and 'Permissible Intervention' might superficially suggest that only the latter involves an exercise of discretion by the court, the contrary is clearly the case." Judge Henry Friendly, observing that they "may well have been correct," acknowledged that trial courts have considerable discretion under Rule 24(a)(2) and suggested that appellate judges defer to district courts with the "feel of the case" when reviewing determinations on conditioning, litigation management, and intervention of right generally.

Numerous courts have also emphasized the contributions that applicants' expertise or perspectives might make to issue resolution and to judicial decisionmaking, apparently recognizing the worth of intervention as a mechanism for information gathering and for improving substantive determinations. Some have considered the possible prejudice to litigants of permitting intervention, while others have found party prejudice so significant that they incorporated it as a principal component when elaborating a four-part timeliness test. Additional judges have acknowledged the validity and value of conditioning intervention, integrated that prospect into their Rule 24(a)(2) decisionmaking, or creatively conditioned internenor participation. Quite a few courts that invoke party prejudice or condition involvement seem


226. See United States v. Hooker Chems. & Plastics, 749 F.2d 968, 991 n.20 (2d Cir. 1984) (three judges may well have been correct); id. at 990-93 (remaining propositions); see also Int'l Paper v. Town of Jay, 887 F.2d 338, 344 (1st Cir. 1989); accord FEDERAL PRACTICE, supra note 115, § 1913, at 375-76.

227. See, e.g., Keith v. Daley, 764 F.2d 1265, 1273 (7th Cir. 1985) (Cudahy, J., concurring); Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983); Southeast Alaska Conservation Council v. Watson, 35 Fed. R. Serv. 2d 1255 (9th Cir. 1983). But see American Nat'l Bank & Trust v. City of Chicago, 865 F.2d 144, 147 (7th Cir. 1989).


to find important intervention's potential disadvantages, namely delay.230

A substantial number of courts, in resolving intervention requests, has carefully weighed the factors enumerated and other relevant considerations, balancing them as indicated. Many judges have de-emphasized or relaxed the Rule's four express criteria, while some courts even seem to have ignored certain of the requirements. For instance, a few Ninth Circuit panels and additional judges have failed to mention the interest condition or effectively read it out of Rule 24(a)(2).231 Correspondingly, some members of the bench have accorded decreased significance to applicants' need to intervene.232 Numerous judges have employed such elastic tests of impairment, inadequate representation or timeliness that they have practically eviscerated the criteria.233 Others have imposed proof burdens so lenient or viewed potential intervenors' showings with such sympathy that the applicants easily satisfied the Rule's requirements.234

The approach advocated here is a practical, equitable and sensitive recalibration of the longstanding intervention device to the realities of modern litigation.235 The approach attempts to make Rule 24(a)(2)'s application as responsive as possible to the needs of the principal participants in public law cases, namely public interest litigants, judges and the original parties. It recognizes the significance of, and attempts to balance as fairly as possible, public interest litigants' strong interest


230. Indeed concern about the litigation explosion and for efficient operation of the federal courts may be the very reason some courts invoked standing. See supra notes 162-65 and accompanying text.

231. See, e.g., Sagebrush Rebellion, 713 F.2d at 528; cases cited supra note 134.

232. See, e.g., Manasota-88, Inc. v. Tidwell, 896 F.2d 1318, 1323 (11th Cir. 1990); American Nat'l Bank & Trust, 865 F.2d at 147.

233. See, e.g., United States v. Stringfellow, 783 F.2d 821, 826-28 (9th Cir. 1986) (impairment and inadequate representation); Sanguine, Ltd. v. United States Dep't of Interior, 736 F.2d 1416, 1419 (10th Cir. 1984) (inadequate representation); Hodge v. HUD, 862 F.2d 859 (11th Cir. 1989) (timeliness).

234. For examples of lenient proof burdens, see Stringfellow, 783 F.2d at 827; Sagebrush Rebellion, 713 F.2d at 528. For examples of sympathetic views of applicants' reasons for delayed application, see Grubbs v. Norris, 870 F.2d 343, 345-46 (6th Cir. 1989); Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989). Some courts may be treating Rule 24(a)(2) as I say for reasons slightly different than those that I have suggested. For example, the Ninth Circuit panels may de-emphasize interest to accommodate their view that "Rule 24 is broadly construed in favor of applicants for intervention." Stringfellow, 783 F.2d at 827. Correspondingly, some courts that accord little significance to applicants' needs may be doing so to protect public interest litigants as plaintiffs from delay that applicants could cause. See, e.g., Manasota-88, 896 F.2d 1318.

235. See Bandes, supra note 11, at 250-55, 311-14; cf. Marcus, supra note 167, at 664 (characterization of Judge Lord's resolution of intervention of right questions in United States v. Reserve Mining Co., 56 F.R.D. 408 (D. Minn. 1972)).
in participating when they seek to intervene, the federal judiciary's growing concerns about the litigation explosion and its need for the finest decisional information, and the existing parties' desire to minimize the expense of dispute resolution.236

The adaptation effectuates the express requirements of Rule 24(a)(2) and their underlying policies, such as efficient litigation packaging, by, for example, including in one lawsuit as many interested parties as can fairly and efficiently be accommodated.237 It also implements the Advisory Committee's intent in drafting the 1966 amendment. The suggested approach clearly carries out the Committee's admonition that application be flexible and pragmatic while recognizing that such enforcement is essential in public law cases, because the Committee crafted the revision primarily for private law litigation.238 Judge Leventhal and Judge Friendly explicitly espoused these ideas; they apparently appreciated the complications inherent in writing a rule that would govern all types of litigation, especially cases that differed from those prevalent in the 1960s, the problem of anticipating future developments in civil litigation, and the need to adjust Rule 24(a)(2)'s application to the new circumstances presented by public law litigation.239 Moreover, the approach effectuates the Advisory Committee's professed intent in drafting the other two 1966 party joinder amendments, but an intent which it neglected to implement fully in Rule 24(a)(2): the provision of decisional factors, rather than definitional categories, as guides for judicial disposition of party joinder questions.240

The adaptation properly stresses those considerations, like the need to provide federal courts with the best possible input, that should have greatest importance. The approach appropriately deemphasizes the factors that should receive reduced significance. For instance, as interests sufficient to satisfy the Rule have become increasingly intangible and the importance of their private or common law character has concomitantly diminished, some judges continued insistence on a traditional, concrete interest has become the modern-day search for property in the court's custody that the Advisory Committee abandoned in 1966 and that its Reporter and prominent judges criticized shortly

236. The approach is responsive to concerns about the litigation explosion, because it seeks to reduce the possibility of multiple litigation and suggests that judges consider conditioning the intervention granted.
237. See Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967); see also supra note 136; infra notes 239, 242.
238. See supra notes 98, 105-08 and accompanying text.
239. See Nuesse, 385 F.2d at 700 (D.C. Cir. 1967); United States v. Hooker Chems. & Plastics, 749 F.2d 968, 983-84 (2d Cir. 1984). There is some speculation involved in saying what the judges appreciated; however, a fair reading of Nuesse and Hooker Chems. supports the textual statement. The approach also honors the Committee's strong, explicit concerns about judicial economy and efficient litigation packaging, evidenced specifically, for example, in the Committee Note's recommendation that courts condition intervention.
240. See supra notes 95, 110 and accompanying text.
Correspondingly, the approach recognizes the decreased significance that judges should attach to litigant autonomy. Plaintiffs pursuing litigation that implicates public values or that may practically prejudice absentees cannot expect to exercise complete control over their cases, to dictate the lawsuit's party structure, or to relegate public interest litigants to separate, later litigation, even when the entities have standing.

The reformulation essentially leaves intact numerous dimensions of present Rule 24(a)(2) application. For example, the suggestion that courts deny or limit intervention by applicants whose contributions would duplicate parties' input implements the adequate representation requirement and is sensitive to concerns about judicial economy. Moreover, the approach should clarify the Rule's enforcement, because it suggests that those factors, which many courts ignore or treat implicitly or rarely, be applied more explicitly and more frequently. It recommends, for instance, the express judicial consideration of party prejudice and more routine conditioning.

The adjustment is advisable as a matter of public policy and implements important policies, included in or derived from the language or purposes of rules other than Rule 24(a)(2) and the Rules as a set of litigating principles that courts invoke. The approach effectuates Rule 1's explicit command that the Rules be "construed to secure the just, speedy, and inexpensive determination of every action" and significant policies drawn from the Rules as a whole, particularly their emphases on fairness, on merits-based conclusion of lawsuits, and on the substance of disputes rather than procedural technicalities. The 1983 amendments to the Rules lend additional support to this approach.

See generally supra note 208 and accompanying text.

See generally supra note 208 and accompanying text.

See generally supra note 208 and accompanying text. The validity of conditioning is not entirely clear. See United States v. Hooker Chems. & Plastics, 749 F.2d 968, 992 n.22 (2d Cir. 1984); see also supra note 229 and accompanying text.

See generallu supra note 208 and accompanying text. The validity of conditioning is not entirely clear. See United States v. Hooker Chems. & Plastics, 749 F.2d 968, 992 n.22 (2d Cir. 1984); see also supra note 229 and accompanying text.

Judges often seem to consider party prejudice sub silentio. See generally supra note 228 and accompanying text. The validity of conditioning is not entirely clear. See United States v. Hooker Chems. & Plastics, 749 F.2d 968, 992 n.22 (2d Cir. 1984); see also supra note 229 and accompanying text.

See generally supra note 208 and accompanying text.

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See A. Miller, THE 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL
The Advisory Committee, in revising Rules 7, 11, 16 and 26, meant to revamp the process of federal civil litigation, streamlining it and expediting dispute resolution.248 The drafters sought to achieve these goals by, for instance, enhancing judicial control over cases, especially vis-à-vis lawyers, emphasizing that the civil justice system is a public resource and decreasing litigant autonomy. The Committee, therefore, intended to change the Federal Rules and the litigation process so fundamentally that certain precepts, such as intensive litigation management, which informed that effort should have applicability beyond the provisions specifically amended to Rule 24(a)(2).249

The approach implements evolving policy notions of the federal courts as a public resource and of the proper judicial role in closely managing cases and in acquiring necessary decisional input. It also draws on transformed conceptualizations of the idea of a case and its constituents. A case is both a mechanism for settling private disputes and a vehicle for explicating public values and for preventing or correcting government illegality.250 Its subject matter may be a government decision, policy or practice, and the proper participants in a case are those that can contribute best to issue resolution. Indeed, intervention of right itself now functions not only as a device for protecting absentees against practical prejudice but also as an important information-gathering mechanism for enhancing federal judicial decisionmaking. Thus, it serves as a valuable complement to numerous, existing devices that are addressed more explicitly to the judicial need for decisionmaking input, such as the appointment of special masters or expert witnesses or the designation of amici curiae.251


248. See, e.g., Fed. R. Civ. P. 11 advisory committee's note. See generally A. Miller, supra note 247. For helpful discussion of how the Committee intended to change the Rules and the litigation process fundamentally, see Burbank, The Transformation of American Civil Procedure: The Example of Rule 11, 137 U. PA. L. REV. 1925 (1989); Subrin, supra, note 33. I realize that the 1983 amendments and their application have been controversial since their effective date. See, e.g., Tobias, supra note 8. I also recognize that there are risks in placing too much discretion in the federal judiciary, as some argue the 1983 amendments do and as the approach proposed may. See, e.g., Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987); see also Burbank, supra; Burbank, supra note 39; Tobias, Judicial Discretion and the 1983 Amendments to the Federal Civil Rules, 43 RUTGERS L. REV. 927 (1991). Congress evinced strong concern about expediting dispute resolution as recently as its last session. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, Title I., 104 Stat. 5089 (1990) (civil justice expense and delay reduction plans).


250. See Bandes, supra note 11, at 281-89; Chayes, supra note 77, at 4. For discussion of Supreme Court opinions that may suggest a different approach, see supra note 177.

251. See Brazil, supra note 20 (special masters); Krislov, The Amicus Curiae Brief: From Friendship to Advocacy, 72 YALE L.J. 694 (1963 (amici); Chayes, supra note 13, at
These new realities have deprived Rule 24(a)(2) of considerable substance, diluting the applicability of the core concepts of interest, impairment and inadequate representation, to most modern lawsuits. The literal terms of the Advisory Committee's quarter-century old amendment, aimed at private cases, simply cannot bind judges with significantly altered responsibilities to resolve public law litigation. When the essential character of much federal civil litigation changes so dramatically, the courts must be able to treat the litigation efficaciously by adjusting existing Rules to the new circumstances.\textsuperscript{252} Many federal judges apparently have ascribed importance to similar phenomena in creating a "public rights exception" to compulsory party joinder under Rule 19, one of the other two party joinder rules revised in 1966.\textsuperscript{253} Finally, the approach effectuates good public policy for equitable, efficacious court administration by facilitating citizen participation in litigation. This involvement affords individuals and groups the opportunity to be heard before judges enter decrees that might affect them adversely, a concept inherent in the idea of equitable discretion, and may increase public accountability for, and acceptance of, governmental decisionmaking.\textsuperscript{254}

Congress has expressly subscribed to these public policies.\textsuperscript{255} For example, it has enacted much legislation intended to promote the active involvement of public interest litigants and other members of the public in administrative proceedings and courtroom litigation. By generously providing participatory possibilities, Congress clearly meant to expand federal court access for previously excluded and underrepresented individuals and groups.\textsuperscript{256} The many specific expressions of legislative intent suggest that courts should apply analogous, more general pro-

\textsuperscript{1300-01 (other mechanisms). Intervention of right augments these devices; it does not replace them.}

\textsuperscript{252} Courts have similarly adjusted other rules. See, e.g., Tobias, \textit{supra} note 4, at 296-301 (Rule 8); id. at 332-33 (Rule 60(b)(5)); Tobias, \textit{supra} note 5 (Rule 19); see also Goldberg, \textit{supra} note 38, at 416-18; Matasar, \textit{supra} note 249, at 1478-79.

\textsuperscript{253} See, e.g., Conner v. Burford, 836 F.2d 1521, 1540-41 (9th Cir. 1988); Sierra Club v. Watt, 608 F. Supp. 305, 324-25 (E.D. Cal. 1985). These courts recognize, for example, that governmental decisions are the subject matter of public law litigation, that those decisions affect thousands of geographically dispersed entities that public interest litigants cannot join or whose joinder would unduly complicate their litigation, and that there would be losses in governmental accountability were the claims dismissed. See Tobias, \textit{supra} note 5, at 764-65.

\textsuperscript{254} See Marcus, \textit{supra} note 167, at 668 (idea inherent in equitable discretion); \textit{supra} notes 182-83 and accompanying text (public accountability for and acceptance of governmental decisionmaking).

\textsuperscript{255} See \textit{supra} notes 25-28 and accompanying text.

visions in the Federal Rules, such as Rule 24(a)(2), in ways that facilitate the participation of public interest litigants and the broader public.\textsuperscript{257}

\textbf{C. Summary}

In short, the letter and spirit of the Federal Rules and the need for efficient, well-informed judicial decisionmaking, support judicial enforcement of present Rule 24(a)(2) in accord with the approach suggested. A number of judges may be uncomfortable with certain aspects of the approach, finding that some facets conflict with their perceptions of the proper judicial role or are otherwise inappropriate.\textsuperscript{258} Quite a few judges may consider the approach problematic, as it is insufficiently attentive to the Rule's specific requirements. The approach suggests that courts exercise discretion when applying a rule couched in mandatory terms,\textsuperscript{259} deemphasize policies that underlie the express requirements of Rule 24(a)(2),\textsuperscript{260} and stress concepts that are not explicitly included in the provision.\textsuperscript{261} Judges, thus, might be troubled because Rule 24(b)(2) expressly states that they are to exercise discretion in resolving permissive intervention requests and makes party prejudice the exclusive criterion that courts must consider in doing so.\textsuperscript{262}

\textsuperscript{257} I am merely saying that the large number of specific expressions of legislative intent strongly indicate that Congress favors expansive intervention and that this should inform courts' application of Rule 24(a)(2). See also Sperling, 110 S. Ct. at 486-88. I realize, of course, that Rule 24(a)(1) provides for statutory intervention of right and that Congress could specifically prescribe intervention of right by regulatory beneficiaries in every substantive statute, but this is an unrealistic view of the legislative process, given, for instance, its extremely fragmented nature and the shifting coalitions that coalesce to pass specific statutes.

Congress also has subscribed more recently to other policies that support the suggested approach. Congress, by acquiescing in the 1983 amendments and by passing the Judicial Improvements Acts of 1988 and 1990, for example, evinced concern about expeditious dispute resolution and efficient litigation packaging.

\textsuperscript{258} One basis for objection might be that an aspect seems inconsistent with recent Supreme Court opinions that view the idea of a case rather narrowly. See supra note 177.

\textsuperscript{259} "Upon timely application, anyone \textit{shall} be permitted to intervene ...." Fed. R. Civ. P. (24)(a)(2) (emphasis added).

\textsuperscript{260} This is especially so with regard to applicant need to intervene. See supra notes 223-24, 232, 236 and accompanying text.

\textsuperscript{261} Of particular import are contributions to issue resolution and party prejudice. See supra notes 178-83, 197-205, 227-28 and accompanying text.

\textsuperscript{262} Rule 24 provides in pertinent part:

(b) Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: \ldots (2) when an applicant's claim or defense and the main action have a question of law or fact in common \ldots In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

\textit{Fed. R. Civ. P. 24 (b)(2).} Judges could be concerned because they believe that the approach might violate the Advisory Committee's intent when drafting Rule 24(a)(2) in 1966. Even if the Committee revised the provision with Rule 24(b) in mind, it is not clear that the drafters meant to divest judges of all discretion, and numerous courts have exercised discretion when including party prejudice as an integral part of the timeliness test or in their intervention of right decisionmaking more generally. See supra notes 24-25, 228 and accompanying text. Although the drafters did not amend Rule 24(b) in 1966, it is fair to assume that they had it in mind. See generally \textit{Federal Practice}, supra note 115, § 1911, at 355-56.
Given the scope of the suggested changes, some judges may find them so fundamental that the recommendations should only be effectuated through the formal rule amendment process. Indeed, when civil rights plaintiffs recently championed a different, but not entirely inapposite, approach to Rule 24(a)(2), the Supreme Court responded that the application advocated "would require a rewriting rather than an interpretation of" Rules 24 and 19.

The Supreme Court, the Advisory Committee and Congress, therefore, should expeditiously revise Rule 24(a)(2) to conform with the approach suggested here. Formal amendment would afford numerous benefits. It would resolve any doubt about judicial authority to implement the approach espoused, permit full public discussion of the proposal's advisability and of other suggestions for improvement and their revision as indicated, and offer the advantage of expressly including in the provision any changes adopted.

Notwithstanding the need for Rule 24(a)(2)'s revision or the advisability of the approach recommended, amendment appears unlikely in the near future. For over a quarter century, the Advisory Committee has manifested no interest in revision, despite considerable agreement that Rule 24(a)(2) was flawed as amended, while the Committee has recently assigned higher priority to modifying other provisions, such as Rule 11 covering sanctions and Rule 56 governing summary judgment. Moreover, the Supreme Court has evinced little concern for

263. This is the process in which the Advisory Committee develops proposals, circulates them for public comment, and finalizes them for submission to the Supreme Court which, if it approves or modifies the Committee's recommendation and Congress does not modify the Court's action, amends the Rule. See 28 U.S.C. §§ 2072-74 (1988); see also Lewis, The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision, 85 MICH. L. REV. 1507 (1987); Mullenix, Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking, 69 N.C. L. REV. 795 (1991).


265. Most of the public policies that support the suggested approach also support courts' authority to implement it absent formal amendment. See, e.g., supra notes 255-57 and accompanying text (explicit indications of Congressional intent augment considerable existing judicial authority mentioned in this piece); cf. Chambers v. Nasco, Inc., 111 S. Ct. 2123 (1991) (courts have broad inherent authority to manage dockets even in certain areas specifically covered by statute or federal rule); G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989) (courts have broad implied power to manage their dockets). But cf. Comment, Mandatory Summary Jury Trial: Playing by the Rules?, 56 U. CHI. L. REV. 1495, 1510-13 (1989). Although the ideas analyzed strongly support the exercise of authority, there are some relatively convincing arguments against its exercise. Nonetheless, additional discussion is beyond the scope of this piece.

266. See supra notes 109-11 and accompanying text (flawed as amended).

267. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, CALL FOR WRITTEN COMMENTS ON RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND RELATED RULES, reprinted in 131 F.R.D. 344
public interest litigants in its recent opinions,268 and neither the Committee nor the Court has shown much interest in revising the Federal Rules in ways that would be more solicitous of public interest litigants' needs.269 Although Congress has passed many substantive, procedural, and fee-shifting statutes that facilitate the active involvement of public interest litigants in federal civil litigation,270 it rarely has been sufficiently interested to focus on the revision of one rule.271

Because the Supreme Court and Congress are not likely to revise Rule 24(a)(2) soon, the courts will have to resolve intervention requests pursuant to the current Rule. In treating motions to intervene, judges should follow the approach recommended above. Courts that disagree with any aspects of the approach should selectively apply those elements they deem proper. For example, many courts probably will consider appropriate the recommendations that respond to the litigation explosion, perhaps finding them logical extensions of the judicial economy concept, which clearly underlies Rule 24(a)(2). In contrast, the possibility that a court might grant intervention to an applicant lacking such an interest that could contribute substantially to issue resolution


271. See Tobias, supra note 4, at 293, 337-40. In 1983, Congress did reject the Court's suggestions for revising Rule 4 and amended the provision statutorily. See Changes in Federal Summons Service Under Amended Rule 4 of the Federal Rules of Civil Procedure, 96 F.R.D. 81 (1983); cf. Burbank, supra note 29, at 1018-20 (documenting increased Congressional willingness since 1973 to intercept proposed rules and amendments governing evidence and civil, criminal and appellate procedure). Congress also has evinced greater interest in the rules revision process recently. See, e.g., Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642; H. R. REP. NO. 100-889, 100th Cong., 2d Sess. 22-27 (1988), reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5982, 5983-87. The civil rights area affords two telling indications of why Congress is unlikely to revise Rule 24. Congress only recently showed interest in the 1983 amendment of Rule 11, although considerable evidence indicated that it was seriously disadvantaging civil rights plaintiffs. See Tobias, supra note 8. Moreover, Congress was unable to override President Bush's veto of the Civil Rights Act of 1990. This happened, even though the measure was a tepid version of the bill initially introduced and had the nearly unanimous support of the powerful civil rights lobby. Moreover, there was substantial need to reinstate Congressional intent that the federal judiciary facilitate the vindication of fundamental civil rights by discrimination victims, an intent that narrow Supreme Court interpretations had eroded. See President's Veto Of Rights Measure Survives By One Vote, N.Y. Times, Oct. 25, 1990, A1, col. 3; cf. New Battle Looming as Democrats Reintroduce Civil Rights Measure, N. Y. Times, Jan. 4, 1991 (strong, new legislation introduced in 102nd Congress).
Standing to Intervene

but deny intervention to an absentee having a traditional interest that would contribute little may prove too much for a number of judges.\textsuperscript{272} Courts that employ the aspects of the suggested approach with which they agree should integrate that enforcement with application that is tailored more specifically to the Rule's express terms and embodies the intervention of right jurisprudence many courts have developed.\textsuperscript{273} Even judges who reject the approach in its entirety should seriously consider abandoning the inadvisable imposition of standing requirements criticized above while pragmatically applying the Rule's explicit phrasing which affords sufficient flexibility to resolve intervention requests similarly to the suggested approach.\textsuperscript{274}

VI. Conclusion

Numerous federal circuit and district courts have required intervention applicants to satisfy standing or certain of its components. Their invocation of standing has been inadvisable. Nonetheless, the policies that underlie standing are integral to reformulating intervention of right, because they help to define the idea of a case, the appropriate parties to participate in it, and the proper judicial role in resolving public law litigation. The approach to standing and to Rule 24(a)(2) suggested here is a pragmatic, equitable recalibration of the intervention procedure to the realities of modern lawsuits. If courts apply it, they will at once enhance the quality of their decisionmaking and realize judicial economy.

\textsuperscript{272} I am not advocating these results, although they could occur, albeit rarely, under the approach suggested.

\textsuperscript{273} See \textit{supra} notes 225-34 and accompanying text. The way courts integrate the enforcement will depend on many considerations, such as how many, and which, aspects of the approach they want to apply, how flexibly they wish to enforce the Rule's four requirements, and the facts that are present in specific contexts. For instance, a judge who agrees with the central facets of the approach might grant intervention to an applicant that promised to contribute greatly to issue resolution, especially if there were some prospect of inadequate representation. \textit{See generally} United States v. Hooker Chems. & Plastics, 749 F.2d 968, 983 (2d Cir. 1984). In comparison, a judge who is less enamored of the approach may want to apply the Rule's requirements in light of the approach, perhaps finding sufficient, for example, the type of intangible interest public interest litigants frequently assert. \textit{See supra} notes 11, 100-02 and accompanying text.

\textsuperscript{274} See \textit{supra} notes 98, 100-02, 225-26 and accompanying text. These judges might wish, for instance, to read the Rule's criteria literally and apply parts of the approach only when the four criteria yield unclear conclusions.