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Rule 19 and the Public Rights Exception to Party Joinder

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RULE 19 AND THE PUBLIC RIGHTS EXCEPTION TO PARTY JOINDER

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The increasing number of "public interest" lawsuits suggests that federal courts increasingly will confront difficult party joinder questions posed by such litigation. These problems arise because entities not involved in the litigation may have interests that may be adversely affected by the litigation. The joinder issue presented by such cases is whether rule 19 of the Federal Rules of Civil Procedure requires that the suit be dismissed or whether the litigation can continue without joinder of the absent entities. Numerous courts have dealt with the question by creating a "public rights exception," which permits the litigation to continue even without absentees whose interests may be at risk. However, no court has clearly articulated or analyzed this exception. Because of this failure, adoption of the exception has not resolved all of the joinder problems raised by public rights litigation. In this Article Professor Tobias considers whether there is a better solution to these problems.

First, Professor Tobias considers the origins of the public rights exception. He then evaluates the judicial articulation of the exception and reveals that courts have not explained the exception adequately or exhibited concern for interests other than those of the plaintiff. Professor Tobias then examines the procedural and statutory mechanisms currently available for treating this party joinder issue. He concludes that the courts should abandon the public rights exception and resolve the joinder question by applying these other mechanisms.

Federal courts increasingly confront a difficult question of party joinder when "public interest litigants," such as the National Wildlife Federation, sue the government over administrative agency activity.[1] These public interest litigants challenge an activity, like leasing of the public lands, but fail to join entities, such as major oil companies, holding oil and gas leases on the public lands.

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1. A "public interest litigant" is an advocacy group that represents "unorganized 'public interests,'—interests shared by large numbers of individuals (such as consumers . . .) who are not well enough organized to pool their mutual stake in agency policies and participate effectively in the informal administrative process on a par with . . . other organized economic interests." S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 1185 (2d ed. 1985). "Public interest" or "public law" litigation is the activity pursued by public interest litigants before agencies or courts to vindicate these interests. For general discussions of public interest litigants and litigation, see Chayes, *Foreword: Public Law Litigation and The Burger Court, The Supreme Court 1981 Term*, 96 HARV. L. REV. 4 (1982) [hereinafter Chayes, *Foreword*]; Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) [hereinafter Chayes, *Public Law Litigation*]; Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975).

The entities have interests that may be adversely affected by a determination on the merits favorable to the plaintiff. The party joinder issue that these suits present is whether rule 19 of the Federal Rules of Civil Procedure[2] requires that the plaintiff's case be dismissed, whether absentees must be joined because joinder is feasible, or whether the litigation can continue without joinder of such absentees. Numerous judges have treated this question by creating a "public rights exception," which permits the plaintiff's suit to proceed in the absence of entities that could be prejudiced should the litigation continue without them. But no court has clearly articulated, analyzed, or substantiated the exception. Moreover, most of these judges, out of apparent concern that plaintiffs have a forum in which to contest agency activity and vindicate public rights,[3] have evinced little express solicitude for interests of others, particularly absentees. Furthermore, the plethora of varying factual contexts in which courts have been asked to apply the public rights exception are difficult to generalize. The history of recent public rights litigation, however, illustrates the problems that can attend invocation of the public rights exception.

In recent public rights litigation, trial judges have not required joinder of a large number of geographically dispersed absentees that have spent millions of

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2. Rule 19 provides:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

FED. R. CIV. P. 19. For brief descriptions of the rule, see *infra* notes 42-46, 126-32 and accompanying text. For thorough analysis, see 3A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 19 (2d ed. 1986) [hereinafter MOORE'S FEDERAL PRACTICE]; 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL §§ 1601-26 (1972).

3. For example, several environmental groups recently vindicated all citizens' interest in environmental quality by suing to restrain the National Park Service (NPS) "from approving mining plans and access permits in Alaska's national parks until" the NPS complied with the National Environmental Policy Act and its own regulations. *See* Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466, 467 (9th Cir. 1986).

dollars exploring for, and developing, natural resources in reliance on government leases of public lands. When public interest litigants have successfully challenged the propriety of government activity relating to lease issuance, trial judges essentially have discontinued absentee exploration and development pursuant to the leases. Thus, the absentees have had to spend considerable time, money, and effort participating in prolonged litigation. Indeed, the absentees even could lose the substantial investments committed to exploration and development, should the federal judiciary ultimately reject their contentions, because the absentees cannot secure satisfactory relief against the government under existing compensation schemes.[4] In short, trial judges have not ordered joinder of absentees, despite the apparent significance of the absentees' interests.

Notwithstanding these complications, numerous courts that have recognized the public rights exception seem to have resolved correctly the relevant party joinder question, especially by honoring rule 19's strong concern for providing the plaintiff a forum. It is difficult, however, to determine definitively if most of these judges made appropriate decisions in light of rule 19's requirements or whether they properly completed the inquiry contemplated by the rule. Moreover, it is impossible to determine how the remaining courts resolved the joinder issue. Even if the conclusions reached were correct, the uncertainty engendered by the courts' lack of clarity has disrupted operations conducted by absentees that were not required to be joined in the public rights suits. That uncertainty has also led to protracted litigation, wasting public and private resources and undermining judicial credibility. Because public rights litigation is burgeoning, the party joinder question that the public rights exception was fashioned to address will increasingly arise. These considerations make it important to determine if there is a better solution to the joinder problem.

The first section of this Article analyzes the origins of the public rights exception. The second section evaluates judicial articulation of the public rights exception and reveals that courts have neither clearly enunciated the exception nor expressly exhibited concern for pertinent interests other than those of the plaintiffs. Moreover, this assessment suggests that the federal judiciary's recognition of the public rights exception was unwarranted. Accordingly, the third section explores the procedural mechanisms currently available for treating the party joinder issue addressed by the exception. Because this analysis demonstrates that these measures will enable courts not only to facilitate plaintiffs' vindication of public rights but also to accommodate other relevant interests, the Article concludes that the federal judiciary should abandon the public rights

4. The absentees cannot secure satisfactory relief because the government may have no technical legal obligation to them or the harm suffered may not support a cause of action. *See infra* notes 238-39 and accompanying text. National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1612-14 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082, 1084-86 (D.D.C. 1986) (mem.), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986), and Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985), *appeal filed*, No. 85-3935 (9th Cir. argued July 11, 1986) illustrate the problems that can occur. For more comprehensive analysis of other contexts in which courts have invoked the exception, see *infra* text accompanying notes 75-94. One of the most problematic difficulties in treating the exception is explaining how the party joinder question arises.

exception and resolve the party joinder question by applying the additional mechanisms.

I. ORIGINS OF THE PUBLIC RIGHTS EXCEPTION

A. *Early Party Joinder Concepts*

1. Developments Prior to the Adoption of Original Federal Rule 19

English equity courts attempted to join every entity that had some interest in a particular action, so as to minimize the possibilities of multiple and inconsistent litigation.[5] But comprehensive joinder was not a prerequisite to pursuit of a claim or to entry of judgment before 1800.[6] At the end of the eighteenth century the equity courts began finding certain entities so integrally related to specific litigation that the case could not proceed in their absence.[7] For example, Lord Chancellor Thurlow's 1787 decision in *Fell v. Brown*[8] was read as stating that a second mortgagee's suit, which sought an accounting of rents and profits from a first mortgagee, could not continue in the absence of the heir of the deceased mortgagor.[9] Judges in the United States subscribed to this change. Although the modification was said to be "imported" by Justice Washington's 1806 opinion in *Joy v. Wirtz*,[10] the alteration was articulated most authoritatively in the factually similar, 1855 decision of the United States Supreme Court, *Shields v. Barrow*.[11]

In *Shields* plaintiff sought to rescind an agreement with six people but did not sue four of them, because their presence in the litigation would have destroyed diversity jurisdiction. The Supreme Court refused to permit the case to proceed without the four individuals whose interests could have been adversely affected. The Court apparently premised its determination on the distinction between "necessary" parties, who should be sued and "indispensable" parties, such as the four absentees, who must be joined and in whose absence it would be unfair to continue:

> Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which re-

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5. *See* Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1255-58 (1961); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (I), 81 HARV. L. REV. 356, 358-59 (1967); Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 331 (1957).

6. "Equity . . . tolerated the absence of an interested person when it was shown that joinder was impossible, or impractical, or involved undue complication . . . because the chancellors apprehended that doing an incomplete job in a litigation would often be better than doing no job at all." Kaplan, *supra* note 5, at 359; *see* Hazard, *supra* note 5, at 1268-75.

7. "Under the influence of the heady slogans of 'doing perfect justice' and 'making complete decrees,' " the chancery premised its determinations on abstract categorizations of absentees as "indispensable." Kaplan, *supra* note 5, at 359; *see* Hazard, *supra* note 5, at 1268-75.

8. 2 Bro. C.C. 276, 29 Eng. Rep. 151 (Ch. 1787).

9. *Fell* became the leading case and was read inflexibly for the proposition that litigation must be dismissed whenever any absentee who was "indispensable" could not be joined. *See* Hazard, *supra* note 5, at 1274-77.

10. 13 F. Cas. 1172 (C.C.D. Pa. 1806) (No. 7553-54); *cf.* Hazard, *supra* note 5, at 1278-82 (analysis of *Joy*); Kaplan, *supra* note 5, at 359 (discussing this "importation").

11. 58 U.S. (17 How.) 130 (1855).

> quires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it . . . are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, [they] are not indispensable parties. . . . Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience [are indispensable parties].[12]

The Court failed to mention specifically all the relevant factors that led it to resolve the party joinder question by ordering dismissal of plaintiff's claim. Therefore, although the Court might have resolved the joinder issue properly, that conclusion can be reached only by making certain assumptions about the reasoning the Court employed or by considering particulars not stated in *Shields*, such as the practical implications of dismissal.[13]

The *Shields* Court's classification of parties as necessary or indispensable, however, was most important to the development of party joinder ideas over the subsequent century. That categorization underlies what commentators have characterized as a "jurisprudence of labels"[14] or the "classification of cases by a kind of sloganeering process in which important factual detail was overlooked."[15] Judges, assessing circumstances in which absentee joinder was infeasible, did not evaluate thoroughly, much less pragmatically or flexibly, all considerations present in specific situations.[16] Rather, courts rigidly relied on concepts of "separability" or "jointness." Thus, judges assigned the conclusory label "indispensable" to absentees—such as the four unjoined original endorsers of the note in *Shields*—whose interests were considered "joint" or "common" or "united in interest" with entities in the litigation. If an absent party were held to be indispensable, the court dismissed the case.[17]

2. Original Federal Rule 19

Adopted in 1938, Federal Rule of Civil Procedure 19 was intended to facilitate more comprehensive packaging of suits and to minimize multiple litigation

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12. *Id.* at 139.

13. Thus, although "the Court left unmentioned that the plaintiff Barrow might possibly lack access to any court in which all parties could be joined, so that dismissal of the instant suit might leave him remediless," Kaplan, *supra* note 5, at 362, Professor Kaplan has noted that other considerations not stated in *Shields* might indicate the Court resolved the joinder issue properly, *id.*

14. *See* C. WRIGHT, THE LAW OF FEDERAL COURTS § 70, at 458 (4th ed. 1983); *see also* Reed, *supra* note 5, at 329 (cases revealed "ready reliance on labels [and] thoughtless reiteration—instead of a critical reexamination—of the basic principles of required joinder").

15. Kaplan, *supra* note 5, at 362.

16. For helpful descriptions of judicial treatment, see Freer, *Rethinking Compulsory Joinder: A Proposal To Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1075-76 (1985); Kaplan, *supra* note 5, at 362. The advisability of proceeding was an important consideration that judges neglected.

17. "It fostered an inward analysis of the nature of the rights asserted, rather than an outward assessment of the pros and cons of continuing with the particular case in the face of some incompleteness of the dramatis personae." Kaplan, *supra* note 5, at 362.

"by abandoning the mystical, inefficient, and narrower old tests in favor of a simpler and broader inquiry . . . along transactional lines."[18] But the rule failed to affect significantly the deficiencies in judicial treatment of the party joinder issue that had developed over the preceding 100 years.[19] The rule employed the familiar concepts of "necessary" and "indispensable" parties as well as "joint interests." This use of traditional terminology directed the courts to focus on the abstract or technical nature of absentees' interests while diverting judicial attention from practical concerns, like hardships imposed on litigants and absentees, that should have been considered more important.[20] Contemporaneous with the adoption of original Federal Rule 19, the United States Supreme Court resolved several labor law issues that became important in the development of the public rights exception.

B. *The Public Rights Doctrine,* National Licorice Company v. NLRB, *and the Public Rights Exception*

During the late 1930s and early 1940s, the Supreme Court subscribed to a "public rights doctrine" that generally enshrined the government, rather than private entities like labor unions, as the appropriate agent for vindicating certain "rights" found in labor legislation.[21] *National Licorice Co. v. NLRB*,[22] decided in 1940, was one in the line of cases espousing this doctrine. This decision was destined to serve as a primary source of the public rights exception.[23]

In *National Licorice* the National Labor Relations Board (NLRB) had found an employer's procurement of labor contracts with employees to be an unfair labor practice and effectively rendered those contracts unenforceable. The NLRB made its decision in an administrative proceeding in which the employees were not parties. The employer then challenged the NLRB's determination on the basis that the Board had failed to join the employees whose contracts were in question. The Supreme Court rejected the employer's contention that the employees were "indispensable parties" who were required to be joined in the administrative proceeding, partly because the NLRB was vindicating statutorily prescribed public rights:

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18. Freer, *supra* note 16, at 1065-67; *see* Fed. R. Civ. P. 19, 308 U.S. 687 (1938). For discussions and criticisms of the 1938 rule, see Freer, *supra* note 16, at 1065-67, 1075-76; Kaplan, *supra* note 5, at 363-64.

19. Widespread agreement exists on this point. *See, e.g.*, Freer, *supra* note 16, at 1076; Hazard, *supra* note 5, at 1287-89; Kaplan, *supra* note 5, at 363-64.

20. *See* FED. R. CIV. P. 19, Advisory Comm. Note, 39 F.R.D. 89, 90 (1966) [hereinafter Rule 19 Advisory Comm. Note]; Kaplan, *supra* note 5, at 363-64.

21. *See* Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 310-18 (1978); *see also* Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720 (1946) (contemporaneous account of the doctrine's development).

22. 309 U.S. 350 (1940).

23. The public rights doctrine's continuing application has not been restricted to the labor area. *See* Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245 (1986); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67-72 (1982); Luneburg & Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887, 955-69 (1981).

> In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights . . . .
>
> Here the right asserted by the Board is not one arising upon or derived from the contracts between petitioner and its employees. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices.[24]

Considerations other than NLRB vindication of public rights, however, were as important to Justice Stone's resolution of *National Licorice*. Thus, although the Court's determination that the absent employees were "not indispensable parties for purposes of the Board's order" was premised partially on agency pursuit of public rights, the finding was based as much on the order's ineffectiveness to "determine any private rights of the employees [who remained] free to assert such legal rights as they may have acquired under their contracts."[25] Emphasis on the separate, rather than the public, nature of the rights at issue as well as concern for absentees permeate the opinion. For example, the Court observed that joinder might be unnecessary "in private litigation where the rights asserted arise independently of any contract" that a defendant may have with an absentee. The Court considered contractual rights "distinct and separate, so that the Court [could], in a proper case, proceed to judgment without joining other parties to the contract, shaping its decree in such manner as to preserve the rights of those not before it."[26] The Court expressed solicitude for absentees by emphasizing the difference between the statutory public rights that were adjudicated and the absentees' private contractual rights. These rights (1) were independent and not litigated, (2) should be protected assiduously by the court in fashioning relief, and (3) could be pursued separately by absentees.[27]

The Court in *National Licorice* did not, however, explicitly espouse a "public rights exception." Indeed, its resolution of the case comported with prior understandings of party joinder, captured in the federal rule adopted two years earlier. For instance, the concepts of "separable" interests held by "necessary" parties, in contrast to "joint" or "common" interests held by "indispensable" parties, were compatible with, and even implemented, those previous understandings.[28] The ruling in *National Licorice* apparently was premised as much on the independent character of the rights in question and fidelity to pre-existing party joinder ideas, as on the public nature of those rights. Nonetheless, the Supreme Court did mention vindication of public rights, and judges subsequently read the decision as enunciating a public rights exception.

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24. *National Licorice*, 309 U.S. at 363-64.

25. *Id.* at 366.

26. *Id.* at 363.

27. *Id.* The Court also appreciated the absurdity of permitting statutory violators to avoid the law by inducing absentees not to require compliance with it or by conditioning compliance on absentee presence. *See id.* at 364.

28. *See supra* text accompanying notes 5-20.

C. *Developments from 1940 to 1970*

In the three decades following *National Licorice* no federal judge expressly declared that the Court had recognized a public rights exception to party joinder. To be sure, *National Licorice* was cited, but only rarely for the proposition that governmental agencies vindicating public rights need not join entities like the employee-signatories of the labor contracts in *National Licorice*.[29] By the end of this period, however, there were two developments important to the creation of the public rights exception.

1. Amendment of Rule 19

During the mid-1960s the original rule 19 was revised, a process that culminated in significant restructuring of the rule in 1966.[30] The changes, made primarily at the instigation of commentators,[31] were said to be necessitated by experience indicating that the 1938 rule was poorly phrased and failed to state clearly the correct bases for deciding the party joinder question.[32] Writers suggested that the "use of 'indispensable' and 'joint interest' in the context of original rule 19 directed attention to the technical or abstract character of the rights or obligations of the persons whose joinder was in question, and correspondingly distracted attention from the pragmatic considerations which should be controlling."[33] Concomitantly, the rule failed to alert judges to the importance of flexible, practical analysis and to prescribe affirmatively those factors pertinent to determining if the case should continue or be dismissed when absentee joinder was not feasible.[34] "In some instances courts did not undertake the relevant inquiry [while in others] there was undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of proceeding with the action and the ways by which these consequences might be ameliorated."[35]

The proponents of revision and the drafters of the 1966 amendment ac-

29. *See, e.g.*, NLRB v. Indiana & Mich. Elec. Co., 124 F.2d 50, 54-55 (6th Cir. 1941), *aff'd*, 318 U.S. 9 (1943); *cf.* Pepsico, Inc. v. FTC, 472 F.2d 179, 187-90 (2d Cir. 1972) (post-1970 mention of public rights doctrine), *cert. denied*, 414 U.S. 876 (1973).

30. *See* Rule 19 Advisory Comm. Note, *supra* note 20, at 88-94; 7 C. WRIGHT & A. MILLER, *supra* note 2, §§ 1601-26; Kaplan, *supra* note 5. The Advisory Committee Note bears the imprint of Professor Kaplan, the reporter for the Advisory Committee on Civil Rules, and is a valuable source for the drafters' views of the revisions. *See also* 7 C. WRIGHT & A. MILLER, *supra*, § 1601, at 13 (noting the weight courts accord the Advisory Note). *See generally* Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204 (1966) (contemporaneous commentary on amended rule 19).

31. *E.g.*, Hazard, *supra* note 5; Reed, *supra* note 5. *But see* Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 YALE L.J. 403 (1965) (criticizing the proposed amendment).

32. *See* Rule 19 Advisory Comm. Note, *supra* note 20, at 90; *cf. infra* text accompanying note 36 (even advocates of change admitted 1938 rule did not seem to have been "responsible for much erroneous judicial resolution of the party joinder issue").

33. Rule 19 Advisory Comm. Note, *supra* note 20, at 90; *see* 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1601, at 8-9; Kaplan, *supra* note 5, at 363-64.

34. The 1938 version failed to "state affirmatively what factors were relevant in deciding whether the action should proceed or be dismissed when joinder of interested persons was infeasible." Rule 19 Advisory Comm. Note, *supra* note 20, at 90-91; *see* Freer, *supra* note 16, at 1076; Kaplan, *supra* note 5, at 363-64.

35. Rule 19 Advisory Comm. Note, *supra* note 20, at 91.

knowledged that these problems apparently were not responsible for much erroneous judicial resolution of the party joinder issue.[36] Indeed, most courts appeared to have resolved the joinder question properly by correctly balancing the pertinent factors in classifying absentees as indispensable or necessary.[37] But it was difficult to ascertain precisely how these satisfactory decisions had been made, "since the courts, in tune with the rule, had not asked the really cogent questions and hence failed to bring out the facts and their legal implications, by reference to which the results could be intelligently criticized."[38] Moreover, some judges had improperly resolved the joinder issue or used categorical, formulaic, or rigid approaches.[39] Thus, the rulemakers were concerned more with altering judicial reasoning processes than with case results[40] or existing joinder principles.[41]

The amendment first designated entities that should be joined for just adjudication and required explicit consideration of the interests served by joinder.[42] When absentees were found to have an interest in the pending litigation—an interest that could be jeopardized by its resolution without them—or when the entities' absence could have injured parties to the case, courts were to determine whether joinder was feasible, considering subject matter jurisdiction, venue, and service of process.[43] If joinder were feasible, judges were to order it.[44] When joinder was infeasible, the rule provided guidance for determining whether in "equity and good conscience" the plaintiff's suit should be dismissed or proceed without the absentees.[45] A list of factors implicating four pertinent interests informed this determination: (1) the plaintiff's need for a forum in which to litigate; (2) absentees' concern in minimizing prejudice to their interests if the case continued without them; (3) defendant's desire to avoid multiple actions,

36. *See* Rule 19 Advisory Comm. Note, *supra* note 20, at 91; 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1601, at 11-12; Kaplan, *supra* note 5, at 366-67.

37. "A proper balancing of the values and interests could take place in the process of assigning persons to the categories mentioned, and no doubt this often occurred." Kaplan, *supra* note 5, at 363.

38. Kaplan, *supra* note 5, at 367.

39. "The existing rule, it was said . . . had not resulted in any spate of wrong or hurtful decisions. . . . But scholarly examination of the cases had turned up errors in no negligible quantity." Kaplan, *supra* note 5, at 366-67.

40. *See* Rule 19 Advisory Comm. Note, *supra* note 20, at 91; 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1601, at 11-12, 14-16, § 1608, at 92-93; Kaplan, *supra* note 5, at 367.

41. *See* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 116 n.12 (1968); 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1601, at 11-12, 14-16.

42. Amended rule 19 is reproduced in full *supra* note 2 and analyzed comprehensively *infra* text accompanying notes 124-255. Considerations pertinent to determining whether entities should be joined appear in subsections 19(a)(1), (a)(2) (i) and (ii). Judges and writers still employ the term "necessary." *See, e.g.*, Northern Alaska Envtl. Center v. Hodel, 803 F. 2d 466, 468 (9th Cir. 1986); F. JAMES & G. HAZARD, CIVIL PROCEDURE § 10.11, at 530 (3d ed. 1985). But "Rule 19's title phrase 'needed for [a] just adjudication' was substituted for 'necessary' in an effort to avoid the talismanic significance which that term had acquired." Freer, *supra* note 16, at 1076 n. 77. Thus, this Article avoids use of the term "necessary."

43. These "joinder limitations" appear in the initial and concluding sentences of rule 19(a). *See supra* note 2 (full text of rule 19).

44. The entity "shall be joined as a party in the action." FED. R. CIV. P. 19(a).

45. *See* FED. R. CIV. P. 19(b); *see also* Kaplan, *supra* note 5, at 365 (discussing rule 19(b)); 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1608 (discussing rule 19(b)).

inconsistent judgments, or sole responsibility for liability another should share; and (4) the public's interest in thorough, consistent, and efficient resolution of disputes.[46]

The rulemakers emphasized the need to protect relevant interests, evincing particular solicitude for plaintiffs and absentees.[47] The drafters also sought to encourage case-by-case, practical decisionmaking with a balancing of pertinent considerations when appropriate.[48] In the 1968 case of *Provident Tradesmens Bank & Trust Co. v. Patterson*,[49] the Supreme Court placed its imprimatur on the amendment, approving the propositions above and giving the new rule its definitive judicial gloss.

2. Public Rights Litigation

About the time of the rule's amendment, there began to coalesce numerous closely related developments that altered significantly the character of much federal civil litigation.[50] These developments engendered a new party joinder problem that the rulemakers apparently did not anticipate.[51]

One important development was the changed perception, and probably the reality, of much administrative decisionmaking.[52] At the time of the New Deal and for several decades thereafter, numerous public officials and commentators

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46. *See* FED. R. CIV. P. 19(b). The characterization of the four factors in the text is drawn from the Supreme Court's formulation in Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110-12 (1968).

47. *See* Rule 19 Advisory Comm. Note, *supra* note 20, at 89-94; Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109-12 (1968); Cohn, *supra* note 30, at 1210; *see also infra* text accompanying note 197 (discussing the relative import of plaintiffs' and absentees' interests).

48. *See* Rule 19 Advisory Comm. Note, *supra* note 20, at 89-94; *Provident Tradesmens*, 390 U.S. at 116-19.

49. 390 U.S. 102 (1968).

50. Thorough analysis of all the developments is beyond the scope of this Article. Instead, this Article offers an account that examines themes most important to recognition of the public rights exception by drawing on numerous sources that have competently chronicled many of the developments. These sources include: COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE (1976) [hereinafter BALANCING THE SCALES]; B. WEISBROD, PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS (1978) [hereinafter PUBLIC INTEREST LAW]; Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986) [hereinafter Rabin II]; Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207 (1976) [hereinafter Rabin I]; Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

51. Rule 19, its Advisory Committee's Note, and Professor Kaplan's writing evince no cognizance of the problem. The rule seems to contemplate traditional two-party litigation, typified by the Supreme Court's decision in *Provident Tradesmens*. These considerations comport with many developments discussed below that were nascent when the amendment was adopted. Thus, although the exception appears to constitute a natural response to an unanticipated problem, rule 19's "liberalization" may have obviated the need for the exception. Telephone interview with Professor Richard Marcus, University of Illinois, College of Law (July 18, 1986) (recognizing that Kaplan was proponent of rules' "liberal ethos" favoring disposition of cases on merits); *see also* United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 983-84 (2d Cir. 1984) (Rule 24 contemplated traditional private litigation); Freer, *supra* note 16, at 1065-66 ("The common law and early civil procedure code rules were based essentially on a two-party model of litigation, a model that became obsolete in a more mobile and complex society.").

52. *See* S. BREYER & R. STEWART, *supra* note 1; J. FREEDMAN, CRISIS AND LEGITIMACY (1978); Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981); Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 507 (1985); Rabin II, *supra* note 50, *passim*; Stewart, *supra* note 50, *passim*.

believed that the best agency decisions would result from trusting administrative expertise and that courts therefore should defer to agency expertise.[53] By the 1960s, however, practical experience had undermined this New Deal faith and even created doubt about the possibility of objectively identifying the "public interest," which many agencies were commanded by statute to implement in their decisionmaking.[54] Furthermore, critics found that the exercise of administrative expertise alone did not guarantee the best substantive governmental decisions. A number of agency determinations required the balancing of numerous competing factors; some of these determinations involved policy choices such as wealth redistribution. Governmental decisions were affected by extra-agency influences, such as political pressure. Little of this decisionmaking, however, was amenable to resolution by "experts," so that judicial deference to agencies premised on expertise made less sense.[55] Commercial concerns, for example, contended that agency decisionmaking was inaccurate, ineffective, and expensive; consumer organizations argued that agencies were biased toward industry. All these considerations contributed to the widespread perception that agencies had "failed" to accomplish the missions Congress assigned them.[56]

As a result of this new criticism, much administrative decisionmaking be-

53. New Deal Congresses delegated "sweeping powers to a host of new agencies under legislative directives cast in the most general terms," so that agencies had broad discretion to adjudicate and legislate. Stewart, *supra* note 50, at 1677. Defenders of this legislation justified broad discretionary delegations, agencies' combination of functions, decreased procedural formalities, and deferential judicial review by arguing that the economy's salvation demanded administrative controls involving expertise, mixed powers, and discretionary management like that used by business. They also asserted that successful administration was "incompatible with legalistic formalities and [implicated] technical issues beyond the undertaking of lay judges." S. BREYER & R. STEWART, *supra* note 1, at 28; *see* Garland, *supra* note 52, at 577-78.

54. In 1975 Professor Stewart stated:

> Experience has withered this faith. To the extent that belief in an objective "public interest" remains, the agencies are accused of subverting it in favor of the private interests of regulated and client firms. [We] now doubt the very existence of an ascertainable "national welfare" as a meaningful guide to administrative decision. Exposure on the one hand to the complexities of a managed economy in a welfare state, and on the other to the corrosive seduction of welfare economics and pluralist political analysis, has sapped faith in the existence of an objective basis for social choice.

Stewart, *supra* note 50, at 1682-83 (citations omitted); *accord*, Rabin II, *supra* note 50, at 1266-72, 1281-1306. Section 307(a) of the Communications Act of 1934, 47 U.S.C. 307(a)(1970), instructs the Federal Communications Commission to grant licenses in the "public convenience, interest, or necessity." *Id.*

55. For example, the populace "lost faith in the notion that technical experts could obtain value-free results," Garland, *supra* note 52, at 577, or that they could protect the "public interest" against regulated interests, *see* Stewart, *supra* note 50, at 1682-83.

56. For example, economists and some business representatives assert that regulatory programs characteristically benefit strategically placed, well-organized interests at the public's expense while the mechanisms administrators use to "alter market behavior—such as regulatory prohibitions, licensing, and other legalistic controls—are inappropriate, clumsy, and excessively costly." Correspondingly, consumer advocates like Ralph Nader have criticized traditional regulatory agencies for being "captured" by the industries they ostensibly regulated and for failing to protect vigorously "consumers, workers, and other supposed beneficiaries of regulatory programs." S. BREYER & R. STEWART, *supra* note 1, at 36. For helpful analyses of changed perceptions of administrative decisionmaking, see Garland, *supra* note 52, at 577-78; Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1186-90 (1973); Rabin II, *supra* note 50, at 1266-72, 1281-1306; Stewart, *supra* note 50, at 1671-88.

gan to be viewed as an essentially legislative process in which all interests[57] affected by agency judgments were considered and weighed in reaching the correct determination.[58] The difficulty with this perspective on the decisional process was that regulated entities submitted most of the input on which agencies relied in making decisions. Therefore, certain advocates of reform and critics of agency decisionmaking recommended the expansion of opportunities for nonindustry participation in administrative proceedings and courtroom litigation. Thus, judges eased constraints on citizen involvement in agency and judicial proceedings.[59] Moreover, courts scrutinized administrative decisional processes to determine whether individuals and entities affected were adequately represented, whether agencies properly considered and balanced the ideas they expressed, and whether the conclusions reached were rational.[60]

The rise of this "interest representation" model of the administrative process and judicial review of agency decisions was inextricably linked to the substantial expansion of the "public interest law movement."[61] That movement, which originated in the areas of civil rights and civil liberties advocacy, sought to vindicate in the administrative sphere and in the courts rights and interests of large, unorganized groups of people, such as the poor, consumers, disadvantaged minorities, and others who previously had been underrepresented, if represented at all.[62]

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57. Interests considered particularly important were those previously unrepresented, such as consumers' interests.

58. Professor Stewart has noted:

> Today, the exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy. . . . Courts have asserted that agencies must consider all of the various interests affected by their decisions as an essential predicate to "balancing all elements essential to a just determination of the public interest."

Stewart, *supra* note 50, at 1683 (citing Airline Pilots Ass'n, Int'l v. CAB, 475 F.2d 900, 905 (D.C. Cir. 1973)). For helpful analyses of these new perspectives on administrative decisionmaking, see *id.* at 1711-59; Garland, *supra* note 52, at 577-81; Rabin II, *supra* note 50, at 1296-99.

59. *See, e.g.*, Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1000-06 (D.C. Cir. 1966); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 615-17 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *see also* Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 362-69 (1972) (analyzing case law development easing constraints); Stewart, *supra* note 50, at 1723-56 (analyzing case law development easing contraints).

60. The "model that emerged looked upon judicial review . . . as a means of fostering a substitute political process in which all affected interests would be represented and considered." Garland, *supra* note 52, at 578; *see, e.g.*, Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); Airline Pilots Ass'n, Int'l v. CAB, 475 F.2d 900, 905 (D.C. Cir. 1973), *cert. denied*, 420 U.S. 972 (1975). For analyses of the model and the case law developing it, see Garland, *supra* note 52, at 577-81; Rabin II, *supra* note 50, at 1300-15; Stewart, *supra* note 50, at 1756-60, 1781-89.

61. *See* BALANCING THE SCALES, *supra* note 50, *passim*; S. LAZARUS, THE GENTEEL POPULISTS, *passim* (1974); PUBLIC INTEREST LAW, *supra* note 50, *passim*; Rabin I, *supra* note 50, at 224. Models are a matter of ongoing debate. *See, e.g.*, Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, *passim* (1984); Rabin II, *supra* note 50, at 1311-15; Sunstein, *Factions, Self-Interest and the APA: Four Lessons Since 1946*, 72 VA. L. REV. 271, 281-92 (1986). For helpful syntheses of these models, see Cass, *Models of Administrative Action*, 72 VA. L. REV. 363, *passim* (1986); Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1495-99 (1983).

62. *See* BALANCING THE SCALES, *supra* note 50, *passim*; PUBLIC INTEREST LAW, *supra* note 50, *passim*; S. LAZARUS, *supra* note 61, *passim*; Rabin I, *supra* note 50, *passim*; Stewart, *supra* note 50, at 1711-16, 1748-70. For discussion of "public interest," or "public law," litigation, see Chayes, *Public Law Litigation*, *supra* note 1, *passim*; Chayes, *Foreward*, *supra* note 1, *passim*; Rabin I, *supra*

Closely related to these developments was much legislative activity.[63] Between 1962 and 1980 Congress passed much "social legislation," said to institute "social regulation," in fields such as race, gender, and employment discrimination, and environmental, consumer, and workplace protection.[64] Many of the statutes vested considerable discretion in administrative agencies to implement broad mandates. But Congress also attempted to constrain exercise of that discretion. For example, legislation required agencies to solicit and consider public input and provided for administrative participation and citizen suits by the legislation's intended beneficiaries.[65]

Thus, "public interest group" plaintiffs pursued an increasing share of federal civil litigation on behalf of substantial, unorganized collections of individuals to vindicate "public rights" allegedly violated by administrative decisionmakers.[66] Moreover, some of these suits implicated amended rule 19 concerns by proceeding in the absence of entities whose interests could have been adversely affected. In 1971 a new party joinder problem arose, when the Natural Resources Defense Council (NRDC), a national environmental "public interest group," sought to vindicate public rights under the National Environmental Policy Act (NEPA). The NRDC sought to prevent the Tennessee Valley Authority (TVA) from buying coal under contracts with unjoined private producers until TVA satisfied NEPA's requirements.

D. Natural Resources Defense Council v. Tennessee Valley Authority

The pivotal opinion, *Natural Resources Defense Council v. Tennessee Valley Authority (NRDC)*,[67] harkens back to, and honors much in, *National Licorice*.

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note 50, at 228-35. For discussion of "early law reform efforts" and their links to modern efforts, see BALANCING THE SCALES, *supra* note 50, at ch. 1; Houck, *With Charity For All*, 93 YALE L.J. 1415, 1438-43 (1984); Rabin I, *supra* note 50, at 209-24.

63. *See* Rabin II, *supra* note 50, at 1278-95. Professor Rabin has criticized many writers for undifferentiated treatment of the activity, and he has offered analysis at once more thorough and refined. *See* Rabin I, *supra* note 50, at 242 (noting that much environmental legislation's passage was contemporaneous with the rise of public interest law). For discussion of "social regulation," see Vogel, *The "New" Social Regulation in Historical and Comparative Perspective*, in REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS 155 (T. McCraw ed. 1981); Lilley & Miller, *The New "Social Regulation,"* 47 PUB. INTEREST 49 (Spring 1977).

64. Classic examples of such legislation are: the National Environmental Policy Act, Pub. L. No. 91-190, § 102, 83 Stat. 852, 854 (1970) (codified at 42 U.S.C. §§ 4321, 4331-35 (1977)); the Occupational Safety and Health Act, Pub. L. No. 91-596, 84 Stat. 1590-1620 (1970) (codified at 29 U.S.C. §§ 651-78 (1985)); and the Equal Employment Opportunity Act, Pub. L. No. 92-261, 86 Stat. 103-13 (1972) (codified at 42 U.S.C. §§ 2000e-e17 (1981)). *Cf.* R. LITAN & W. NORDHAUS, REFORMING FEDERAL REGULATION 44 (1983) (noting 40 major statutes that have been passed).

65. Helpful examples of Congressional provision for administrative participation and citizen suits appear in the Federal Land Policy and Management Act, 43 U.S.C. §§ 1702, 1712, & 1739 (1986) and the Clean Water Act, 33 U.S.C. § 1365 (1986). *See also* 15 U.S.C. § 57a(h) (1973) (agency funding of citizen participation); 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 (1982) (discussing agency funding of citizen participation in administrative proceedings).

66. For discussion of this phenomenon and closely related developments, see sources cited *supra* notes 50 & 62; Fiss, *Foreword: The Forms of Justice, The Supreme Court, 1978 Term*, 93 HARV. L. REV. 1 (1979); *see also* Rabin II, *supra* note 50, at 1295-1315 (discussing specific litigation pursued by public interest group plaintiffs).

67. 340 F. Supp. 400 (S.D.N.Y. 1971), *rev'd on other grounds*, 459 F.2d 255 (2d Cir. 1972).

It also integrates numerous legal and policy developments, including changed perspectives on administrative decisionmaking, that occurred during the intervening period.[68] Most significant, however, *NRDC* provided a foundation for creation of the public rights exception.

In *NRDC* the Natural Resources Defense Council sought to compel TVA's compliance with the dictates of NEPA before the agency purchased coal under contracts with private producers. These producers were not sued because it was impossible to serve them. NRDC alleged that NEPA required TVA to prepare an environmental impact statement on the environmental consequences of buying strip-mined coal to be burned in the agency's power plants. The governmental defendant, TVA, asked that NRDC's case be dismissed for failure to join as "indispensable parties" the private producers who had contracted to sell the agency coal. The court refused to require joinder, partly because NRDC was vindicating statutorily provided public rights, independent of any private contractual interests that the producers were free to pursue:

> The instant action, like that in *National Licorice*, seeks to enforce an essentially public right . . . .
>
> Plaintiffs do not seek to abrogate the contracts, but to restrain defendants from purchasing coal under them "until such time as the requirements of the National Environmental Policy Act of 1969 are met." If this relief were granted, the private contractors would still be able to assert their rights against TVA . . . .[69]

Thus, *NRDC* is similar to *National Licorice*. Both courts would have permitted plaintiffs to vindicate public rights without joining absentees that had private contractual interests *separate* from those rights—interests that the absentees remained free to pursue. *NRDC*, however, differs in certain respects from *National Licorice*: the *NRDC* court allowed a "public interest group" to vindicate public rights in new "social legislation" against a government agency. The *NRDC* court also employed an amended rule 19(b) analysis that explicitly treated *National Licorice* under only the subdivision's first stated factor: the extent of prejudice to absentees if the litigation proceeds without them.[70] These distinctions, although technical, were predictable. For example, the "party transformation"—which permitted an essentially private entity to serve as the plaintiff for vindicating public rights against a government defendant, rather than allowing the government to pursue public rights against private parties—comported with numerous earlier developments, such as liberalized standing accorded public interest groups.[71] Correspondingly, the emphasis on rule 19 was compelled by its 1966 revision.[72] Nevertheless, the *NRDC* court, by "moderniz-

68. For discussion of these developments, see *supra* text accompanying notes 50-66.

69. *NRDC*, 340 F. Supp. at 408 (quoting the complaint).

70. *Id.* at 407-08.

71. *See supra* text accompanying note 59; *see also NRDC*, 340 F. Supp. at 408 (citing landmark standing and environmental cases); Luneburg & Nordenberg, *supra* note 23, at 963-69 (suggesting that private entities might vindicate public rights).

72. The *NRDC* court could not ignore rule 19. Judges who recognize the public rights exception, however, arguably are ignoring rule 19 and, thus, raise the question whether they can create true exceptions to the Federal Rules. *See also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974)

ing" *National Licorice* and mentioning the public nature of the rights being asserted, afforded additional support for recognition of the public rights exception.

In sum, neither *National Licorice* nor *NRDC* expressly espoused a "public rights exception" to party joinder. The independent character of the rights under consideration and fidelity to applicable party joinder concepts, whether grounded in common law, equity, or the applicable Federal Rule, were significant for both decisions.[73]

It is on these points, however, that judges subsequently broke with these two prior cases, notwithstanding liberal citation to them, and created the "public rights exception."[74] Thus, although numerous federal courts have seized on *National Licorice* and *NRDC* to support recognition of a public rights exception, this reliance seems misplaced. Furthermore, none of these courts has clearly enunciated, assessed, or justified the exception. It is important, therefore, to analyze the public rights exception as articulated; this analysis will enhance understanding of problems the exception engenders and the party joinder issue it addresses. This evaluation will also suggest approaches for treating that question.

II. JUDICIAL ARTICULATION OF THE PUBLIC RIGHTS EXCEPTION

A. *Description of the Cases*

Ten district court judges have explicitly recognized the "public rights exception."[75] As might be expected, seven sit either in the District of Columbia or the Ninth Circuit; most federal agencies "reside" in the District of Columbia, and much public land is located in the Ninth Circuit. Although neither circuit has expressly applied the public rights exception, both are currently considering recognition, and the Second and Eleventh Circuits have explicitly applied it.[76]

(federal judiciary must follow unambiguous requirements of federal rules). For helpful discussion of the rules' purpose, construction, status and validity, rulemaking authority, and the weight of Advisory Committee recommendations, see 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL §§ 1029-30 (1969); 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1601, at 13.

73. *See National Licorice*, 309 U.S. at 362-67; *NRDC*, 340 F. Supp. at 407-08.

74. Judges enunciated this exception in most cases decided in the 1970s and in a number of cases since then. These cases are cited *infra* notes 75-76 and analyzed *infra* text accompanying notes 77-123.

75. *See* National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1613-14 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082, 1084-86 (D.D.C. 1986) (mem.), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986); Northern Alaska Envtl. Center v. Hodel, No. J 85-009 Civ. 2-3 (D. Alaska July 24, 1985), *aff'd on other grounds*, 803 F.2d 466 (9th Cir. 1986); Sierra Club v. Watt, 608 F. Supp. 305, 324-25 (E.D. Cal. 1985); Louisiana v. Lee, 596 F. Supp. 645, 651 (E.D. La. 1984), *vacated on other grounds*, 758 F.2d 1081 (5th Cir. 1985), *cert. denied.*, 106 S. Ct. 1259 (1986); NAACP v. Donovan, 558 F. Supp. 218, 223 (D.D.C. 1982); Swomley v. Watt, 526 F. Supp. 1271, 1273 (D.D.C. 1981); Dintino v. Dorsey, 91 F.R.D. 280, 283 (E.D. Pa. 1981); NRDC v. Berklund, 458 F. Supp. 925, 933 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1979) (per curiam); National Audubon Soc'y v. Kleppe, C.A. No. 76-0943, at 9 (D.D.C. Nov. 11, 1976), *modified on other grounds*, National Audubon Soc'y v. Watt, 678 F.2d 299 (D.C. Cir. 1982); Sansom Comm. v. Lynn, 366 F. Supp. 1271, 1281 (E.D. Pa. 1973).

76. The District of Columbia Circuit case is National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1612-14 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082, 1084-86 (D.D.C. 1986) (mem.), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986); while the Ninth Circuit case is Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985), *appeal filed*, No. 85-

Litigation in this area has implicated a variety of rights and issues. National public interest organizations, concerned with protection and preservation of natural resources, have brought four cases against the United States Department of the Interior asserting public rights under public lands legislation or NEPA. The successful vindication of public rights in these suits could have prejudiced absentees by adversely affecting some interest, such as leaseholds, that the absentees claimed in the public lands.[77] In similar litigation the American Civil Liberties Union challenged on first amendment grounds Interior Department issuance to a religious organization of a permit for use of public lands.[78] Three suits sought to compel compliance with the requirements of NEPA when the Interior Department, the Army Corps of Engineers, and the Department of Housing and Urban Development proposed to undertake "major Federal actions significantly affecting the quality of the human environment."[79] Two cases questioned the constitutionality of tenant eviction procedures,[80] and two others involved employment issues affecting farm workers and correctional officers.[81]

An important problem with judicial articulation of the public rights exception is that the courts have applied it in varied factual circumstances that are difficult to generalize. Moreover, courts have invoked the exception in the context of a federal rule that is very difficult to apply and they have failed to explain clearly the exception's relationship to that rule. In the basic scenario a "public

3935 (9th Cir. argued July 11, 1986). Many judges cite the circuit court opinion in NRDC v. Berklund, 609 F.2d 553 (D.C. Cir. 1979), as affirming the holding in NRDC v. Berklund, 458 F. Supp. 925, 933 (D.D.C. 1978), but the exception is not expressly mentioned in the circuit court opinion. The Second and Eleventh Circuit cases are Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420, 424 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976), and Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919, 928-29 (11th Cir.), *cert. denied*, 459 U.S. 971 (1982). In a recent case the District of Columbia District Court's "review of the interests identified by Rule 19(b)" led to the conclusion absentees were not indispensable, so that it "need not determine whether [the case fell] within the 'public rights' exception." Coalition on Sensible Transp., Inc. v. Dole, 631 F. Supp. 1382, 1387 & n.4 (D.D.C. 1986). The Author also found no decision rejecting the exception, although this is not surprising, given the many ways to avoid it. But a panel of the Ninth Circuit Court of Appeals, reviewing a trial court's decision that "the 'public interest' exception to Rule 19 applied," stated it could "affirm on any basis supported in the record" and concluded that the absentees did "not satisfy the requirements for a 'necessary party' under Fed. R. Civ. P. 19(a)." Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466, 468 (9th Cir. 1986). Some judges appear to apply, but do not explicitly mention, the exception. *See, e.g.*, Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm., 662 F.2d 534 (9th Cir. 1981), *cert. denied*, 459 U.S. 917 (1982); Defenders of Wildlife v. Andrus, 77 F.R.D. 448 (D.D.C. 1978); Delaware v. Bender, 370 F. Supp. 1193 (D. Del. 1974).

77. *See* Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466 (9th Cir. 1986); National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1612-14 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082, 1084-86 (D.D.C. 1986) (mem.), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986); Sierra Club v. Watt, 608 F. Supp. 305 (E.D. Cal. 1985); NRDC v. Berklund, 458 F. Supp. 925 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1979) (per curiam).

78. *See* Swomley v. Watt, 526 F. Supp. 1271 (D.D.C. 1981).

79. *See* Louisiana v. Lee, 596 F. Supp. 645 (E.D. La. 1984), *vacated on other grounds*, 758 F.2d 1081 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1259 (1986); Sansom Comm. v. Lynn, 366 F. Supp. 1271 (E.D. Pa. 1973). The quoted phrase in the text is NEPA's language that requires preparation of an environmental impact statement. *See* 42 U.S.C. § 4332 (1982).

80. *See* Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919 (11th Cir.), *cert. denied*, 459 U.S. 971 (1982); Dintino v. Dorsey, 91 F.R.D. 280 (E.D. Pa. 1981).

81. *See* Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976); NAACP v. Donovan, 558 F. Supp. 218 (D.D.C. 1982).

interest litigant" sues a governmental defendant challenging agency activity but fails to join absentees whose interests could be adversely affected by a substantive judicial determination favorable to the plaintiff. The court, presented with a potential party joinder problem, has applied the public rights exception, allowing the plaintiff's case to proceed without requiring joinder of absentees. This difficulty has arisen in diverse factual contexts, although a taxonomy of situations can be described in terms of rule 19's steps.

In a few cases absentees apparently have lacked sufficient interest in the litigation to warrant designation as parties needed for just adjudication under rule 19(a).[82] For instance, applicants seeking governmental permission to explore for natural resources on public lands have been held to lack adequate interest in the continued application of approval procedures that public interest litigants alleged violated NEPA.[83] Of course, if absentee interest were insufficient, that determination would have obviated the necessity to reach the ancillary question whether disposition of the litigation without an absentee might "as a practical matter impair or impede his ability to protect" such an interest.[84] Although courts have not expressly depended on lack of potential absentee prejudice when cases proceeded without absentees, such reliance may have been appropriate when absentee interests were not sufficiently affected.[85]

In some circumstances absentees apparently possessed enough interest in the litigation to be considered entities needed for just adjudication. Moreover, absentee joinder appeared feasible under rule 19(a)'s joinder limitations, pertaining to subject matter jurisdiction, venue, and service of process, principally because the absentees were located within the jurisdiction.[86] For example, when a citizens' organization sued in the United States District Court for the Eastern District of Pennsylvania to compel Department of Housing and Urban Development compliance with two federal statutes before approving a development application, it seemed feasible to join the University of Pennsylvania, which would

82. Rule 19(a) requires that an absentee have an "interest relating to the subject of the action and [be] so situated" that disposition without the absentee would practically prejudice that interest or expose parties to a "substantial risk of incurring double, multiple, or otherwise inconsistent obligations." FED. R. CIV. P. 19(a).

83. "The 'subject matter' of this dispute concerns NPS procedures regarding mining plan approval. Naturally, all miners are 'interested' in how stringent the requirements will be. But miners with pending plans have no legal entitlement to any given set of procedures." Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466, 469 (9th Cir. 1986); *see also* Sierra Club v. Watt, 608 F. Supp. 305, 321-24 (E.D. Cal. 1985) (owners of mineral rights have no legally protected interest in dispute questioning Interior Secretary's decision to remove land from wilderness inventory). This premise also may have been true of absentees in other cases, such as certain absentee landlords in Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919 (11th Cir.), *cert. denied*, 459 U.S. 971 (1982), and Dintino v. Dorsey, 91 F.R.D. 280 (E.D. Pa. 1981), who may have lacked sufficient interest in the continued applicability of tenant eviction procedures challenged as unconstitutional.

84. FED. R. CIV. P. 19(a)(2)(i). "If the interest requirement is not satisfied, we need not reach the factors in clauses (2)(i) and (ii) [of rule 19(a)]." Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466, 468 (9th Cir. 1986).

85. In these situations, absentees had sufficient interest but were insufficiently prejudiced.

86. The rule states that a "person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action" or render venue improper "shall be joined as a party in the action." FED. R. CIV. P. 19(a).

have been adversely affected were plaintiff's request granted.[87] Similarly, when the Sierra Club challenged in the United States District Court for Alaska the stringency of Interior Department procedures governing issuance of permits to work claims on Alaskan national parks, it appeared feasible to join miners who held such permits.[88] Despite rule 19(a)'s language, which says judges shall order joinder when feasible, the judges in these cases did not order joinder. Perhaps they believed that it would have been unduly expensive for the plaintiff to identify and serve all absentees, that the plaintiff's relief would have been jeopardized by the resulting delay, or that the presence of absentees would have complicated the litigation.[89]

In the remaining cases joinder apparently was infeasible, as the large number and wide geographic distribution of absentees meant all the rule 19(a) joinder limitations could not be satisfied. In those situations, judges seemed to determine, pursuant to rule 19(b)'s "equity and good conscience" test and its four stated factors, that it was fairer to allow the plaintiff's suit to continue rather than to dismiss it.[90] Moreover, in a few instances courts apparently failed to consider seriously options less drastic than continuing or dismissing, such as notifying absentees and affording them an opportunity to enter the litigation.[91]

It is important to understand, however, that judges responded identically in

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87. *See* Sansom Comm. v. Lynn, 366 F. Supp. 1271, 1281 (E.D. Pa. 1973).

88. These were the miners who had approved plans and were not joined in Nothern Alaska Envtl. Center v. Hodel, No. J 85-009 Civ. 2-3 (D. Alaska July 24, 1985), rather than those with applications for plans whose joinder was at issue in the circuit court case, Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466, 469 (9th Cir. 1986). It also appears from the facts stated in the opinions that joinder of absentees was feasible in numerous other cases in which courts applied the exception. *See* Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919 (11th Cir.), *cert. denied*, 459 U.S. 971 (1982); Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976); Louisiana v. Lee, 596 F. Supp. 645 (E.D. La. 1984), *vacated on other grounds*, 758 F.2d 1081 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1259 (1986); Dintino v. Dorsey, 91 F.R.D. 280 (E.D. Pa. 1981); Swomley v. Watt, 526 F. Supp. 1271 (D.D.C. 1981).

89. One court offered the most explicit statement of these concerns:

> Because of problems of jurisdiction and venue, plaintiff could never join all defendants in one forum. Requiring it to bring seventeen separate lawsuits or even to combine actions through the device of multidistrict litigation would create enormous administrative disorder and delay. Dismissal, therefore, would effectively discourage and, for all practical purposes, put an end to this litigation.

National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1612-13 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082 (D.D.C. 1986) (mem.), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986); *see also* Coalition on Sensible Transp., Inc. v. Dole, 631 F. Supp. 1382, 1387-89 (D.D.C. 1986) (expressing similar concerns).

90. *See* Sierra Club v. Watt, 608 F. Supp. 305, 324-25 (E.D. Cal. 1985); NRDC v. Berklund, 458 F. Supp. 925, 933 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1979) (per curiam); National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1612-14 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082, 1084-86 (D.D.C. 1986) (mem.), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986).

91. Very few of the opinions in which courts recognized the exception specifically indicate that such options were considered. *See, e.g.*, NAACP v. Donovan, 558 F. Supp. 218 (D.D.C. 1982); Swomley v. Watt, 526 F. Supp. 1271 (D.D.C. 1981). Because the facts and reasoning processes are unclear in the cases, *see infra* note 94, the opinions cannot be definitively classified. Thus, some appear above in multiple categories. Moreover, the joinder question arises in a few cases out of unusual fact situations. For example, in one case, the federal government defendant moved to dismiss a case brought by the state for failure to join certain state agencies. *See* Louisiana v. Lee, 596 F. Supp. 645 (E.D. La. 1984), *vacated on other grounds*, 758 F.2d 1081 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1259 (1986).

all of these factual circumstances; they invoked the public rights exception so that the plaintiff's action could proceed. But very few courts explained the relationship between the exception and rule 19, or clearly and comprehensively applied that rule's requirements. Some judges even appeared to disregard rule 19's express commands.[92] In a number of situations courts might have resolved the joinder question correctly under rule 19, and in other instances absentees' interests ultimately were protected because they entered the case or were adequately represented by the government.[93] In some circumstances, however, the joinder issue may have been improperly resolved. In a number of additional situations it is impossible to determine conclusively what courts actually did.[94]

In short, judicial reliance on the public rights exception to address the difficult party joinder question presented by public rights litigation has been problematic. Courts' enunciation of that exception is analyzed more comprehensively below.

B. *Analysis of the Cases*

A few judges recognizing the public rights exception have thoroughly explored the difficult issues involved.[95] But some courts have treated the exception so tersely or unclearly that its basis cannot be definitively ascertained. Nonetheless, it is possible to discern three principal ways in which the exception has been articulated: a few judges have announced it with minimal explication; some have relied on considerations of public policy; and others have somehow invoked rule 19. Courts that have enunciated the exception in the second and third ways frequently intertwined the explanations provided.[96]

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92. The best example is failure to order joinder of absentees when feasible as explicitly mandated by the rule. *See supra* notes 86-89 and accompanying text.

93. Of course, absentee entry may have been very inconvenient. Moreover, adequate representation of their interests by the government may have been merely fortuitous, given certain peculiarities of public rights litigation such as disparities between absentee and governmental interests. *See infra* text accompanying notes 158-59.

94. This classification, tailored to rule 19, is only one of numerous ways to categorize the diverse factual contexts in which courts have invoked the public rights exception. Furthermore, it is often difficult to determine all the relevant facts from terse opinions and meaningfully explain a complex, multi-faceted procedural issue. Nonetheless, several important considerations warrant mention. It is important to consider the players, their interests and motivations, and how deserving their conduct is. For example, has the plaintiff failed to join absentees due to a lack of awareness of them, because they would strategically disadvantage the plaintiff, or because their joinder would be very expensive? Have absentees failed to enter the litigation because they were not notified, for tactical reasons, or because they were distant from the forum? Another significant consideration could be timing: who knew what, when did they know it, and how did they respond to the information? A third important consideration may be the options available. Were the only choices dismissal of the plaintiff's case or proceeding without absentees? Were there less extreme possibilities, such as the plaintiff suing in another forum or absentees entering the litigation? If there were other options, how costly would they have been? All of these and other considerations are examined fully, *infra* notes 124-255 and accompanying text.

95. *See, e.g.*, National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082 (D.D.C. 1986) (mem.), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986); Sierra Club v. Watt, 608 F. Supp. 305 (E.D. Cal. 1985).

96. Examples are cases cited *infra* notes 100-22. Insofar as possible, analysis of the first and second ways of articulating the exception is separated from rule 19. Courts apparently had little difficulty with this separation, but it is problematic, because the exception should have no existence apart from rule 19.

1. The Essentially Unadorned Exception

A few judges simply have proclaimed with little explanation that the exception exists,[97] apparently considering rule 19 inapplicable to public rights litigation. One court found irrelevant the "effect that a judgment may have on third parties [because] the constraints of Rule 19 apply only to adjudications of 'private rights.' "[98] A second court stated, "[E]ven when a party might otherwise be indispensable, joinder is not required where the plaintiff seeks to vindicate *public* rights."[99]

2. Public Policy Considerations

A number of courts recognizing the public rights exception have relied on concepts of public policy. These courts recognize that public rights litigation, which challenges governmental activity involving constitutional, statutory, or administrative issues, can affect many geographically dispersed entities, thereby rendering joinder impracticable, if not impossible.[100] From these considerations the courts reason that adherence to rule 19 could effectively preclude public rights suits by making such claims unduly cumbersome or by denying the plaintiff a forum.[101]

Numerous unstated assumptions apparently underlie these ideas. One may be that litigation questioning governmental activity is intrinsically beneficial, partly because it could increase public accountability of government officials for their actions or it could make such activity more acceptable to the citizenry.[102] Similarly, judges apparently assume that it is important to afford plaintiffs a "day in court" and to resolve on the merits the significant issues raised, rather

97. The opinions of these judges, and others, also include conclusory propositions. For example, one court stated that "NEPA suits have rarely included the joinder of all parties which hold contracts, licenses, leases or other rights which might be affected." National Audubon Soc'y v. Kleppe, C.A. No. 76-0943, at 9 (D.D.C. Nov. 11, 1976), *modified on other grounds*, National Audubon Soc'y v. Watt, 678 F.2d 299 (D.C. Cir. 1982).

98. Louisiana v. Lee, 596 F. Supp. 645, 651 (E.D. La. 1984), *vacated on other grounds*, 758 F.2d 1081 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1259 (1986).

99. Swomley v. Watt, 526 F. Supp. 1271, 1273 (D.D.C. 1981). These cases, and others, do cite National Licorice Co. v. NLRB, 309 U.S. 350 (1940), and later cases recognizing the exception. *See, e.g.*, Swomley v. Watt, 526 F. Supp. 1271 (D.D.C. 1981); Northern Alaska Envtl. Center v. Hodel, No. J 85-009 Civ. 2-3 (D. Alaska July 24, 1985). But the precedent does not support the propositions for which it is invoked. *See supra* text accompanying notes 21-29, 67-74.

100. *See, e.g.*, Sierra Club v. Watt, 608 F. Supp. 305, 324-25 (E.D. Cal. 1985); NRDC v. Berklund, 458 F. Supp. 925, 933 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1979) (per curiam); National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1614 (D.D.C. 1985) (mem.).

101. *See* Sierra Club v. Watt, 608 F. Supp. 305, 324-25 (E.D. Cal. 1985); NRDC v. Berklund, 458 F. Supp. 925, 933 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1979) (per curiam); National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1614 (D.D.C. 1985) (mem.).

102. For example, in recent public rights litigation involving government accountability, the National Park Service "confessed to NEPA violations" and was "violating its own regulations concerning access to claims" when it permitted mining in Alaska's national parks. *See* Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466, 469 (9th Cir. 1986). For discussions of public accountability for, and acceptability of, governmental decisions, see Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Furrow, *Governing Science: Public Risks and Private Remedies*, 131 U. PA. L. REV. 1403, 1422-24 (1983); Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. CHI. L. REV. 976, 986-88 (1982).

than to dismiss potentially legitimate suits.[103] Such dismissal in turn could shield from public scrutiny improper governmental behavior, like violation of statutory commands governing disposition of the public lands, and permit absentees to benefit from the improper conduct.[104] Moreover, judges seem to appreciate certain practicalities of public rights litigation in the modern administrative state. For instance, "public interest group" plaintiffs have available minimal resources for litigation, especially in contrast to governmental defendants and certain interests subject to governmental regulation.[105] Thus, were a court to order dismissal of such a public interest litigant's case against the government and offer the possibility of relitigation in an alternative forum, that public interest litigant could well be disproportionately affected by the delay, expense, and effort entailed in pursuing the option.[106]

Most of these public policy considerations, however, effectuate or implicate concerns addressed by rule 19, especially solicitude for plaintiffs having a forum. Other courts have articulated the exception by relying more directly on the rule.

3. Invocation of Rule 19

Courts enunciating the exception in terms of rule 19 seem to invoke one or more of its components. Much judicial treatment is less clear than it might be. Courts do not expressly examine every consideration relevant to the rule or follow all of its steps, apparently making assumptions about those left unmentioned or perhaps even ignoring them. For example, when absentees are located in the jurisdiction, so that their joinder appears feasible under rule 19(a)'s joinder limitations, judges do not specifically explore the possibility of that joinder. When courts explicitly apply pertinent considerations, judges fail to explain clearly why or how the factors pertain. For instance, courts treat plaintiffs' need for a forum in which to pursue public rights litigation as so important that it is virtually impossible for absentees' interests to be prejudiced in any way that could be

103. *See* Sierra Club v. Watt, 608 F. Supp. 305 (E.D. Cal. 1985); NRDC v. Berklund, 458 F. Supp. 925 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1979) (per curiam); National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609 (D.D.C. 1985) (mem.). The courts thus are implementing the Federal Rules' "liberal ethos" favoring disposition of cases on the merits. *See supra* note 51.

104. For example, had the district court in Northern Alaska Envtl. Center v. Hodel, No. J 85-009 Civ. 2-3 (D. Alaska July 24, 1985), dismissed the Sierra Club's case, the NPS' violations of NEPA and its own regulations governing mining in the national parks would not have been exposed or remedied, while the miners would have continued to benefit from the less rigorous environmental regulation afforded by the improper NPS conduct. *See also supra* note 27 (noting the *National Licorice* Court's apparent appreciation of the absurdity of permitting statutory violators to elude the law by seeking dismissal premised on failure to join absentee statutory beneficiaries).

105. *See, e.g.*, PRACTICING LAW INST., COURT AWARDED FEES IN "PUBLIC INTEREST" LITIGATION chs. 7, 23 (1978) (discussing public rights litigation costs); BALANCING THE SCALES, *supra* note 50, at ch. 4; PUBLIC INTEREST LAW, *supra* note 50, at chs. 4, 18 (discussing plaintiffs' resources). *See generally* Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983) (discussing private litigation costs).

106. The judges who decided Coalition on Sensible Transp., Inc. v. Dole, 631 F. Supp. 1382, 1386-88 (D.D.C. 1986), and National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas (BNA) 1609, 1613 (D.D.C. 1985) (mem.), evinced awareness of these and similar realities of public rights litigation. For discussions of additional realities of public rights litigation, see PUBLIC INTEREST LAW, *supra* note 50, *passim*; Chayes, *Public Law Litigation*, *supra* note 1, *passim*; Chayes, *Foreword*, *supra* note 1, *passim*; Rabin I, *supra* note 50, *passim*.

considered more significant under rule 19(b).[107]

The best illustration of such unclear judicial articulation of the exception is courts' reliance on *National Licorice Co. v. NLRB*[108] for the proposition that " 'when litigation seeks the vindication of a public right, third persons who could be adversely affected by a decision favorable to [the] plaintiff do not thereby become indispensable parties.' "[109] As already discussed, *National Licorice* does not actually support this idea.[110] That decision did not rely so strongly on the public nature of the rights in question or de-emphasize absentee interests.[111]

Even if *National Licorice* could be read to substantiate that proposition, reliance on the opinion and the proposition is problematic. Judges essentially substitute citation to a 1940 case for the comprehensive inquiry envisioned by the 1966 amendment to rule 19. Courts should consult relevant considerations and explain clearly judicial determinations even if they do not provide express step-by-step explication of their treatment in opinions.[112] Rule 19 instructs courts to find initially whether absentees have the type of interest in the litigation to be considered parties needed for just adjudication under rule 19(a). If absentees are needed, judges then must determine whether joinder is feasible pursuant to rule 19(a)'s joinder limitations respecting subject matter jurisdiction, venue, and service of process. If these requirements are satisfied, courts are commanded to order absentee joinder. When absentee joinder is found infeasible, judges must next find under rule 19(b) whether it is more equitable for the plaintiff's action to continue or to be dismissed. This subdivision contemplates that courts will examine first its four stated factors, especially those implicating the plaintiff's forum needs and potential absentee prejudice, then examine additional pertinent considerations, and perhaps value and balance all the relevant factors. Judges should also consider options less Draconian than dismissing the plaintiff's case or proceeding without absentees, if alternatives are available. Only after making this detailed inquiry should courts determine whether it is more fair for the plaintiff's litigation to be dismissed or to continue. Dismissal is

107. Indeed, Professor Freer recently observed that "[t]hough this is but one factor in a multifactor balancing test, federal courts have elevated it to primary importance by their reluctance to dismiss in the absence of an adequate alternative forum." Freer, *supra* note 16, at 1078. Rule 19 can be difficult to apply. *See infra* text accompanying note 123. But little judicial treatment of the rule, especially in relationship to the exception, is as clear as it might be.

108. 309 U.S. 350 (1940).

109. Sierra Club v. Watt, 608 F. Supp. 305, 324 (E.D. Cal. 1985) (quoting Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919 (11th Cir. 1982)). This proposition, derived from *National Licorice*, is found in the first case applying the exception, Sansom Comm. v. Lynn, 366 F. Supp. 1271, 1281 (E.D. Pa. 1973), and in half of the opinions issued between *Sierra Club* and *Sansom Comm.* Reliance on this proposition with little more is not the only example of unclear judicial articulation of the exception. But this is the best example, because it is so ubiquitous, both in the sense of being widespread and because it illustrates numerous difficulties in judicial enunciation of the exception in terms of rule 19.

110. *See supra* text accompanying notes 21-29.

111. Indeed, abiding solicitude for absentees is fundamental to *National Licorice*. *See supra* text accompanying notes 26-27.

112. In some situations, when a fair solution is readily available, the inquiry can be less thorough. Even then, however, judges should clearly explain the resolution reached.

to be premised on a judgment that absentees are "indispensable," while continuing is to be based on the decision that absentees are not indispensable. But both determinations are conclusory ones meant to attach only at the very end of the process described.[113] The drafters who amended rule 19(b) a quarter century after *National Licorice* was decided, and the Supreme Court Justices applying the new version two years later, expressly admonished judges to determine whether absentees are indispensable only *after* treating relevant considerations.[114] For instance, Justice Harlan emphasized that saying a "court 'must' dismiss in the absence of an indispensable party . . . puts the matter the wrong way around: a court does not know whether a particular person is 'indispensable' until it has examined the situation to determine whether it can proceed without him."[115]

By depending on the proposition derived from *National Licorice* with little more, judges have failed to articulate explicitly the factors that comprise their determinations. As a result, readers cannot discern whether courts properly resolved the joinder question or even if they correctly performed the rule 19 inquiry.[116] Most important, it is difficult to determine whether courts were sufficiently solicitous of absentees. Judges have often failed to mention absentee prejudice expressly, and in several recent public rights cases absentees were sufficiently injured to contest trial judges' decisions not to require absentee joinder.[117] In one case absentees had spent millions of dollars exploring for natural resources on public lands in reliance on agency representations that it was proper to do so. These investments allegedly would be lost should the appeal be rejected, as adequate relief cannot be secured from the government under present compensation systems.[118]

Perhaps reliance on the idea drawn from *National Licorice* to the exclusion

113. For a detailed analysis of the rule 19 inquiry, see *infra* text accompanying notes 124-255.

114. *See* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 118-19 n.15 (1968); Rule 19 Advisory Comm. Note, *supra* note 20, at 93.

115. *Provident Tradesmens*, 390 U.S. at 119.

116. The reasoning processes can be determined only by scrutinizing the facts or supplying missing particulars, such as the number and geographic location of absentees, the nature of their interests and possible prejudice of proceeding without absentees as well as the location of an alternative forum where plaintiff could sue and the relative convenience of pursuing that option. *See also* K. LLEWELLYN, THE COMMON LAW TRADITION 38 (1960) (late nineteenth century judiciary's "guerrilla raids on statutes by way of 'strict construction' " made every statutory case a faro game); *supra* note 13 and accompanying text (similar characterization of difficulties entailed in understanding Shields v. Barrow, 58 U.S. (17 How.) 130 (1855)).

117. *See* Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466 (9th Cir. 1986); Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985), *appeal filed*, No. 85-3935 (9th Cir. argued July 11, 1986); National Wildlife Fed'n v. Burford, 23 Env't. Rep. Cas. (BNA) 1609 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't. Rep. (BNA) 1082 (D.D.C. 1986), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986).

118. The case is National Wildlife Fed'n v. Burford, 23 Env't. Rep. Cas. (BNA) 1609 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082 (D.D.C. 1986) (mem.), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986). However, Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466 (9th Cir. 1986) and Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985), *appeal filed*, No. 85-3935 (9th Cir. argued July 11, 1986) are similar cases. Telephone interview with Constance Brooks, Vice-President and General Counsel of the Mountain States Legal Foundation (MSLF), Intervenor in *National Wildlife Fed'n v. Burford* and *Conner v. Burford* (June 19, 1986) (alleging that investment will be lost and noting that the other two cases are similar).

of nearly all else constitutes a cryptic formulation of the inquiry rule 19 contemplates. Courts may have considered absentee interest and potential prejudice, and joinder's feasibility under rule 19(a); they may also have analyzed absentee prejudice and plaintiffs' forum needs, valued these and other relevant factors, and balanced them when appropriate under rule 19(b).[119] For instance, a review of some opinions in which judges depended on the proposition drawn from *National Licorice* with little more reveals that absentees seemed to have the requisite interest and their joinder appeared infeasible.[120] Concomitantly, prejudice to absentees of proceeding apparently could have been kept minimal. Moreover, plaintiffs may have had difficulty securing relief were dismissal ordered, because no alternative forum was available in state court and even were there a forum at the federal level its invocation would have been inconvenient. In those particular situations plaintiffs' needs were paramount and judges resolved the joinder question properly by permitting the case to continue without requiring absentee joinder.[121] However, these courts should have explained the considerations they examined and how those factors yielded the determination that it was appropriate to continue. Instead, the judges, like courts in half of the cases recognizing the public rights exception, relied almost exclusively on the uninformative proposition that " 'when litigation seeks the vindication of a public right, third persons who may be adversely affected by a decision favorable to the plaintiff do not thereby become indispensable parties.' "[122]

In sum, although a dozen federal courts have recognized a public rights exception, none has clearly enunciated it, and some treatment has been strained or unexplained. Moreover, few judges have expressly exhibited regard for relevant interests other than those of plaintiffs, even for absentees threatened with substantial loss—interests rule 19 requires be considered. In fairness, all of the courts were addressing a difficult question of party joinder that appeared to have no simple solution and whose proper resolution might have seemed to mandate dismissal of sympathetic plaintiffs' public rights cases. Judges had to apply a

119. This list is neither exhaustive nor universally applicable. For a suggested analysis, meant to provide an example of the type of comprehensive inquiry that rule 19 contemplates in certain cases, see *infra* text accompanying notes 124-255. *See also infra* note 133 (discussing the possibility of streamlined analysis).

120. *See, e.g.*, Sierra Club v. Watt, 608 F. Supp. 305 (E.D. Cal. 1985); Swomley v. Watt, 526 F. Supp. 1271 (D.D.C. 1981).

121. *See, e.g.*, Sierra Club v. Watt, 608 F. Supp. 305, 319-25 (E.D. Cal. 1985); Swomley v. Watt, 526 F. Supp. 1271, 1273 (D.D.C. 1981); *see also infra* note 203 (noting that no state forum is available when plaintiffs challenge federal activity).

122. Sierra Club v. Watt, 608 F. Supp. 305, 324 (E.D. Cal. 1985) (quoting Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919, 929 (11th Cir. 1982)). Ironically, the public rights exception when so viewed resurrects the very deficiencies in the 1938 rule and its attendant application that necessitated the 1966 amendment. The sloganeering, jurisprudence of labels, and failure to consider relevant interests and explain determinations that the rulemakers meant to remedy, *see supra* text accompanying notes 30-48, are merely revisited with invocation of the "public interest"—even could one overcome the difficulties of defining that elastic concept and ascertaining who should represent it. These difficulties are nicely illustrated by the rise of entities like MSLF that represent interests like those of lessees. For discussions of the "public interest," see G. SCHUBERT, THE PUBLIC INTEREST (1962); Gellhorn, *supra* note 59, at 360. Indeed, the cases read as a group leave the impression that there is an exception to each of rule 19's three principal components: 19(a), the joinder requirements, and 19(b).

federal rule that essentially enjoined them to "do equity" by examining several difficult-to-evaluate, conflicting considerations, while accommodating the developing concept of public rights litigation.[123]

Given these constraints, the exception afforded a workable, albeit problematic solution. The difficulties with these cases lie primarily in what courts omitted, assumed, or stated unclearly. These problems do not necessarily mean that judges resolved the joinder issue erroneously. Indeed, a number of courts apparently made correct decisions and certainly effectuated rule 19's weighty concern for plaintiffs' forum needs. However, the reader of judicial opinions invoking the public rights exception cannot positively determine if most of the courts reached appropriate conclusions. Moreover, it is often difficult to ascertain whether judges followed the rule's steps in resolving the joinder question, and a few judges apparently ignored or even violated the rule's explicit commands. Indeed, it is impossible to discern what some judges applying the exception in fact did. Regardless of whether these joinder issues were properly concluded, the unclear judicial treatment has protracted litigation and wasted resources and may have eroded respect for the judiciary.

Although courts have not clearly articulated the public rights exception, they generally have seemed able to resolve the joinder issue correctly. This suggests that the public rights exception is not needed. Perhaps the most provocative question the cases raise is whether judges could have solved the pertinent joinder problem, without the complications accompanying the exception's application, by employing rule 19 and additional available mechanisms, especially those in other federal rules and the United States Code. Thus, although the public rights exception has been invoked more frequently during the 1980s, the exception cannot be enunciated satisfactorily, and its application seems unwarranted. Because public rights litigation is increasing substantially, the federal judiciary should encounter the party joinder question even more frequently. It is important, therefore, to determine whether the party joinder issue can be treated more appropriately under rule 19 and additional existing measures.

III. A SUGGESTED ANALYSIS

Analysis of the cases indicates that some courts created the public rights exception because they believed that application of rule 19 effectively would end public rights litigation. Correspondingly, few judges expressly evinced regard for relevant interests other than those of plaintiffs. As discussed later, however, concerns about rule 19's application to public rights litigation were unfounded and the apparent lack of solicitude for additional interests was inappropriate. The nature of public rights litigation and of the rule 19 inquiry means that judges can facilitate plaintiffs' vindication of public rights and better accommodate other interests. Thus, it is important to explore how courts might apply the rule to the joinder problem. This Article provides both general guidance and a

123. Judges may have believed that rule 19 contemplated polycentric decisionmaking. *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978).

specific assessment that principally entails rule 19 analysis, integrated with non-rule 19 elements, when proper.[124] The entire examination is tailored to the realities of public rights litigation, with pertinent illustrations drawn from the case law, and relies on rule 19's phraseology as well as pronouncements of the rulemakers and judges applying the rule and the public rights exception.[125]

A. *General Guidance*

A court may consider the party joinder question posed by public rights litigation on its own motion[126] or that of the defendant, who generally bears the

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124. It is helpful to view the 1966 party joinder amendments as a package of different tools designed to solve similar problems. Thus, this Article focuses on rule 19, augmenting the discussion with FED. R. CIV. P. 23 (class actions) and FED. R. CIV. P. 24 (intervention), whenever those rules facilitate analysis. For similar approaches, see Atlantis Dev. Corp. v. United States, 379 F.2d 818, 824-29 (5th Cir. 1967); Coalition on Sensible Transp., Inc. v. Dole, 631 F. Supp. 1382, 1386-88 (D.D.C. 1986); McCoid, *A Single Package For Multiparty Disputes*, 28 STAN. L. REV. 707 (1976). The rulemakers also accorded interrelated treatment to the three rules. *See* FED. R. CIV. P. 24, Advisory Comm. Note, 39 F.R.D. 109 (1966) [hereinafter Rule 24 Advisory Comm. Note]; Kaplan, *supra* note 5. It is also important to be aware that the joinder difficulty posed by public rights litigation can present problems different from those typically raised by more traditional private law litigation. For instance, the government has less incentive to notify the court of absentees' existence or to notify the absentees than do defendants in more traditional suits, because the government will not be liable to absentees under existing compensation schemes. *See also* Freer, *supra* note 16 (discussing joinder problems raised by traditional litigation). By offering a rule 19 solution to this joinder difficulty, this Article is not necessarily endorsing the rule. It merely suggests that the exception is problematic, while rule 19 affords a workable, if less than optimal, solution to the particular difficulty. Professor Freer recently has offered valuable suggestions for restructuring rule 19 in the context of traditional private law litigation, although he explicitly excluded public rights litigation from his consideration. *See* Freer, *supra* note 16, at 1063 n.31, 1097-1110. These recommendations warrant serious consideration, but seem unlikely to be adopted in the near future. Moreover, if the suggestions were adopted, the applicability of certain ones to public law litigation may be problematic. Nonetheless, a number of them apply to public rights litigation and are included in later analysis. Professor Freer's ideas regarding rule 19(c), which requires the plaintiff to notify the court of absentees, are illustrative. Freer, *supra* note 16, at 1085-88. Thus, although his advocacy of more rigorous judicial enforcement of the notification requirement is appropriate, his suggestion that courts impose sanctions against violators may be inadvisable in public rights litigation. *See infra* notes 136-39 and accompanying text.

125. Rule 19 Advisory Committee Note is a convenient source for the rule and rulemaker pronouncements, although the reader may wish to consult the rule's text, which is reproduced in full *supra* note 2, in considering the later analysis. It may seem curious to rely on cases recognizing the exception, given the criticisms above, but many of the cases inform the later analysis. *See* National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas (BNA) 1609, 1612-13 (D.D.C. 1985) (mem.) (example of helpful rule 19 analysis; problematic invocation of exception).

The guidance provided by the later analysis is less full and general than it might be, because the author had to make choices about depth, detail, and relevance. It also is not dispositive, because every situation cannot be anticipated. Even could more precise advice be afforded, it seems inadvisable, as judges should be free to tailor analysis to the specific circumstances they confront. But the guidance offered should enable courts to apply rule 19 efficaciously to most situations in which they must treat the joinder question raised by public rights suits. When other approaches appear preferable, they should be employed.

As generally used here, "interest" means stake and "consideration" means element to be treated. But each also may have more specific connotations in the later analysis. Interest may mean what is needed to satisfy rule 19(a)'s criteria, like a mineral lease of public lands. *See infra* text accompanying notes 144-77. Moreover, it was employed in *Provident Tradesmens* to facilitate treatment of rule 19(b)'s four stated factors. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109-12 (1968). Interest as so used and the rule 19(b) factors will be described generically as considerations. *See, e.g., infra* text accompanying notes 181-97.

126. *See* McCowen v. Jamieson, 724 F.2d 1421, 1424 (9th Cir. 1984); Sierra Club v. Watt, 608 F. Supp. 305, 320 (E.D. Cal. 1985); 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1609, at 89.

burden of proof or persuasion.[127] The judge first determines, under rule 19(a)'s three stated criteria, if an absentee is needed for just adjudication. This is achieved by determining whether the absentee has an interest in the case that could be harmed by the suit's resolution or whether the entity's absence could adversely affect one of the litigants.[128] If an absentee is needed, the court next decides whether the entity's joinder is feasible, examining subject matter jurisdiction, venue, and service of process.[129] When joinder is feasible, the judge must order that the absentee be made a party.[130] If absentee joinder is infeasible, the court determines under rule 19(b) whether in "equity and good conscience" the action should proceed without the absentee or be dismissed.[131] This judgment is to be premised on four stated factors: the plaintiff's forum needs, the likelihood of absentee prejudice, the defendant's interest in avoiding additional or inconsistent litigation or obligations, and the public's interest in efficient dispute resolution, as well as other considerations that may be pertinent.[132]

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127. *See* Sierra Club v. Watt, 608 F. Supp. 305, 319-21 (E.D. Cal. 1985); Kalmich v. Bruno, 404 F. Supp. 57, 61 (N.D. Ill. 1975), *rev'd on other grounds*, 553 F.2d 549 (7th Cir.), *cert. denied*, 434 U.S. 940 (1977). *See generally* Pulitzer-Polster v. Pulitzer, 784 F.2d 1305, 1309 (5th Cir. 1986) (discussing proof and persuasion burdens).

128. The rule provides in pertinent part:

> (a) Persons to be Joined if Feasible. A person who [can be served and will not destroy jurisdiction and as to whom venue is proper] shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. . . .

FED. R. CIV. P. 19(a). For more analysis of this part of the rule, see *infra* text accompanying notes 144-77.

129. The rule provides in pertinent part:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if [the person satisfies one of the three criteria stated]. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

FED. R. CIV. P. 19(a). For more analysis of this part of the rule, see *infra* text accompanying notes 178-80.

130. Rule 19(a) provides in pertinent part that if the absentee "has not been so joined, the court shall order that he be made a party." FED. R. CIV. P. 19(a).

131. The rule provides in pertinent part:

> (b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. . . .

FED. R. CIV. P. 19(b).

132. The rule provides in pertinent part:

> The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19(b). For more analysis of this part of the rule, see *infra* text accompanying notes 181-255.

In a number of instances, the character of this inquiry and of public rights litigation means that the relevant joinder difficulty can be solved by following the rule's steps. In these cases absentees will be needed for just adjudication due to the nature of absentee interests and the way they are affected in public rights suits as well as the relative ease with which one rule 19(a) criterion may be met. Joinder will be infeasible because of certain characteristics of public rights litigation, such as the large number and wide geographic distribution of absentees, and the comparative difficulty of satisfying all of the rule 19 joinder limitations. Accordingly, the inquiry becomes a rule 19(b) query whether it is more fair to continue without absentees or to dismiss the plaintiff's case. However, judges can employ numerous mechanisms to avoid either extreme alternative, or its more detrimental consequences, and accommodate pertinent interests.

Thus, rule 19 and other available measures better enable courts to solve the joinder problem, expeditiously and fairly ending the inquiry. These considerations have important implications for the order, scope, depth, and other aspects of the analysis undertaken by judges who may want to follow certain general guidelines.[133] There is no prescribed formula for making most determinations required by the rule.[134] Thus, courts can exercise substantial discretion, pragmatically and flexibly assessing the relevant considerations in each case.[135]

As early as possible in a lawsuit, judges should anticipate and attempt to solve the joinder difficulty. At the suit's commencement courts should be aware of the joinder question by virtue of rule 19(c), which requires that the plaintiff's initial pleading include the identity of entities that may satisfy rule 19(a), but are not joined, and why they have not been joined.[136] If the plaintiff neglects this duty, as often happens in private as well as public rights litigation,[137] a problem may arise, because the government has less incentive to notify the court or absentees than do defendants in more traditional cases.[138] Accordingly, judges

133. In considering the order, for example, judges generally should proceed from the most to the least auspicious possibilities, so that some aspects of the analysis can be omitted or performed less rigorously. Similarly, the guidance provided by the later analysis does not follow rule 19's steps precisely. For discussion of scope and depth, see *infra* notes 143, 146-48 and accompanying text.

134. *See Provident Tradesmens*, 390 U.S. at 118 n.14 (applying rule 19(b)); Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466, 468 (9th Cir. 1986) (applying rule 19(a)); Bakia v. County of Los Angeles, 687 F.2d 299, 301 (9th Cir. 1982) (applying rule 19(a)); 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1604, at 35 (discussing the application of rule 19(a)).

135. *See Provident Tradesmens*, 390 U.S. at 117-19; Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm., 459 U.S. 917, 920 (1982) (Rehnquist, J., dissenting from denial of certiorari); J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 6.5, at 341-42 (1985); F. JAMES & G. HAZARD, *supra* note 42, § 10.13, at 541; 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1604, at 45-46, § 1607, at 59-65; § 1608, at 66.

136. *See* FED. R. CIV. P. 19(c). For more discussion of this requirement, see Rule 19 Advisory Comm. Note, *supra* note 20, at 93-94; 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1610, at 103, § 1625, at 253.

137. For a discussion of plaintiffs' neglect in private litigation, see Freer, *supra* note 16, at 1085-88. In the recent public rights case of Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985), plaintiff's counsel did not comply with rule 19(c) because the timing of governmental lease issuance and the difficulty of researching lessees' names and addresses in government records would have left insufficient time to sue. Interview with Tom France (attorney for plaintiff in *Conner*) (June 19, 1986).

138. This is what counsel for intervenors on appeal in Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985), asserts happened in that case. Telephone interview, *supra* note 118. The government

should remember that much public rights litigation potentially poses joinder difficulties, and they may want to consider several options, such as raising the joinder issue sua sponte or notifying absentees.[139]

Once judges identify the joinder issue, they should survey the situation, searching for promising solutions, such as affording absentees notice and the opportunity to enter the litigation.[140] At the outset, courts also should canvass factual information such as the number of absentees and their location, remedies for the joinder problem, such as intervention, and the ramifications of applying the mechanisms, such as their practical impact on absentees.[141] Judges then should examine more closely all pertinent considerations, particularly the plaintiff's and absentees' interests; quantify and refine the considerations, when appropriate; and compare and balance them, as indicated. Because there are numerous fair solutions, judges should be wary of terminating the inquiry prematurely. Rather than invoking the Draconian alternatives of dismissing the action or proceeding, courts may want to resolve close questions in favor of continuing the inquiry.[142] Nonetheless, when a fair solution is available, it should be applied and the inquiry ended. Finally, courts always should explain their resolution of the joinder issue—making clear which considerations were examined and why, and how each consideration figured in the specific determination.[143]

B. *Specific Guidance*

1. Rule 19(a): Persons Needed for Just Adjudication

Rule (19)(a) directs courts to ask whether absentees are entities that should

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has less incentive to give notification because it will not subsequently be found liable under existing government compensation schemes. *See infra* notes 238-39 and accompanying text.

139. *See* Rule 19 Advisory Comm. Note, *supra* note 20, at 93-94 (discussing the possibility of court notifying absentees); *supra* text accompanying note 126 (discussing the possibility of court raising sua sponte joinder issue). Professor Freer has suggested that sanctions might be imposed for failure to comply with rule 19(c). *See* Freer, *supra* note 16, at 1085 n.116. Sanctions may be too harsh as applied to the public interest litigant with limited resources and little time to append the names of all absentees to the complaint. But judges may want to consider more rigorous enforcement of the requirement, and it is fair to require such a litigant to inform the court of the possible existence of absentees, so that the court might institute appropriate action. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974) (nothing in rule 23 suggests notice requirements can be tailored to plaintiff's pocketbook).

140. For instance, such a survey might reveal that absentees are few in number, readily identifiable, and nearby, so that notifying them and affording the opportunity to intervene may be a quick, easy solution. Indeed, this could be a promising solution in a number of situations, but it appears rarely to have been invoked in cases in which the exception was applied. *See supra* text accompanying note 91.

141. These are only examples. For more thorough treatment, see *infra* text accompanying notes 144-255. Even when this exercise does not end the inquiry, it should facilitate later analysis.

142. *See infra* note 183 and accompanying text. *Cf.* Sierra Club v. Watt, 608 F. Supp. 305, 324 (E.D. Cal. 1985) (helpful example of judicial resolution of close questions); Fink, *supra* note 31, at 448 (characterizing such Draconian options as a "cruel choice"). Moreover, proper solutions may become clear only at the inquiry's end.

143. Several circuits have said that a trial judge's rule 19 determination must include a thorough statement of the facts and reasons for the decision. *See* Bakia v. County of Los Angeles, 687 F.2d 299, 301 (9th Cir. 1982); Bio-Analytical Serv. v. Edgewater Hosp., 565 F.2d 450, 452 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978); Manygoats v. Kleppe, 558 F.2d 556, 559 (10th Cir. 1977).

be joined in the litigation, if feasible.[144] No precise test exists: absentees must meet one of three stated criteria, which essentially consider whether absentees possess an interest in the suit that could be threatened by its resolution or if their absence could jeopardize interests of parties to the case.[145] The character of absentee interests in, and how they are influenced by, public rights litigation and the relatively undemanding, pragmatic nature of the second criterion, rule 19(a)(2)(i), mean this inquiry will be answered affirmatively in numerous situations.[146] When the second criterion is not met, it is unlikely that the third criterion, rule 19 (a)(2)(ii), will be met, while the first criterion, rule 19(a)(1), apparently has no independent significance.

In a number of situations judges easily can determine that the second criterion is satisfied. They can then proceed directly to the rule 19(b) component of the inquiry. One assessment central to rule 19(b), however, is similar to the one needed to determine that the second rule 19(a) criterion is not met.[147] This congruity and the possibility of terminating or facilitating numerous inquiries warrant focusing on the second criterion.[148]

a. Rule 19(a)(2)(i): Absentee Interest and Potential Prejudice

The second criterion asks whether an absentee "claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest."[149] The criterion can be satisfied when the absentee interest is protectable and will be affected considerably if suit continues without the absentee.[150] Thus, the nature of absentee interests, and the way they are affected, in

144. The rule defines those that "should be joined as parties so that they may be heard and a complete disposition made." Rule 19 Advisory Comm. Note, *supra* note 20, at 89.

145. *See* J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 135, § 6.5, at 334-44; 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1604, at 35. The criteria are treated more fully than they might otherwise be, because they are similar to three of rule 19(b)'s four stated factors.

146. These factors may explain why many courts treat rule 19(a) tersely, "assuming the existence of a person who should be joined if feasible." Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 118 (1968); *accord* NRDC v. TVA, 340 F. Supp. 400, 407 (S.D.N.Y. 1971), *rev'd on other grounds*, 459 F.2d 255 (2d Cir. 1972). *But see infra* notes 160-66 and accompanying text (discussing some courts' technical treatment of absentee interests).

147. Rule 19(b)'s first stated factor asks "to what extent a judgment rendered in the person's absence might be prejudicial to him." For analysis of the factor, see *infra* notes 186-97 and accompanying text. This factor may differ subtly from rule 19(a). Rule 19(b) may be more analytical, asking about the likelihood of prejudice on the facts of each case, while rule 19(a) asks whether there may be some prejudice.

148. The approach in the text is meant to foster judicial economy. If courts must refine absentee prejudice under rule 19(b), they may as well do so at this juncture, while conducting a similar, albeit cruder, inquiry.

149. FED. R. CIV. P. 19(a)(2)(i). This criterion "recognizes the importance of protecting [the absentee] against the practical prejudice to him" of proceeding without that person. Rule 19 Advisory Comm. Note, *supra* note 20, at 91.

150. *See, e.g.*, Doty v. St. Mary Parish Land Co., 598 F.2d 885 (5th Cir. 1979); Atlantis Dev. Corp. v. United States, 379 F.2d 818, 822-29 (5th Cir. 1967); *see also* NRDC v. NRC, 578 F.2d 1341, 1343-45 (10th Cir. 1978) (noting similar requirements for satisfying rule 24); Nuesse v. Camp, 385 F.2d 694, 700-02 (D.C. Cir. 1967) (noting similar requirements for satisfying rule 24); Rule 24 Advisory Comm. Note, *supra* note 124, at 109-10 (noting that rules 24 and 19 emphasize practical prejudice).

public rights cases and the criterion's comparatively unrestrictive, pragmatic character mean it will be met in numerous instances. Moreover, in most of these situations courts easily can detect that the second criterion has been satisfied and then turn to rule 19(b). For the reasons stated above, however, judges should examine closely absentee interests and the practical impact of proceeding.[151]

Courts should scrutinize absentee interests and the pragmatic effect on absentees in terms of such parameters as substantive legal nature or tangibility.[152] In analyzing the substantive legal nature of an absentee interest, judges might ask whether it is a property right, a contract, or something less, like an opportunity for employment derived from filing an application. In assessing the tangibility of practical effect on absentees, courts could consider whether the impact is "immediate and serious, or remote and minor."[153] Courts should also assess the legal effect of entering judgment in litigation that continues without absentees, such as whether the judgment could have a stare decisis effect and what that might mean for absentees' interests.[154] Courts then may want to quantify absentee interest and impact on absentees, assigning them preliminary values through the use of such parameters as quality and magnitude.[155] Exacting numerical quantification is neither contemplated nor necessary. In most circumstances comparing and contrasting should suffice. For instance, a right to exclusive possession of property obviously will be accorded greater weight than an application for a one-season permit to explore on the public lands. Similarly, a judgment that could have an adverse stare decisis effect will be more significant than a judgment that would have less persuasive impact.[156] Another helpful example, drawn from a pending case, is absentee exploration for, and development of, natural resources pursuant to a government lease that is threatened with modification by public rights litigation. This interest could be quantified in terms of its technical legal character, in terms of money committed to exploration and development, or in terms of the natural resources' worth and how much the value of that interest might be diminished by proceeding to judgment with-

151. If judges encounter difficulty securing the requisite data from litigants, courts should contact absentees. *See supra* note 139 and accompanying text (noting the possibility of a court notifying absentees of litigation). For judicial analysis of absentee interests and practical impacts, see United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 983-84 (2d Cir. 1984); Neusse v. Camp, 385 F.2d 694, 700-02 (D.C. Cir. 1967); Atlantis Dev. Corp. v. United States, 379 F.2d 818, 822-29 (5th Cir. 1967).

152. The treatment in this paragraph is not meant to be exhaustive but merely to suggest possible approaches derived principally from the Advisory Committee Note and case law.

153. *See* Rule 19 Advisory Committee Note, *supra* note 20, at 92.

154. For example, the stare decisis effect of a judgment adjudicating the applicability of national legislation could seriously affect an absentee, because another court would be unlikely to view the legislation differently. For more discussion of the technical legal effect of entering judgment, see *infra* notes 167 & 217 and accompanying text, *infra* note 206.

155. This approach may appear more art than science and even require crude estimates, but courts can do it, often rather easily. *But see infra* note 193 (discussing rule 19(b) quantification difficulties).

156. *Compare* the right to exclusive possession at issue in National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1612-13 (D.D.C. 1985) (mem.) *with* the application for a one-season mining permit at issue in Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466, 467-69 (9th Cir. 1986). The stare decisis effect of a judgment could effectively preclude absentees' opportunity to protect their interests. *See infra* notes 167 & 217 and accompanying text.

out absentees.[157]

In performing this analysis, courts should remember that the second criterion explicitly mandates consideration of practical prejudice to absentees; pragmatism is rule 19's touchstone. Accordingly, several technical concepts that could govern application of the criterion should not do so. For instance, judges have found that absentees will not be affected adversely when they are "adequately represented" by others who can accurately inform the court of potential absentee prejudice and fully and fairly protect absentees' interests in the litigation.[158] But dissimilarities between interests of absentees and governmental defendants, difficulties in measuring and articulating absentee prejudice, questions regarding the quality of advocacy, and other complications make it nearly impossible to ensure that there will be adequate representation.[159] A second, rather abstract notion has been enunciated in two recent public rights cases.[160] The courts have considered absentees with some "interest" in the public lands—like a subsurface estate mineral fee—not to have a "legally protected interest" in the litigation's subject matter. The judges have characterized the subject matter of the litigation as challenges to agency procedures or decisions governing use of those lands.[161] But each court's pronouncement belies such a technical interpretation of the second criterion and underscores the problems entailed in a technical reading of that criterion, especially the important practical implications for absentees. One court expressly acknowledged the "real financial hardship" imposed on absentees prevented from mining during a short summer season and explicitly admonished the district court not to "ignore those concerns in passing on plans for mining operations."[162] The second court expressly recognized that the "technical scope of the subject matter of the litigation may not serve as the only benchmark of resolution of a joinder motion."[163] A closely related techni-

157. *See supra* note 118 and accompanying text. A similar interest, the "right" of a permittee who had discovered coal in commercial quantities on public lands to a preference right coal lease, was considered sufficient in NRDC v. Berklund, 458 F. Supp. 925, 933 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1979) (per curiam). However, an application for a one-season mining permit was found insufficient in Northern Alaska Envt'l Center v. Hodel, 803 F.2d 466, 468-69 (9th Cir. 1986). Several courts have also indicated that the generalized interest of all citizens in an agency rule's validity might not suffice. *See* Sierra Club v. Watt, 608 F. Supp. 305, 324-25 (E.D. Cal. 1985); NAACP v. Donovan, 558 F. Supp. 218, 223 (D.D.C. 1982).

158. *See, e.g.*, Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919, 928-29 (11th Cir.), *cert. denied*, 459 U.S. 971 (1982); Owens-Illinois, Inc. v. Lake Shore Land Co., 610 F.2d 1185, 1191 (3d Cir. 1979); *see also* 3A MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 19.07[2.-1], at 19-106 (citing adequate representation for proposition that "as a practical matter" has restrictive and expansive side).

159. *See* National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1613 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't. Rep. (BNA) 1082 (D.D.C. 1986) (mem.), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986); *see also* United States v. Stringfellow, 783 F.2d 821, 826-27 (9th Cir. 1986) (similar treatment of "adequate representation" under rule 24, which unlike rule 19 explicitly mandates its consideration), *rev'd on other grounds sub. nom.* Stringfellow v. Concerned Neighbors in Action, 107 S. Ct. 1177 (1987); National Farm Lines v. ICC, 564 F.2d 381, 383-84 (10th Cir. 1977) (similar treatment of "adequate representation" under rule 24).

160. *See* Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466, 468-69 (9th Cir. 1986); Sierra Club v. Watt, 608 F. Supp. 305, 321-24 (E.D. Cal. 1985).

161. *Northern Alaska Envtl. Center*, 803 F.2d at 468-69; *Sierra Club*, 608 F. Supp. at 321-24.

162. *Northern Alaska Envtl. Center*, 803 F.2d at 471.

163. *Sierra Club*, 608 F. Supp. at 322.

cal idea is that public rights litigation affects absentees' interests only minimally because these interests are technically independent of the litigation and thus can be vindicated in separate, subsequent suits.[164] However, this viewpoint trivializes rule 19's significant goal of minimizing multiple litigation.[165] The perspective also ignores pragmatic consequences that may well be compelling for absentees; absentees that could be substantially prejudiced by their inability to secure efficacious, later relief against the government.[166] A final concern is whether the potential stare decisis effect of a judgment rendered in litigation that proceeds without absentees satisfies the second criterion's requirement that absentees' interests be "practically impaired." Because the possible stare decisis effect of a judgment in public rights litigation, such as suits that adjudicate the applicability of national legislation, can affect absentees' interests significantly, that impact should suffice.[167]

Thus, this evaluation indicates that rule 19(a)(2)(i) will be satisfied in numerous circumstances. There might be some instances, however, when this second criterion is not met. In such situations judges then must determine whether the rule's first or third criterion is satisfied.

b. Rule 19(a)(1) and (2)(ii)

The first criterion, rule 19(a)(1), "stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or 'hollow' rather than complete relief to the parties before the court."[168] Public rights litigation arguably does not satisfy this criterion's literal terms, because "[c]omplete relief refers to relief as between the persons already parties, not as between a party and the absent person whose joinder is sought."[169] In public rights cases the governmental defendant is said to be the only entity responsible for the challenged activity as well as the only entity sought to be, and actually, bound, so that comprehensive relief can be afforded between the litigants.[170] Judges may reject this proposition either because they find it overly technical or

164. *See, e.g.*, Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919, 928-29 (11th Cir.), *cert. denied*, 459 U.S. 971 (1982); *Sierra Club*, 608 F. Supp. at 321-24.

165. *See infra* notes 172, 238 and accompanying text.

166. *See supra* text accompanying note 118; *infra* notes 167, 238-39 and accompanying text.

167. *See* Doty v. St. Mary Parish Land Co., 598 F.2d 885, 887 (5th Cir. 1979); Atlantis Dev. Corp. v. United States, 379 F.2d 818, 822-29 (5th Cir. 1967); J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 135, § 6.5, at 339; *see also* NRDC v. NRC, 578 F.2d 1341, 1345 (10th Cir. 1978) (stare decisis effect should suffice under rule 24); Note, *Intervention in Government Enforcement Actions*, 89 HARV. L. REV. 1174, 1180-83 (1976) (contextual analysis of stare decisis). *See infra* note 206 (suggesting that absentee who failed to enter suit when able to do so might be bound by determination in suit). Indeed, absentees' opportunity to protect themselves may be effectively precluded when one federal court adjudicates the applicability of national legislation, because another federal court will be unlikely to view the legislation differently. *See infra* note 217 and accompanying text.

168. Rule 19 Advisory Comm. Note, *supra* note 20, at 91. Rule 19(a)(1) states that an absentee "shall be joined if in his absence complete relief cannot be accorded among those already parties." FED. R. CIV. P. 19(a)(1).

169. Sierra Club v. Watt, 608 F. Supp. 305, 321 n.26 (E.D. Cal. 1985) (citation omitted); *accord* Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466, 468 (9th Cir. 1986).

170. *See Northern Alaska Envtl. Center*, 803 F.2d at 468; *Sierra Club*, 608 F. Supp. at 321 n.26.

because they pragmatically recognize the potential for absentee prejudice.[171] However, if courts find the proposition too abstract or refute it on pragmatic grounds, the remaining consideration relevant to this criterion—rulemaker concern that parties would pursue multiple litigation[172]—will not materialize because the plaintiff and the defendant have no reason to bring additional claims when courts grant complete relief.[173]

The third criterion, rule 19(a)(2)(ii), asks "whether a party may be left, after the adjudication, in a position where a person not joined can subject him to a double or otherwise inconsistent liability."[174] In public rights litigation the only conceivable circumstance under which a governmental defendant may incur such responsibilities is when absentees are sufficiently prejudiced to pursue independent actions and, therefore, satisfy the second criterion, rule 19(a)(2)(i). Absentees will have little reason to sue separately unless they are injured enough to meet that criterion.[175] Even then, however, the government will not be "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations."[176] The government may owe no legal responsibility to the absentee or the harm sustained may not support a cause of action.[177]

In short, there may be situations in which none of the three rule 19(a) criteria is met, so the inquiry may end. In most instances, however, the second criterion will be satisfied. In a small number of these circumstances it will be possible to avoid the rule 19(b) inquiry, if the rule's joinder requirements can be met.

2. Rule 19 Joinder Limitations

If an absentee needed for just adjudication under rule 19(a) can be served, does not make a valid objection to venue, and will not deprive the court of jurisdiction, the "court shall order that he be made a party."[178] These determinations regarding the feasibility of joinder involve a plethora of complex issues that demand consideration of other federal rules, the United States Code, state statutes, and the Constitution. Accordingly, it is exceedingly difficult to determine whether all the limitations are satisfied and whether joinder is feasible in specific

171. *See supra* notes 162, 166-67 and accompanying text (discussing practical prejudice to absentees). It is important to understand, however, that absentee prejudice is not a relevant consideration under this criterion, although it is relevant under rule 19(a)(2)(ii) and the first stated factor of rule 19(b).

172. Rule 19(a)(1) advances the public interest in "avoiding repeated lawsuits on the same essential subject matter." Rule 19 Advisory Comm. Note, *supra* note 20, at 91.

173. This obviously is related to the first consideration discussed *supra* notes 169-70 and accompanying text. Of course, absentees might pursue multiple litigation, but that is not relevant to this criterion. *See supra* note 171. For helpful analysis of the criterion, concluding that it "lacks independent significance and ought to be jettisoned," see Freer, *supra* note 16, at 1062-63, 1080-82.

174. Rule 19 Advisory Comm. Note, *supra* note 20, at 91.

175. *See supra* text accompanying notes 149-67.

176. FED. R. CIV. P. 19(a)(2)(ii); *see also* Freer, *supra* note 16, at 1095 n.163 (absentee that is unlikely to recover does not pose such a risk).

177. *See infra* notes 238-39 and accompanying text; *see also* Bozcon v. Northwestern Elevator Co., Inc., 652 F. Supp. 1482, 1487 (E. D. Wis. 1987); FED. PROC. L. ED. § 59:83 (1984) (joinder not ordered when risk only of frivolous suit or absentee has no cause of action).

178. *See* FED. R. CIV. P. 19(a).

cases.[179] In some situations every joinder requirement may be met so that the absentee may be joined and the inquiry terminated.[180] But the multitude and relative stringency of constraints, as well as peculiar characteristics of public rights litigation, such as the substantial number and geographic dispersion of absentees, suggest that joinder will not be feasible in a number of circumstances. Judges then must turn to the rule 19(b) element of the inquiry.

3. Rule 19(b): Determination by Court Whenever Joinder not Feasible

When it is infeasible to join an absentee needed for just adjudication, the court must "determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable."[181] No formula exists for making this judgment, which the Supreme Court has admonished "must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests."[182] Some guidance, however, can be suggested.

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179. These considerations may explain why most courts treat joinder limitations tersely or assume some defect exists. The considerations, as compounded by the factual variations in public rights cases, complicate meaningful generalization and make comprehensive exploration of all relevant questions beyond this Article's scope. For helpful discussions, see 3A MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 19.01-1.; 7 C. WRIGHT & A. MILLER, *supra* note 2, §§ 1602, 1605-06, 1610. Nonetheless, courts should search for defects and explain clearly any found. *See* R. MARCUS & E. SHERMAN, COMPLEX LITIGATION 63-65 (1985) (analyzing many issues judges could consider in determining joinder's feasibility).

180. The rule mandates joinder if feasible and dismissal if all absentees cannot be made parties. This requirement is problematic in cases like Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm., 662 F.2d 534, 538 (9th Cir. 1981), *cert. denied*, 459 U.S. 917 (1982). In that case, even if 4500 absent employers could have been joined, the litigation would have been unmanageable. Similarly, in Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985), *appeal filed*, No. 85-3935 (9th Cir. argued July 11, 1986), intervenors argued that the intra-jurisdictional location of several hundred lessees and assignees mandated joinder. But plaintiff's counsel claimed suit would be precluded, were joinder required (1) at the outset, because timing of lease issuance and the difficulty of identifying absentees would have left insufficient time to sue, or (2) later, because of the expense entailed. Interview with Tom France (June 19, 1986) (attorney for plaintiff in *Conner*). Thus, a more flexible approach may be warranted by the considerations above, by the idea that judicial discretion should be as great here as under rule 19(b), and by the idea that representational substitutes, like a defendant's class action, could respond to rule 19 concerns. *See* Kaplan, *supra* note 5, at 403 n.178; Note, *Defendant Class Actions*, 91 HARV. L. REV. 630 (1978) (discussing defendant class action suits). Nonetheless, cases such as Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) and Walsh v. Ford Motor Co., 807 F.2d 1000 (D.C. Cir. 1986), suggest that the federal judiciary should follow strictly or read literally the requirements of the Federal Rules, especially those implicating plaintiff's notification costs. *See infra* note 225.

181. FED. R. CIV. P. 19(b).

182. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119 (1968). "Whether a person is 'indispensable' . . . can only be determined in the context of particular litigation." *Id.* at 118. The rulemakers stressed pragmatism, *see* Rule 19 Advisory Comm. Note, *supra* note 20, at 92, while the Court found the "new version emphasize[d] the pragmatic consideration of the effects of the alternatives of proceeding or dismissing." *Provident Tradesmens*, 390 U.S. at 117 n.12; *accord*, Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm., 459 U.S. 917, 920 (1982) (Rehnquist, J., dissenting from denial of certiorari); J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 135, § 6.5, at 341 (noting that courts have substantial discretion to make equity and good conscience determination); *cf.* F. JAMES & G. HAZARD, *supra* note 42, § 10.13, at 542-43 (noting that courts have substantial discretion to make equity and good conscience determination); 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1604, at 45-46, § 1607, at 65, § 1608, at 66 (noting that courts have substantial discretion to make equity and good conscience determination).

The operative "equity and good conscience" language speaks in absolute terms of continuing without absentees or dismissing the plaintiff's case. Nevertheless, numerous measures can be applied to avoid each possibility or its more deleterious aspects, and these mechanisms should be invoked, when appropriate.[183] Rule 19(b) "uses the word 'indispensable' only in a conclusory sense";[184] judges are to determine whether absentees are indispensable only after considering pertinent factors.[185] Four factors, derived from prior case law, were explicitly included in the subdivision,[186] because the 1938 "rule did not state affirmatively what factors were relevant."[187] The Supreme Court has found that the four factors implicate the plaintiff's interest in a forum,[188] the interest of the absentee,[189] the defendant's need to avoid "multiple litigation, or inconsistent relief, or sole responsibility" for liability shared with another,[190] the public interest in "complete, consistent, and efficient settlement of controversies,"[191] and the "possibility of shaping relief to accommodate these four interests."[192] Although the factors do overlap to some extent, they are not very similar or amenable to measurement.[193] The four factors are neither inflexible standards nor equally applicable in all contexts.[194] Furthermore, the stated factors are not exclusive; thus, courts may consider other factors that should be pertinent to equity and good conscience.[195] These facts may explain why neither rule 19(b) nor the Advisory Committee's Note expressly mention assigning values or pri-

183. The rulemakers prescribed many measures to avoid proceeding or dismissing. *See* Rule 19 Advisory Comm. Note, *supra* note 20, at 92; *see also infra* notes 206-13 and accompanying text (discussing measures rulemakers prescribed and other measures).

184. Rule 19 Advisory Comm. Note, *supra* note 20, at 93; *accord* Freer, *supra* note 16, at 1077 n.83.

185. "[A] person is 'regarded as indispensable' when he cannot be made a party *and, upon consideration of the factors above-mentioned,* it is determined that in his absence it would be preferable to dismiss the action . . . ." Rule 19 Advisory Comm. Note, *supra* note 20, at 93 (emphasis added). This and the quotation *supra* text accompanying note 184 appear verbatim in Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 118 n.15 (1968). *See also supra* text accompanying note 115 (Court's reiteration of ideas in two rulemaker excerpts). "Factor" is the rulemakers' term to describe what judges are to consider, and it is so used in this Article.

186. Rule 19 Advisory Comm. Note, *supra* note 20, at 92.

187. Rule 19 Advisory Comm. Note, *supra* note 20, at 92. For an explanation of these factors, see *id.* at 91-92.

188. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109 (1968).

189. *Id.* at 110.

190. *Id.*

191. *Id.* at 111.

192. *Id.* This Article uses the "interest" approach articulated by the Supreme Court.

193. For discussions of this overlap, see Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 n.15 (9th Cir.), *cert. denied,* 464 U.S. 849 (1983); Rule 19 Advisory Comm. Note, *supra* note 20, at 92. Comparison of the stated factors' terminology also illustrates that they overlap. Dissimilarities between the factors and difficulties of measuring them are best illustrated by an example. How can termination of a case brought by one "public interest group" plaintiff that purports to represent millions of people and the potential prejudice to hundreds of absentees of proceeding without them be assigned values so as to be meaningfully compared?

194. *See* Trombino v. Transit Casualty Co., 110 F.R.D. 139, 143 (D.R.I. 1986); 7 C. WRIGHT & A. MILLER, *supra* note 2, §§ 1607-08 (discussing the factors' flexibility). A helpful example of flexibility appears in the second and third stated factors, which ask judges to consider the extent of prejudice to the absentee.

195. "The factors are . . . not intended to exclude other considerations which may be applicable in particular situations." Rule 19 Advisory Comm. Note, *supra* note 20, at 92; *accord* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 112 (1968). For discussions of the factors'

orities to the stated factors, or additional factors relevant to equity and good conscience or balancing the factors in reaching conclusions.[196] Nonetheless, strong concern for plaintiffs' and absentees' interests—evidenced by the subdivision's explicit provision for their consideration and the rulemakers expressly stated reasons for doing so—indicates that both interests are integral to the rule 19(b) inquiry.[197]

Thus, this inquiry differs in certain particulars from the rule 19(a) inquiry. Rule 19(b) in terms contemplates a relatively complex process of analysis, asking judges to do equity by considering the difficult-to-assess effects on diverse interests of dismissing plaintiff's suit or proceeding without absentees. Moreover, courts must consider numerous measures whose invocation could avoid either dismissal or continuing without absentees.[198] But there are similarities between the rule 19(a) and rule 19(b) inquiries. Most telling is the comparable ease with which each inquiry may be completed; indeed, courts rather easily can answer the crucial rule 19(b) equity and good conscience query in numerous situa-

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relevance to equity and good conscience, see Envirotech Corp. v. Bethlehem Steel Corp., 729 F.2d 70, 77 (2d Cir. 1984); 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1607, at 65.

196. Professor Fink initially identified the absence of hierarchical weighting. *See* Fink, *supra* note 31, at 424. Of course, the nonexclusive nature of the four stated factors makes this very difficult, *see supra* note 195, and the problem is compounded by attempting to contrast factors not susceptible to comparison, *see supra* note 193. But case-by-case determinations can be premised on the considerations present, especially when they differ greatly, and on factors' inclusion in the rule or the language used. *See infra* note 197 and accompanying text. Indeed, the *Provident Tradesmens* Court championed case-by-case analysis and provided for the possibilities of interest balancing and assertion of compelling interests. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119 (1968); *see supra* text accompanying note 182; *see also* Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm., 459 U.S. 917, 920 (1982) (Rehnquist, J., dissenting from denial of certiorari) (acknowledging that rule 19(b) establishes a balancing process); Tick v. Cohen, 787 F.2d 1490, 1494 (11th Cir. 1986) (acknowledging that rule 19(b) establishes a balancing process).

197. *See* Rule 19 Advisory Comm. Note, *supra* note 20, at 89-93 (discussing rulemaker rationales). The first three factors mention or implicate absentee interests, and the fourth treats the plaintiff's interest. The fourth factor asks also whether the plaintiff will have adequate relief if the action is dismissed, while the initial two consider the extent of potential prejudice to the absentee and the potential for reduction of this prejudice, thus perhaps evincing more solicitude for plaintiffs. Later judicial pronouncements have confirmed the importance of the two interests. *See, e.g.*, Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109-12 (1968). But many judges now find most important the plaintiff's forum needs. *See* Pasco Int'l (London) v. Stenograph Corp., 637 F.2d 496, 500 (7th Cir. 1980); National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1613 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082 (D.D.C. 1986) (mem.), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986); 3A MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 19.07-2[0], at 19-132 n.13; ¶ 19.07-2[4], at 19-154. Indeed, Professor Freer recently observed that "[t]hough this is but one factor in a multifactor balancing test, federal courts have elevated it to primary importance by their reluctance to dismiss in the absence of an adequate alternative forum." Freer, *supra* note 16, at 1078 (footnote omitted); *see also* Von Bulow *ex rel* Auersperg v. Von Bulow, 634 F. Supp. 1284, 1312 (S.D.N.Y. 1986) (illustrating court's reluctance to dismiss); Defenders of Wildlife v. Andrus, 77 F.R.D. 448, 451 (D.D.C. 1978) (illustrating court's reluctance to dismiss); 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1609, at 83 (noting courts' extreme reluctance to dismiss); *id.* § 1604, at 45 (rule's philosophy to avoid dismissal whenever possible).

198. Thus, courts are asked for a very discretionary judgment, based on a quite general standard, and numerous, complex calculations, so the task appears at once open-ended and polycentric. In contrast, rule 19(a) asks if one rather easily satisfied criterion is met. These and other differences thus warrant somewhat dissimilar treatment, which focuses on plaintiffs' and absentees' interests and seeks felicitous solutions by accommodating both. *See supra* note 147 (noting the subtle difference between rule 19(a) and rule 19(b)'s first stated factor).

tions.[199] In many cases the substantial disparity between plaintiffs' and absentees' interests and the importance the subdivision accords both interests mean the inquiry can be resolved easily; one interest will clearly be much more significant than the other. Many other instances can be treated almost as easily. In some, reconsideration and refinement of plaintiffs' and absentees' interests will disclose considerable disparity between them, while in the rest, examination of additional relevant considerations alone, or with the two refined interests, will be dispositive. This analysis suggests that a few, comparatively problematic circumstances remain, but even they can be treated.[200]

a. Preliminary Survey

The character of plaintiffs' and absentees' interests in public rights suits and the significance rule 19(b) assigns them mean the inquiry can be easily resolved because one interest obviously will be much greater than the other. In the vast majority of these cases the plaintiff's interest in proceeding will be substantial, if the case is dismissed, while absentees' interests will be small should the litigation proceed. More specifically, the plaintiff's forum needs will be very difficult to accommodate; absentees' large number and wide geographic distribution in public rights actions mean that the plaintiff either will have no forum or ineffective alternatives.[201] Thus, dismissing the suit essentially will foreclose it.[202] For example, in a recent case involving public lands in seventeen states and implicating interests of even more broadly dispersed absentees, the court observed:

> Because of problems of jurisdiction and venue, plaintiff could never join all defendants in one forum. Requiring it to bring seventeen separate lawsuits or even to combine actions through the device of multidistrict litigation would create enormous administrative disorder and delay. Dismissal, therefore, would effectively discourage and, for all

199. There are other similarities. For instance, the way rule 19(a)'s analysis of absentee prejudice is structured makes it like the absentee prejudice analysis of rule 19(b). Moreover, rule 19(a)'s three criteria implicate essentially the same concerns as rule 19(b)'s first three stated factors.

200. The guidance provided by this analysis is meant to maximize quick resolution of the rule 19(b) inquiry. Thus, it could expose judges to criticism for being unclear or too terse. The guidance is meant to provide a thorough analytical framework, and when courts do not complete the inquiry because they find a solution, judges need only explain it to avoid criticism. For full analysis, focusing on the four factors, see 3A MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 19.07-2; 7 C. WRIGHT & A. MILLER, *supra* note 2, §§ 1607-08.

201. As applied to plaintiffs' and absentees' interests in this Article, "efficacy" implicates ability to protect those interests and subsumes "convenience," which includes cost. For example, an alternative forum's efficacy includes whether the case would proceed, and, if so, possible delay and its impact on the plaintiff's potential relief, and the expense of suing elsewhere.

202. Foreclosing suit implicates the fourth factor that asks whether "plaintiff will have an adequate remedy if the action is dismissed." FED. R. CIV. P. 19(b); *see also* Sierra Club v. Watt, 608 F. Supp. 305, 325 (E.D. Cal. 1985) (noting that the " 'public interest exception' is the effectuation" of this factor); National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1613 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082 (D.D.C. 1986) (mem.), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986); Rule 19 Advisory Comm. Note, *supra* note 20, at 93 (looking to dismissal's "practical effects" and the existence of any assurance the plaintiff could sue effectively in another forum where better joinder possible); *supra* note 197 (citing examples of many courts' phrasing question as one of availability of an alternative forum and characterizing as critical consideration).

practical purposes, put an end to this litigation.[203]

Correspondingly, in some of these circumstances absentees' interests would be insubstantial, as would be potential prejudice.[204] In other instances in which absentees' interests are greater, those interests can be protected with many rather convenient measures, a number of which could secure absentee presence in the litigation.[205]

Significant among these mechanisms are some that can be invoked by absentees, assuming they are aware that suit has been filed. Absentees may appear voluntarily or intervene on an ancillary basis in the case.[206] When entry of a large number of absentees would be expensive for individual absentees or complicate the litigation, the absentees could pool their resources and have their interests protected by representative absentees or an entity like Mountain States Legal Foundation.[207] Absentees might also request transfer of the suit to a

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203. National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1613 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082 (D.D.C. 1986), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986); *accord* Sierra Club v. Watt, 608 F. Supp. 305, 324-25 (E.D. Cal. 1985); NRDC v. Berklund, 458 F. Supp. 925, 933 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1979) (per curiam). Of course, such litigation, which challenges federal activity by invoking federal question jurisdiction under 28 U.S.C. § 1331 (1982), intrinsically eliminates the "most common alternative" available to a plaintiff dismissed for nonjoinder—relitigation in state court. *See* J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 135, § 6.5, at 343.

204. *See, e.g.*, Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466, 468-69 (9th Cir. 1986); Swomley v. Watt, 526 F. Supp. 1271, 1273 (D.D.C. 1981). This situation implicates the first factor, which asks to "what extent a judgment rendered in the person's absence might be prejudicial to him" or "[w]ould the absentee be adversely affected in a practical sense, and if so, would the prejudice be immediate and serious, or remote and minor?" Rule 19 Advisory Comm. Note, *supra* note 20, at 92; *see also supra* notes 149-67 and accompanying text (discussing similar inquiry for rule 19(a)(2)(i)).

205. The possibility of applying these measures principally implicates the second factor, asking the "extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided." FED. R. CIV. P. 19(b). Thus, it includes the measures available as well as their effect on prejudice and the inconvenience they entail. This is not an exhaustive catalog of the measures but includes those most likely to apply in most situations. Moreover, some can be used in combination. For comprehensive analysis of all the measures mentioned *infra* notes 206-14, 220-22 and accompanying text, most of which are drawn from other Federal Rules or the United States Code and some of which may not apply to the relevant joinder question, see F. JAMES & G. HAZARD, *supra* note 42, ch. 10; 3A MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 19; 7 C. WRIGHT & A. MILLER, *supra* note 2, §§ 1600-26.

206. The rulemakers recommended that courts encourage absentees to initiate the measures and consider if undue hardship would result. Professor Kaplan suggested that if hardship did not occur, absentee "inaction with knowledge may be pertinent" to dismissal or continuing. *See* Rule 19 Advisory Comm. Note, *supra* note 20, at 92; Kaplan, *supra* note 5, at 365-66. In Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 114 (1968), the Court indicated that an absentee who fails to enter a case when able to do so might be bound by a determination in that suit. *Accord* Defenders of Wildlife v. Andrus, 77 F.R.D. 448, 452 (D.D.C. 1978). The resolution suggested would implicate due process because "due process prohibits the assertion of claim or issue preclusion against one who was neither a party to prior litigation nor represented by . . . a party there." Freer, *supra* note 16, at 1082; *see also* 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1608, at 76 (noting that the Supreme Court has not conclusively resolved the issue of whether absentees might be bound); 18 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 4452 (1981) (suggesting approaches for resolving issue). Absentees also may intervene on appeal, as happened in Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985), *appeal filed*, No. 85-3935 (9th Cir. argued July 11, 1986). For discussion of the problem of absentee notification in public rights litigation, see *supra* notes 136-39 and accompanying text.

207. Absentees employed arrangements similar to this in Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466 (9th Cir. 1986); Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985), *appeal filed*, No. 85-3935 (9th Cir. argued July 11, 1986); and National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082 (D.D.C.

more appropriate forum when the district selected by the plaintiff is too inconvenient.[208] Numerous other measures could be invoked by litigants or judges. For example, governmental defendants may be able to represent absentees adequately. Agencies might also be able to secure absentee presence in cases involving a res like land through mechanisms such as interpleader.[209] Of course, defendants and plaintiffs always can inform absentees that suit has been brought, and courts may notify absentees and invite their participation.[210] Judges, however, have many additional devices at their command. Courts might transfer cases to another forum "in the interest of justice"[211] or certify a class of absentees when they are sufficiently numerous.[212] Judges may also be able to protect absentees by delaying absentee realization of interests pending governmental compliance with the plaintiff's request for relief.[213] For instance, courts could postpone Interior Department issuance of permits to absentees for development of natural resources discovered on the public lands until the Department completed preparation of an environmental impact statement considering the environmental consequences of development.[214] Accordingly, in numerous situations the plaintiff's interest will be so much larger than absentees' interests as to clearly outweigh them.

In a small number of situations, however, essentially the opposite situation

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1986) (mem.), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986). For helpful analyses of "public interest groups," like Mountain States Legal Foundation, that represent regulated interests, see Houck, *supra* note 62; Farney, *Mountain States' Conservative Legal Bite Loses Strength Due to Funding Woes, Ideological Rifts*, Wall St. J., Jan. 30, 1987, at 50, col. 1.

208. 28 U.S.C. §§ 1404(a) & 1406(a) (1982) prescribe transfer if it is "in the interest of justice;" *See also* 1 C.F.R. § 305.82-3 (1987) (administrative conference of the United States Recommendation that Congress expressly provide for intervenor transfer requests). For additional discussion of transfer, see Coalition on Sensible Transp., Inc. v. Dole, 631 F. Supp. 1382, 1387-88 (D.D.C. 1986); 15 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL, § 3807, at 78-79; § 3827, at 172 (1976); *see also* Freer, *supra* note 16, at 1098 n. 179 (requiring intervention does not take from absentee's due process objections to suit's locus).

209. For helpful analysis of interpleader, see Freer, *supra* note 16, at 1093-94. Impleader also is available. *See* FED. R. CIV. P. 14(a). However, both mechanisms generally are inapplicable. *See supra* notes 93, 158-59 and accompanying text (discussing the fortuity of, and difficulties entailed in ensuring, adequate representation).

210. *See* Rule 19 Advisory Comm. Note, *supra* note 20, at 93-94. Courts considering the joinder question cannot compel absentees to enter the litigation. But if judges in subsequent litigation consider absentees bound by the earlier case, *see supra* note 206, the possibility of such later treatment could effectively compel entry and might have due process implications. Of course, an important problem in some public rights litigation has been the failure of plaintiffs and defendants to notify the court of absentees' existence, much less notify absentees of the litigation. *See supra* notes 137-38 and accompanying text.

211. *See supra* note 208.

212. *See* FED. R. CIV. P. 23. Rule 19 and rule 23 are mutually exclusive, because rule 23 presupposes that the number of entities involved renders joinder impracticable. Nonetheless, rule 23(b)(1), which mirrors rule 19(a)(2) and is meant to address similar prejudice, affords the possibility of a class action when the number of absentees is substantial.

213. The possibility of shaping relief implicates rule 19(b)'s second stated factor, suggesting that courts consider the "extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures [absentee] prejudice can be lessened or avoided." FED. R. CIV. P. 19(b).

214. Similar possibilities were suggested in NRDC v. Berklund, 458 F. Supp. 925, 933 (D.D.C. 1978), *aff'd*, 609 F.2d 553 (D.C.Cir. 1979) (per curiam) and NRDC v. TVA, 340 F. Supp. 400, 408 (S.D.N.Y. 1971), *rev'd on other grounds*, 459 F.2d 255 (2d Cir. 1972). For discussion of certain difficulties entailed in shaping relief, like absentee need to explore during short seasons, see *infra* note 231 and accompanying text.

will be present. In most of these instances absentees' interests will be substantial should the case continue, while the plaintiff's interest will be insignificant if the case is dismissed. More specifically, absentees' needs to protect their interests in such situations will be very difficult to accommodate. The plaintiff's ability to choose a forum in public rights litigation means that the case could proceed in a forum quite distant from and very inconvenient for absentees. Moreover, in public rights litigation, the peculiar character of the questions at issue, the substantial nature of absentee interests at stake, the telling effect on those interests of entering judgment, and the special character of existing government compensation systems mean that absentees could be affected significantly were the plaintiff to sue successfully.[215] Therefore, entering the litigation would be quite expensive for absentees, while continuing without absentees would prejudice their interests substantially.

As to absentee expense for example, public interest litigants often challenge in the District Court for the District of Columbia governmental activity relating to public lands situated in the West and implicating interests of absentees located there.[216] Moreover, prejudice to absentees of proceeding without them is illustrated by the several ways in which absentees' opportunities to protect their interests may effectively be precluded. When one federal court has adjudicated the applicability or statutory meaning of national legislation that implicates absentees' interests, another federal court will be unlikely to view the legislation differently.[217] When a trial judge has resolved sharply contested issues of fact implicating absentees' interests, appellate courts likely will defer to those determinations.[218] Moreover, absentees cannot successfully pursue subsequent litiga-

215. *See infra* notes 217-18 and accompanying text (noting the peculiar character of questions at issue). For explanations and examples of the remaining propositions, see *supra* notes 4, 117-18 and accompanying text; *infra* notes 238-39 and accompanying text.

216. *See, e.g.*, National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082 (D.D.C. 1986) (mem.), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986); *see also* National Coal Ass'n v. Clark, 603 F. Supp. 668 (D.D.C. 1984) (court dismissed litigation against government brought by coal producers' trade association in District of Columbia involving public lands in Montana and suggested that District Court for District of Montana was an adequate alternative forum); Swomley v. Watt, 526 F. Supp. 1271 (D.D.C. 1981) (suit involving lands in Oklahoma).

217. For helpful discussion of numerous reasons for this judicial reluctance and its implications, see NRDC v. NRC, 578 F.2d 1341, 1344-45 (10th Cir. 1978); Nuesse v. Camp, 385 F.2d 694, 699-703 (D.C. Cir. 1967); Atlantis Dev. Corp. v. United States, 379 F.2d 818, 828-29 (5th Cir. 1967). Within each federal circuit, courts are especially reluctant to view legislation differently, because of considerations of judicial economy, mutual respect, stare decisis, practice, and custom. Some of these considerations also operate between circuits, although circuits are more willing to differ. *See, e.g.*, Gee v. Boyd, 471 U.S. 1058 (1985) (White, J., dissenting from denial of certiorari), *see also* Comment, *Administrative Agency Intracircuit Non-Acquiescence*, 85 COLUM. L. REV. 582 (1985) (noting sporadic government agency practice of not following precedent within circuits).

218. *See* Oneida Indian Nation v. New York, 732 F.2d 261, 265-67 (2d Cir. 1984); FED. R. CIV. P. 52(a); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL, §§ 2585, 2589 (1971); *see also* Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, The Judge/Jury Question, and Procedural Discretion*, 64 N.C.L. REV. 993, 1007-17 (1986) (documenting "shift of decisional power towards the trial level"). Given this deferential standard of appellate review, absentees may lose the only meaningful opportunity to protect themselves. Trial judges apparently have resolved factual issues without absentees in few public rights cases, although this did happen in Conner v. Burford, 605 F. Supp. 107 (D. Mont 1985), *appeal filed*, No. 85-3935 (9th Cir. argued July 11, 1986).

tion against the government for investments made in reliance on government representations, because satisfactory relief is unavailable under existing compensation schemes.[219]

In some situations, when absentee interests are great, the plaintiff's interest will be small. In the remaining cases, in which the plaintiff's forum needs are more substantial, they can be accommodated by invoking certain rather convenient measures. A court may transfer the case, when all the absentees are located in a single federal district other than the forum selected by the plaintiff.[220] A judge may also dismiss the plaintiff's litigation, if the plaintiff can file suit again relatively easily in a district where absentees could protect their interests more conveniently.[221] Dismissal even may be possible when the plaintiff can sue relatively conveniently in more than one forum and combine actions with multidistrict litigation in a forum where absentees could be represented conveniently by a single entity.[222]

In short, the rule 19(b) inquiry can be completed rather easily and appropriately in numerous instances because the plaintiff's or absentees' interests will predominate. However, a number of other situations can be resolved with similar facility by re-examining, and refining, plaintiffs' and absentees' interests or by consulting additional pertinent considerations.

b. Secondary Survey

i. Refinement of the Plaintiff's and Absentees' Interests

The plaintiff's interest should be analyzed in terms of the efficacy of pursuing relief in the forum chosen or elsewhere. The absentees' interests should be considered with respect to the prejudice that would be incurred in continuing without them, how effectively available mechanisms can protect absentees' interests, and the inconvenience of invoking the measures. Thus, considerable analysis should be undertaken by a court when conducting the rule 19(b) preliminary survey and the rule 19(a) assessment of absentee interest and prejudice.[223] Nonetheless, rule 19(b) requires more refined analysis at this juncture, because neither the plaintiff's nor absentees' interests significantly outweighed the other in the preliminary survey. Thus, both interests should be assessed more closely, especially in light of the implications of applying the measures mentioned above,

219. *See infra* notes 238-39 and accompanying text.

220. *See supra* note 208 and accompanying text.

221. *See, e.g.*, McKenna v. Udall, 418 F.2d 1171, 1174 (D.C. Cir. 1969); National Coal Ass'n v. Clark, 603 F. Supp. 668 (D.D.C. 1984).

222. Numerous plaintiffs' "public interest groups," such as the Sierra Club; public interest groups representing those regulated, like Mountain States Legal Foundation (MSLF); and trade associations, such as the American Mining Congress, have offices in Washington, D.C. Most of these entities also have offices in the West. For example, the Sierra Club has offices in Denver, Colorado, San Francisco, California, and Juneau, Alaska, while MSLF is headquartered in Denver. For more information on multidistrict litigation, see 28 U.S.C. § 1407 (1982); D. HERR, MULTIDISTRICT LITIGATION (1986); 15 C. WRIGHT & A. MILLER, *supra* note 208, at §§ 3861-3900; *infra* note 229.

223. *See, e.g., supra* notes 201-02 and accompanying text (relevant analysis of the plaintiff's interests); *supra* notes 149-67, 204-14 and accompanying text (relevant analysis of absentees' interests).

to determine whether one interest predominates.[224]

The plaintiff's interest can be refined by assessing the consequences of continuing the litigation in the forum where plaintiff brought the action, assuming that absentees would be willing to enter the suit.[225] For example, judges might calculate the costs of securing absentee presence in the case, which could include the expense of identifying absentees in government records and notifying the absentees,[226] or courts might consider to what extent entry of absentees might complicate the litigation.[227] Judges may also refine their analysis of the plaintiff's interests by exploring the implications of ordering dismissal, assuming the availability of an alternative forum. For instance, courts could estimate the cost of relitigating in another district, including the expense entailed in traveling to a distant forum.[228] They could also consider the extent to which plaintiff's relief would be delayed were suits brought in multiple districts and combined through the multidistrict litigation mechanism.[229]

Judges can refine their analysis of absentees' interests by analyzing the potential prejudice absentees could suffer if the plaintiff's case proceeded without them. For example, courts should examine the precise legal nature, or magnitude, of absentees' interests or evaluate what effect judgment would have on

224. This analysis is not intended to be exhaustive but rather suggests promising approaches by affording examples that are most likely to occur. Measures whose application was rejected in the preliminary survey, because one interest predominated or because the measures were relatively inconvenient, may well apply here. The interests at this point are relatively similar and can profitably be refined by comparing them in terms of the relative inconvenience to each of invoking the measures.

225. Absentees cannot be compelled to enter the suit. *See supra* note 210. Other assumptions that are important will be discussed later, but some will not be discussed for reasons of convenience and brevity. For example, it is superfluous to repeat the determination made earlier that absentee joinder is infeasible. Cases like Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), which say the federal judiciary is to follow strictly or read literally the requirements of the Federal Rules, arguably make irrelevant consideration of factors not mentioned explicitly in rule 19, such as expenses the plaintiff might incur. But the Rule 19 Advisory Comm. Note, *supra* note 20, does state that rule 19(b)'s "fourth factor, looking to the practical effects of a dismissal, indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible." *Id.* at 93. Thus, the plaintiff's expense appears relevant to whether suit could be brought elsewhere. *See infra* note 251. Moreover, courts may consider factors pertinent to equity and good conscience, much as those discussed *infra* text accompanying notes 247-51. *See supra* note 195.

226. For discussion of the difficulties entailed in identifying absentees, much less securing their presence, in public rights litigation, see *supra* note 180.

227. For example, entry of a large number of absentees could complicate the litigation considerably were they to demand that numerous, new issues be treated. *See infra* note 250 and accompanying text. Application of representational substitutes, in turn, then may be appropriate. *See supra* notes 180, 207 and accompanying text.

228. *See supra* notes 220-22 and accompanying text.

229. One court rejected the multidistrict litigation option, because it would "create enormous administrative disorder and delay" and effectively end the suit. National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082 (D.D.C. 1986), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986); *see also supra* note 222 (discussing the multidistrict litigation option). Delay can be important in certain public rights litigation, especially cases challenging activity like mining on the public lands that threatens endangered species, such as grizzly bears. *See, e.g.*, Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678 (D.C. Cir. 1982). For cogent treatment of the effect of delaying the plaintiff's relief and of the financial implications for public interest litigants of invoking many measures, see Coalition on Sensible Transp., Inc. v. Dole, 631 F. Supp. 1382, 1386-88 (D.D.C. 1986); Defenders of Wildlife v. Andrus, 77 F.R.D. 448, 451 (D.D.C. 1978).

those interests. This could be done by considering various factors, such as the nature of the questions to be resolved in the suit, the character of the remedy sought by the plaintiff, or the unavailability of later, effective relief against the government.[230] Judges could also refine absentees' interests by determining how efficaciously existing measures would protect those interests. For example, a judicial attempt to protect absentees by delaying realization of their interests pending governmental compliance with the plaintiff's requested relief can substantially harm those absentees who wish to explore for natural resources on public lands and who have only short seasons in which to conduct such operations.[231] Courts as well could refine their analysis of absentees' interests by examining the convenience of applying certain mechanisms. For example, judges might estimate the absentees' expense of entering the action, which could include examining information such as the absentees' distance from the forum.[232]

When refined judicial analysis indicates that either the plaintiff's or absentees' interests are significantly larger, this determination will be conclusive.[233] But even if there is not considerable disparity between them, that differential should suffice.[234] Nonetheless, in the small number of situations in which the disparities between the two interests are relatively small, courts should evaluate other pertinent considerations.[235]

ii. Additional Relevant Considerations

Courts should analyze unexplored dimensions of rule 19(b)'s four stated factors by examining the potential ramifications of both continuing without requiring absentee joinder and dismissing the plaintiff's case for interests other than those of plaintiffs and absentees.[236] The principal result of continuing the suit is multiple litigation, especially its impact on the defendant and the pub-

230. These factors are all considered *supra* notes 217-19 and accompanying text.

231. *See* Northern Alaska Envtl. Center v. Hodel, 803 F.2d 466, 468 (9th Cir. 1986) (example of absentee with short season); Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985) (example of absentee with short season), *appeal filed*, No. 85-3935 (9th Cir. argued July 11, 1986); *supra* notes 213-14 and accompanying text (general discussion of shaping relief). Of course, these cases provide the foil to the plaintiff's argument regarding delayed relief, discussed *supra* note 229 and accompanying text. In National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1613 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082 (D.D.C. 1986), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986), the court found it impossible to shape relief to protect absentees, and this may be true of much other public rights litigation. *See also* Freer, *supra* note 16, at 1095 n.166 (making similar observation about private litigation).

232. The Advisory Committee Note states that the "court should consider whether [entry] would impose undue hardship on the absentee." Rule 19 Advisory Comm. Note, *supra* note 20, at 92. For mechanisms that might ameliorate expense, such as representation by entities like MSLF, see *supra* note 207 and accompanying text.

233. For example, closer scrutiny may reveal one interest is much different than it appeared initially.

234. For instance, the plaintiff's forum needs, although not gigantic, may be considerable, and absentee prejudice may be more than minimal, yet relatively small.

235. For example, the plaintiff may have a rather inefficacious forum, while absentees would be comparably (1) prejudiced, if suit proceeded or (2) inconvenienced in protecting their interests.

236. Interests of the plaintiff and absentees were found relatively similar under the preceding analysis. Other interests are examined now, because in most situations they become significant only at this point.

lic.[237] In cases involving vindication of public rights, there is little prospect of successful, subsequent suit by absentees against the government. Later litigation is likely only when the public rights case prejudiced absentees significantly, and even then the government may have no legal obligation or the injury may not support a cause of action.[238] For example, absentees who have invested substantial funds exploring for natural resources in reliance on government-issued leases that the courts effectively invalidated in public rights litigation may have no satisfactory remedy against the government under the Federal Tort Claims Act, Court of Claims suits, or the Constitution.[239] But if courts find that such subsequent litigation is possible, they should estimate costs to the government,[240] the judicial system, and ultimately the public in hearing similar claims.[241] Courts should also assess the effect on interests other than the plaintiff and absentees of dismissing the plaintiff's case. The chief consequence is ending the plaintiff's suit, which implicates numerous "public policy" factors, such as resolution of controversial issues on their merits and government accountability.[242] More specifically, one judge recently characterized the public's interest in management of the public lands as a "matter of transcending importance."[243] Other, less significant, because less likely, consequences of dismissing are that dismissed plaintiffs will be able to relitigate in an alternative forum or sue in more than one district and combine cases through multidistrict litigation.[244] If those alternatives appear viable, courts should consider the costs to the public and the judicial system should the options be exercised.[245]

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237. Multiple litigation that results from continuing implicates rule 19(b)'s first three stated factors, relating to interests "of the courts and the public in complete, consistent, and efficient settlement of controversies" and of defendants in avoiding more suits or inconsistent obligations. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110-12 (1968); *cf.* Rule 19 Advisory Comm. Note, *supra* note 20, at 92-93 (discussing multiple litigation and three factors).

238. *See supra* notes 149-67 and accompanying text (discussing absentee prejudice); *supra* note 118 and accompanying text (citing concrete example of absentee prejudice created by government).

239. *See* 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2412, 2671 (1982) (Federal Tort Claims Act); *id.* § 1491 (1982) (Court of Claims). The lack of effective relief may implicate due process. *See* Sierra Club v. Watt, 608 F. Supp. 305, 325-28 (E.D. Cal. 1985) (discussing possible due process claims); *see also* Heckler v. Community Health Servs. of Crawford, 467 U.S. 51, 59-62 (1984) (stating that government rarely estopped by unauthorized acts of agents); Union Oil Co. v. Morton, 512 F.2d 743 (9th Cir. 1975) (United States not estopped by unauthorized acts of agents regarding public lands). Moreover, this consideration fundamentally distinguishes public rights from private litigation, in which absentees generally can secure some relief in later litigation. *See, e.g.*, Helzberg's Diamond Shops, Inc. v. Valley West Des Moines Shopping Center, Inc., 564 F.2d 816 (8th Cir. 1977). Cases in which the public rights exception was recognized have not engendered later suits, but they have prolonged litigation. *See supra* notes 4, 118. That development implicates "public interests" in fair absentee treatment; vindication of interests they assert, such as domestic production of oil, when legitimate; and judicial economy, credibility, and respect. *See Heckler*, 467 U.S. at 61-62; United States v. Wharton, 514 F.2d 406 (9th Cir. 1975) (stating that public has interest in government treating citizens fairly).

240. These might include the costs of trying cases and paying judgments.

241. Hearing similar claims also implicates judicial economy, credibility, and respect.

242. *See supra* notes 100-06 and accompanying text.

243. *See* National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1613-14 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082 (D.D.C. 1986), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986).

244. *See supra* notes 221-22, 229 and accompanying text.

245. *See supra* notes 221-22, 229, 241 and accompanying text; *see also* National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1613 (D.D.C. 1985) (mem.) (noting that the multidistrict

Judges then should analyze considerations either not stated in the rule or those previously examined only indirectly.[246] One consideration may be the time when the court initially treated the joinder issue. For example, if the question were first addressed on appeal, preservation of the judgment, resources spent on the trial below, whether absentees knew that litigation was ongoing, and why the issue was only treated at this juncture could be important.[247] A second consideration might be the good faith of the entities whose interests are involved, insofar as judges can detect such conduct, and the equities implicated. In determining good faith, judges should ask whether the plaintiff failed to join absentees because unaware of their existence, because joinder was infeasible, or for strategic purposes. Similarly, the courts should consider whether the governmental defendant moved for dismissal of the plaintiff's suit to prevent absentee prejudice or to avoid a substantive judicial determination that the agency was violating its statutory mandate. Concomitantly, courts should ask whether absentees failed to enter the case because they received no notification, because entry would have been relatively inconvenient, or because they hoped to have the plaintiff's action dismissed for non-joinder.[248] In examining equities, the court could ask how substantially the less creditable behavior affected interests of other entities and how such conduct might count against those who participated in the activity.[249] Another consideration could be the effects, not yet treated fully, of invoking certain options. For instance, if the suit continued and particular absentees were to enter, would the litigation be expedited by their contributions to issue resolution or be delayed by their demands that additional issues be treated?[250] Considerations, such as the relative resources that parties

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litigation option would "create enormous administrative disorder and delay"), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082 (D.D.C. 1986), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986). The considerations discussed in this paragraph will rarely control; if they do, however, the inquiry can end.

246. Of course, some of these considerations were mentioned in examining rule 19(b)'s four stated factors or in conducting the analysis discussed earlier. *See supra* note 195 (noting why it is proper to consider unstated factors).

247. Timing can be more problematic in public rights litigation than in traditional private litigation, because plaintiffs often fail to notify the court of absentees' existence under rule 19(c), while governmental defendants have less incentive to notify the court or absentees. *See supra* notes 136-38 and accompanying text. For helpful discussions of timing, see Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109-12 (1968); Preston v. Thompson, 589 F.2d 300, 304 (7th Cir. 1978); Kirkland v. New York State Dept. of Correctional Servs., 520 F.2d 420, 424 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976). For more discussion of the timing issue under rules 19 and 24, see 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1609; 7A C. WRIGHT & A. MILLER, *supra* note 2, § 1916.

248. Thus, courts evaluating good faith might consider how objectionable the behavior was and why entities participated in it. For a helpful example that assesses the conduct of the players, see Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110-13 (1968); *accord* Freer, *supra* note 16, at 1080.

249. For example, when the moving party seeks dismissal to protect against subsequent suit by absentees, "undue delay in making the motion can properly be counted against him as a reason for denying the motion." Rule 19 Advisory Comm. Note, *supra* note 20, at 93; *accord* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110 n.4 (1968); *see also* United States v. Sabine Shell, Inc., 674 F.2d 480, 482-83 (5th Cir. 1982) (rejecting defendant's motion on equitable grounds, including failure to raise until appeal). Correspondingly, it is often fair to proceed when absentees refuse to enter the litigation and the government urges dismissal for non-joinder, because government error at once could benefit absentees and be shielded from public scrutiny.

250. The court in NRDC v. TVA, 340 F. Supp. 400, 408 (S.D.N.Y. 1971), *rev'd on other*

command and the probable outcome on the merits, also may apply.[251]

Once all pertinent considerations have been explored, courts should determine whether one, or a combination, controls.[252] Judges should be able to treat nearly all remaining cases easily and appropriately, because such a large number of considerations ought to have been examined and valued, and because so many measures can be invoked. For instance, when a number of important considerations point to the same conclusion, the joinder issue should be easily resolvable. More specifically, litigation should proceed when there are national policy issues that need resolution and one organization could efficaciously represent many dispersed absentees that hold mineral leases on public lands and expedite the litigation by offering valuable information on lease issuance.[253] But even when the situation is less clear, the plethora of considerations and their variable values as well as the mechanisms available should mean that courts can reach conclusions rather easily.

Nonetheless, a miniscule of relatively unclear situations may remain. For example, most significant considerations may point to application of different measures or to multiple conclusions. Although the inquiry may now appear considerably more art than science, and although it is debatable how finely the analysis should or can be calibrated, certain techniques can be applied. For example, the relevant considerations could be valued in terms of their comparative importance and their extent, and balanced. Therefore, judges should re-examine these considerations alone,[254] or with the plaintiff's and absentees' interests, as refined, to determine the appropriate result.[255]

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grounds, 459 F.2d 255 (2d Cir. 1972), found the potential absentee contribution to issue resolution relevant, while the absentees in Conner v. Burford, 605 F. Supp. 107 (D. Mont. 1985), apparently could have provided material data about the important issue of lease stipulations' efficacy. *See also* National Farm Lines v. ICC, 564 F.2d 381, 383-84 (10th Cir. 1977) (similar relevance as to rule 24). Other courts have evinced concern about the effect on the instant litigation of entry of numerous absentees. *See* National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609, 1613 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Env't Rep. (BNA) 1082 (mem.), *appeal filed*, Nos. 85-5239, 85-5240 (D.C. Cir. 1986); Dintino v. Dorsey, 91 F.R.D 280, 283 (E.D. Pa. 1981); *supra* note 227 and accompanying text; *see also* Stringfellow v. Concerned Neighbors in Action, 107 S. Ct. 1177 (1987) (in complex litigation, district judge's Rule 24 decision on how best to balance parties rights against need to keep litigation from becoming unmanageable entitled to great deference).

251. Judge Gasch, in Coalition on Sensible Transp., Inc. v. Dole, 631 F. Supp. 1382, 1386-88, (D.D.C. 1986) and Defenders of Wildlife v. Andrus, 77 F.R.D. 448, 451 (D.D.C. 1978), considered pertinent the financial hardship to public interest litigants of invoking numerous options. Some matters may warrant less weight. *Compare* 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1607, at 64 n.73 *with* FED. PROC. L. ED., *supra* note 177, § 59:76 (opposing views of the relevance of the probable outcome on the merits). For helpful catalogs of additional relevant considerations that may be applicable in specific cases, see 7 C. WRIGHT & A. MILLER, *supra* note 2, § 1607; FED. PROC. L. ED., *supra* note 177, § 59:76.

252. The interests of the plaintiff and absentees are not considered at this point, because they heretofore have been found relatively similar, and the new considerations may yield a clear conclusion.

253. This apparently is what occurred in National Wildlife Fed'n v. Burford, 23 Env't Rep. Cas. (BNA) 1609 (D.D.C. 1985) (mem.), *aff'd on rehearing*, 24 Envt Rep. (BNA) 1082 (D.D.C. 1986) (mem.), *appeal filed*, Nos. 86-5239, 86-5240 (D.C. Cir. 1986). *See also* NRDC v. NRC, 578 F.2d 1341, 1346 (10th Cir. 1978) (discussing similar considerations in context of rule 24).

254. Plaintiff and absentee interests, because they are relatively similar, will suggest a conclusion when one interest and the additional considerations tilt towards this conclusion, as when both favor dismissal.

255. Given everything examined above, it seems virtually inconceivable that any circumstances

In sum, rule 19 and additional existing mechanisms enable judges to solve the party joinder question in public rights litigation more satisfactorily than the public rights exception by accommodating plaintiffs' forum needs and other interests, particularly those of absentees.

IV. CONCLUSION

Numerous federal judges have created, applied, and perpetuated a public rights exception to treat a difficult party joinder problem presented by public rights litigation. Although a number of judges have attempted to enunciate, evaluate, and justify the exception, none has succeeded. Some courts apparently fashioned the exception out of solicitude for plaintiffs or concern that rule 19's application would effectively preclude public rights cases, but few judges expressly exhibited regard for additional pertinent interests, especially those of absentees. Indeed, solicitude for plaintiffs has been excessive and lack of concern for other interests inappropriate. Moreover, doubts about rule 19 have been ungrounded. Application of the rule and additional measures available to courts, litigants, absentees, and counsel will permit judges to facilitate plaintiffs' vindication of public rights and better serve others, namely absentees. Therefore, courts should rely on rule 19 and other available mechanisms, rather than engage in cryptic, unclear, and strained analysis to support an exception the application of which has engendered protracted litigation, wasted resources, and even eroded judicial credibility.

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will remain in which the plaintiff's and absentees' interests are so similar that other relevant considerations and measures available do not tip that delicate balance. In the extremely unlikely event that such a situation should arise, the rule's language and underlying policies will not provide a clear solution. That phraseology and those policies evince remarkably similar solicitude for plaintiffs and absentees, expressing a preference for neither, although the federal judiciary has elevated the plaintiff's forum needs to primary significance, *see supra* note 197. Thus, there may be two "innocent parties," each a victim of government error. Perhaps the inquiry then devolves into a philosophical debate over the principal purpose of rule 19 as applied in the context of public rights litigation—the plaintiff's forum needs, absentee prejudice, and the interests of the judiciary and the public in efficacious dispute resolution—that cannot be resolved.