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Intervention After Webster

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INTERVENTION AFTER *WEBSTER*

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Webster v. Reproductive Health Services throws down the gauntlet on the "most politically divisive domestic legal issue of our time,"[1] imperiling women's progress in securing reproductive freedom and power in society. The battle over abortion rights is likely to splinter an already deeply divided country. After fierce fighting in many statehouses, some legislatures will pass statutes further restricting abortion. The major battleground, however, will quickly shift to the federal courts, where plaintiffs seeking to protect procreative freedom will challenge these measures. Judges, parties, and lawyers participating in this litigation will rigorously analyze the issues of "substance" that *Webster* and the new state laws implicate—questions involving the Constitution, privacy, women's rights, precedent, statutory construction, medicine, science, religion, and morality.

In their haste to evaluate these critical issues, they must not overlook the procedural questions and process values at stake. Indeed, if certain procedural problems receive insufficient attention, they may preclude efforts to protect reproductive rights. Issues involving intervention under Federal Rule of Civil Procedure 24 pose significant difficulties and typify the procedural problems that will pervade the anticipated abortion cases.[2] Two protracted pieces of litigation that challenged restrictive abortion laws passed

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1. Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3079 (1989) (Blackmun, J., concurring in part and dissenting in part).

2. Rule 24 provides in pertinent part:

> (a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
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> (b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

after *Roe v. Wade*[3] illustrate the complications that may ensue.

TALES OF MODERN ABORTION LITIGATION

In *Diamond v. Charles*,[4] the plaintiffs, physicians who provided a complete range of family planning services, including abortion, attacked the Illinois Abortion Act and, in October 1979, secured a temporary restraining order precluding its enforcement.[5] Within days, Dr. Eugene Diamond sought to intervene on the side of the Illinois Attorney General and the Cook County State's Attorney, allegedly to defend his pecuniary and professional interest in prenatal patients and his interest as the "parent of an unemancipated minor daughter of child bearing age."[6] Plaintiffs strenuously opposed intervention, asserting that Dr. Diamond lacked any legally cognizable interest in the case and, alternatively, that amicus curiae participation would suffice.[7] Nevertheless, the district judge permitted intervention, allowing Dr. Diamond to file an answer, a memorandum, and additional documents.[8]

The trial court partially granted the plaintiffs' motion for a preliminary injunction the next month. The governmental defendants and the intervenor appealed. In 1980, the Seventh Circuit affirmed the lower court determination while directing that several other statutory provisions be enjoined.[9] On remand in 1983, the district judge enjoined twenty-five sections of the Act, including its principal operative provisions.[10]

The defendants and the intervenor appealed the trial court's decision on three major sections, while the plaintiffs cross-appealed a fourth provision's constitutionality. In 1984, the Seventh Circuit

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3. 410 U.S. 113 (1973).

4. 476 U.S. 54 (1986).

5. For the description of the case, I rely substantially on the detailed discussion of the litigation in Charles v. Daley, 846 F.2d 1057, 1059-61 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3214 (1989), supplementing that with citation to specific opinions when appropriate.

6. *Id.* at 1059. Dr. Diamond or his counsel, Americans United for Life Legal Defense Fund, have participated in much litigation challenging Illinois abortion legislation. *See, e.g.*, Keith v. Daley, 764 F.2d 1265, 1267-68 (7th Cir.), *cert. denied*, 474 U.S. 980 (1985), and cases cited therein; Wynn v. Scott, 449 F. Supp. 1302, 1306 (N.D. Ill.), *appeal dismissed sub nom.* Carey v. Wynn, 439 U.S. 8 (1978), *aff'd*, 599 F.2d 193 (7th Cir. 1979); Wynn v. Scott, 448 F. Supp. 997, 1000 (N.D. Ill.), *aff'd sub nom.* Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978), *later appeal*, 599 F.2d 193 (7th Cir. 1979).

7. *Charles*, 846 F.2d at 1059.

8. *Id.* at 1059-60.

9. *Id.* at 1060; *see also* Charles v. Carey, 627 F.2d 772 (7th Cir. 1980).

10. *Charles*, 846 F.2d at 1060; *see also* Charles v. Carey, 579 F. Supp. 464 (N.D. Ill. 1983).

ruled in favor of plaintiffs.[11] The Illinois Attorney General and the State's Attorney decided against appeal.[12] In February 1985, however, Dr. Diamond filed a notice of appeal and jurisdictional statement with the United States Supreme Court. The Court granted review, the case was fully briefed, and the argument was heard the following November. In 1986, the Court dismissed Dr. Diamond's appeal because he lacked the requisite "standing" to pursue the case absent the governmental defendants.[13]

The plaintiffs filed two requests for expenses incurred in the lower federal court litigation. The district judge awarded substantial fees against the intervenor in 1985;[14] the plaintiffs also successfully sought from the intervenor significant fees sustained in the Supreme Court appeal during 1986.[15] After complex, preliminary skirmishing over whether the intervenor had filed a timely notice of appeal,[16] he was allowed to appeal the fee awards to the Seventh Circuit, which, in 1988, essentially affirmed the trial court determinations.[17]

Thus, after nearly a decade of litigation, the plaintiffs were vindicated; much of the time, money, and effort they expended were attributable to someone who probably never should have been permitted to intervene. The ultimate irony, and a fitting epilogue to this Kafkaesque travail, is that plaintiffs who pursue future, similar challenges may be unable to recover fees from intervenors such as Dr. Diamond in light of the 1989 Supreme Court opinion in *Independent Federation of Flight Attendants v. Zipes*.[18]

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11. *Charles*, 846 F.2d at 1060; *see also* Charles v. Daley, 749 F.2d 452 (7th Cir. 1984).

12. *Charles*, 846 F.2d at 1060; *see also* Diamond v. Charles, 476 U.S. 54 (1986).

13. *Charles*, 846 F.2d at 1060; *see also Diamond*, 476 U.S. at 64-71.

14. *Charles*, 846 F.2d at 1060-61.

15. *Id.*

16. *See* Charles v. Daley, 799 F.2d 343, 345-48 (7th Cir. 1986). This aspect of the litigation offers interesting insights on the "real parties in interest" in modern abortion litigation. The Americans United for Life Legal Defense Fund sought to become a defendant and to accept any intervenor fee liability because it had solicited intervenor participation. *See id.* at 345.

17. *Charles*, 846 F.2d at 1077. The litigation concluded in 1989 when the Supreme Court denied the intervenor's request that it review the fee award. Diamond v. Charles, 109 S. Ct. 3214 (1989). *Cf.* Akron Center for Reproductive Health v. Slaby, 854 F.2d 852, 854 & n.1 (6th Cir. 1988) (state intervenor alone appealed to circuit court), *prob. juris. noted sub nom.* Ohio v. Akron Center for Reproductive Health, 109 S. Ct. 3239, *motion denied*, 110 S. Ct. 39 (1989).

18. *See* Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989). *See generally infra* notes 165, 186, and accompanying text (explanation of problems *Zipes* presents). Much litigation challenging Illinois legislation has been nearly as prolonged. *See,*

This scenario is not an aberration. Consider the attack on the constitutionality of a restrictive abortion ordinance adopted by the city of Akron. In *Akron Center for Reproductive Health v. City of Akron*,[19] the district court denied the applicants' requests to be appointed guardians ad litem for "unborn children" or "infants born alive as the result of legal abortion." Over the plaintiffs' opposition, the trial judge did grant the applicants' motions to intervene, but severely curtailed their participation by limiting them to amicus involvement on nearly all issues.[20] Notwithstanding these restrictions, the applicants "litigated their claims vigorously," filed approximately forty documents, "including at least 14 to which plaintiffs had to independently respond . . . . [and] took an active role at trial, occasionally requiring the Court to stop their inquiry into areas beyond the permitted scope of intervention."[21] The intervenors fully participated in the circuit court proceedings as to which they alone requested rehearing, unsuccessfully petitioned the Supreme Court for certiorari, and filed briefs in other litigants' consolidated appeals.[22] Although the plaintiffs secured significant fees from intervenors, they might be unable to do so today.[23]

These and similar procedural difficulties are likely to attend the new abortion challenges. Some problems may even prevent resolution of the substantive disputes. Because intervention illustrates the numerous procedural questions that are likely to arise, it warrants a thorough examination.

The first section of this Article briefly examines *Webster*, principally to predict the abortion controversy's future course. The analysis indicates that a number of state legislatures may impose significantly more restrictive limitations on abortion. In most jurisdictions, the focus will swiftly shift to the federal courts as plaintiffs seek to invalidate the new measures. The second section of the Article examines the intervention questions that are likely to arise in this litigation and explores the options available to

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e.g., Keith v. Daley, 764 F.2d 1265 (7th Cir. 1985), *cert. denied*, 474 U.S. 980 (1985); Wynn v. Scott, 449 F. Supp. 1302 (N.D. Ill.), *appeal dismissed sub nom.*, Carey v. Wynn, 439 U.S. 8 (1978), *aff'd*, 599 F.2d 193 (7th Cir. 1979).

19. 604 F. Supp. 1268 (N.D. Ohio 1984). This case, and a number of others in this Article, involved challenges to local ordinances. Although the litigation raises some issues different from those raised by challenges to state statutes, they are sufficiently analogous to warrant similar treatment here.

20. *Id.* at 1272.

21. *Id.*

22. *Id.*

23. *Id.* at 1274-75. *See also* Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989).

address the participatory requests of abortion opponents. The second section then evaluates how the federal judiciary actually has treated the applications in circumstances identical or analogous to those likely to be presented by the next round of abortion cases. This evaluation reveals that the application of Rule 24 often has enabled abortion opponents to delay the resolution of litigation, to prejudice existing parties, and to impose significant costs on the civil justice system. Recognizing the considerable potential for similar problems to recur, the Article provides guidance for resolving requests to participate in abortion challenges and proposes that the involvement of intervenors be sharply circumscribed. The Article concludes by reflecting on the procedural problems and process values that the new abortion litigation implicates.[24]

I. *WEBSTER* AND FUTURE ABORTION LITIGATION

The Supreme Court relied on the right of privacy and the fourteenth amendment to invalidate abortion proscriptions in the 1973 landmark decision of *Roe v. Wade*.[25] That opinion and most of its progeny have ignited a political controversy that steadily intensified during the 1980s.[26] The Court's decisions in *Roe* and later cases, which essentially defined a woman's constitutional right to choose abortion, nonetheless fostered some public consensus about reproductive rights. Although most states have severely restricted abortion during the third trimester, they generally have imposed no limitations in the first trimester and restrictions of varying stringency during the middle trimester.[27] Of course, in a nation as complex and varied as the United States, this approach to abortion has not been universal; numerous states enacted more restrictive legislation. Plaintiffs attacked practically all of these

24. Of course, the new abortion litigation will implicate many procedural problems and process values that the intervention questions do not, although the intervention issues typify in certain respects many of them. It is critical to encourage work on the procedural difficulties and process values implicated in abortion litigation that have been neglected to date. For one recent valuable example of what I have in mind, see Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655 (1988); *see also Symposium on Reproductive Rights*, 13 Nova L.J. 319 (1989).

25. 410 U.S. 113 (1973).

26. The author recognizes that what follows is controversial and truncated; it is meant, however, to be a relatively balanced account tailored to the specific issues this piece treats.

27. For a recent representative compilation, see Comment, *State Abortion Statutes and Their Compliance with* Roe v. Wade: *The Battle Continues*—Thornburgh v. American College of Obstetricians & Gynecologists, 20 CREIGHTON L. REV. 917 (1986-87).

statutes, and the federal judiciary invalidated many of them.[28] Much of this litigation raised the intervention problems discussed in this Article.

In short, the federal courts' treatment of burdensome abortion regulation following *Roe* had continued to recognize women's reproductive freedom.[29] These decisions encouraged additional attacks on restrictive measures and likely discouraged many states from passing overly burdensome legislation. Although there apparently was considerable national consensus on abortion, it has unraveled somewhat during the 1980s. The Supreme Court's recent issuance of *Webster* promises to increase divisiveness while leading to more restrictive abortion legislation and to concomitant federal court challenges.

Chief Justice Rehnquist, writing for a four-Justice plurality in *Webster*, upheld prohibitions on the use of public employees and public facilities to perform nontherapeutic abortions[30] and also upheld a requirement that doctors conduct viability tests before performing abortions.[31] The plurality found "no occasion to revisit the holding of *Roe*"[32] but disparaged its "rigid trimester analysis."[33] Although characterizing a woman's right to abortion as a

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28. For examples of the Illinois legislation and litigation challenging it, see Charles v. Daley, 846 F.2d 1057 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3214 (1989), discussed *supra* notes 5-17 and accompanying text and *infra* notes 126-30 and accompanying text; and Keith v. Daley, 764 F.2d 1265 (7th Cir.), *cert. denied*, 474 U.S. 980 (1985), discussed *infra* notes 108-24 and accompanying text. Missouri's experience is similar. *See* Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3047 n.1 (1989).

29. *See, e.g.*, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 426-27 (1983).

30. *See Webster*, 109 S. Ct. at 3050-53. The plurality relied primarily on its abortion funding precedents, particularly Harris v. McRae, 448 U.S. 297 (1980). For a thorough, recent analysis of *Webster*, see Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105 (1989).

31. *See Webster*, 109 S. Ct. at 3054-58. The plurality relied on Missouri's interest in protecting potential human life. Correspondingly, it did not "pass on the constitutionality" of the "findings" in the statute's preamble, providing that the "life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health, and well-being," primarily because the preamble expressed a value judgment and had not been applied to regulate abortion or restrict appellees' activities. *Id.* at 3049-50.

32. *Id.* at 3058. The statute invalidated in *Roe* criminalized all abortions except to save the woman's life, while Missouri premised its measure on fetal viability as the time when its interest in potential life must be protected. *Id.*

33. *Id.* at 3056. The Chief Justice described that approach as the type of analysis the Court reconsiders when it proves to be "unsound in principle and unworkable in practice." *Id.* (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

"liberty interest protected by the Due Process Clause,"[34] the plurality stated that *Webster's* holding clearly will permit some governmental regulation of abortion that earlier cases would have proscribed.[35] The goal of constitutional adjudication is "not to remove inexorably 'politically divisive' " questions from legislative processes in which the "people through their elected representatives" resolve important matters.[36] The Chief Justice chided the dissent for suggesting that legislatures in a country in which women are the majority would regard the opinion as "an invitation to enact abortion regulation reminiscent of the dark ages."[37] Such a view does "scant justice" to legislators and the electorate.[38]

Despite the plurality's protestations, invitation is the word that most accurately captures *Webster*'s implications. The opinion removes many restraints—practical, political, legal, and otherwise—on lawmakers, essentially inviting them to enact very restrictive measures.[39] Numerous factors enhance the invitation's appeal: the plurality's indication that it might reconsider *Roe* in the future,[40] Justice O'Connor's statement that "there will be time enough to re-examine *Roe*" when a statute's invalidity actually turns on the opinion's constitutional validity,[41] Justice Scalia's plea that *Roe* be overruled explicitly, rather than effectively,[42] and the Court's decision on the day it issued *Webster* to grant review in the 1989 term to three new abortion cases.[43] Indeed, some legislators may be inspired to advocate the most stringent legislation possible in the hopes of provoking *Roe*'s reconsideration. Even more cautious lawmakers may be tempted to champion relatively restrictive measures, given the Court's preference for leaving abortion regulation

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34. *Webster*, 109 S. Ct. at 3058. The plurality acknowledged that certain of the Court's precedents and the *Webster* dissent treated abortion as some type of fundamental privacy right. *Id.* at 3057-58.

35. *Id.* at 3058 (citing City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) and Colautti v. Franklin, 439 U.S. 379 (1979)).

36. *Webster*, 109 S. Ct. at 3058.

37. *Id.*

38. *Id.*

39. It does so by abandoning *Roe's* trimester analysis and by converting the prior right to abortion into a due process liberty interest that will rarely outweigh the newly enhanced state interest in protecting "potential human life."

40. *See Webster*, 109 S. Ct. at 3056-58.

41. *Id.* at 3061 (O'Connor, J., concurring in part and concurring in the judgment.).

42. *Id.* at 3064 (Scalia, J., concurring in part and concurring in the judgment.).

43. The three cases are Ohio v. Akron Center for Reproductive Health, 109 S. Ct. 3239, *motion denied*, 110 S. Ct. 39 (1989); Turnock v. Ragsdale, 109 S. Ct. 3239, *motion denied*, 110 S. Ct. 38, *motion granted*, 110 S. Ct. 532 (1989) (granting joint motion to defer further proceedings); Hodgson v. Minnesota, 109 S. Ct. 3240, *motion denied*, 110 S. Ct. 39, *motion denied*, 110 S. Ct. 317, *motion granted*, 110 S. Ct. 400 (1989).

essentially with state legislatures and its willingness to tolerate additional restrictions. Many limitations that formerly restrained legislators have been eased and perhaps eliminated. Lawmakers now have little reason—other than the force of public opinion—to prevent them from passing measures that sharply curb reproductive freedom and test the outer limits of constitutionality.

Predicting all that *Webster* portends is impossible and fortunately unnecessary for the purposes of this Article. Given *Webster's* invitation, the severity and breadth of new abortion regulations may be restrained only by their sponsors' creativity. Some statutes may be similar to the parental consent provisions at issue in the cases to be decided in the Court's 1989 term.[44] Other measures will attempt to reinstitute regulation tantamount to that previously invalidated, such as laws requiring a husband's permission for abortion.[45] Additional legislation may be comparatively or wholly new, like that prohibiting abortions to be performed because the fetus is of an undesired gender.[46]

If the restrictive new measures pass, plaintiffs will attempt to invalidate them in federal court. These cases will raise many procedural problems, several of which implicate intervention.

II. INTERVENTION PROBLEMS AND SUGGESTED SOLUTIONS

A. Introduction

Litigation challenging abortion statutes will present intervention questions as the individuals or groups who lobbied for enactment of those laws seek to intervene as of right or permissively under Rule 24 or to participate as amici curiae. Allowing their involvement would have important implications. Intervenors essentially have the rights of parties. They can raise issues for resolution that litigants have not, participate in discovery, file motions and other papers, introduce direct testimony and conduct cross-examination

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44. *See, e.g.*, Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988), *cert. granted*, 109 S. Ct. 3240, *motion denied*, 110 S. Ct. 38, *motion granted*, 110 S. Ct. 532 (1989).

45. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 67-72 (1976) and Planned Parenthood v. Board of Medical Review, 598 F. Supp. 625, 633-42 (D.R.I. 1984) (Rhode Island spousal notification provision unconstitutional). *Cf.* 18 PA. CODE §§ 3203-3220 (1989) (requiring spousal notification).

46. *See Ashcroft seeks limit on abortion*, The Kansas City Times, Jan. 20, 1990, at A-1, col. 1 (Missouri governor seeks state law prohibiting women from having more than one abortion in the state and prohibiting abortions performed for sex selection). *But cf. Iowa Abortion-Rights Voters Altering Electoral Equation*, N. Y. Times, Aug. 25, 1989, at A1, col. 5 (Iowa Republicans as a caucus will not push for major abortion restrictions in the 1990 session).

at trial, and appeal adverse substantive determinations.[47] Intervenors' involvement may deprive parties of control over their own lawsuits, frustrate effective judicial case management, complicate the issues to be treated, and delay the prompt resolution of litigation. The original parties and the federal courts must devote substantial time, money, and effort to intervenors' participation. The expenditures can be very onerous, especially for plaintiffs with limited resources, such as public interest litigants and those likely to be challenging the new abortion laws.[48] The presence of intervenors also burdens an already overworked federal judiciary.[49] Some of the individuals and groups that have been denied intervenor status but who have been allowed to participate as amici have required elaborate responses of parties and courts.[50] This section of the Article considers the participatory options available to the federal judiciary, examines how courts actually have responded to participatory requests filed in abortion cases, and recommends an approach for treating future applications.

B. A Framework for Analyzing Participatory Possibilities

Judges asked to permit intervention in the new abortion challenges have numerous options. Courts can grant or deny intervention of right, permissive intervention, or amicus status. They also may impose appropriate conditions on any participation allowed. This subsection examines how judges have treated requests lodged

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47. *See* Diamond v. Charles, 476 U.S. 54, 68 (1986); Bethune Plaza, Inc. v. Lumpkin, 863 F.2d 525, 531 (7th Cir. 1988); New Orleans Pub. Serv. v. United Gas Pipe Line Co., 732 F.2d 452, 473 (5th Cir.), *cert. denied*, 469 U.S. 1019 (1984); 7C C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1920, at 488 (2d ed. 1986).

48. For an analysis of litigation costs and financing, public interest litigants, and resource disparities between them and other parties, see Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFFALO L. REV. 485, 495-98 (1988-89); Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C.L. REV. 745, 754-57, 765 & n.105 (1987).

49. *See* Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 287-91 (1989) (discussing "litigation explosion" and burdens civil litigation imposes on federal judiciary); *cf.* Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701 (1978) (evaluating intervention's costs to federal judiciary).

50. *See, e.g.*, Roe v. Casey, 464 F. Supp. 487, 497-502 (E.D. Pa. 1978), *aff'd*, 623 F.2d 829 (3d Cir. 1980); Klein v. Nassau County Medical Center, 347 F. Supp. 496, 498-99, 501 (E.D.N.Y. 1972), *aff'd sub nom.* Ryan v. Klein, 412 U.S. 924, *vacated sub nom.* Commissioner of Social Serv. v. Klein, 412 U.S. 925 (1973) (showing elaborate responses to arguments by guardians ad litem for "unborn children"). *Cf. A Husband Fights for Family Rights*, NAT'L L.J., March 5, 1990, at 13 (intervenors cost plaintiff $50,000 in "Baby Klein" case).

principally in public law litigation that did not involve abortion.[51]

1. Rule 24(a)(2)

Rule 24(a)(2) provides that upon timely application, anyone with an interest in the subject matter of the litigation shall be permitted to intervene if the disposition of the litigation may impair the applicant's interest, and the interest is not adequately represented by existing parties.[52] A number of courts and commentators state that applicants must satisfy all four requirements while recognizing that they are interrelated.[53] Most of the numerous judges who deny intervention enforce the conditions rather rigorously and literally, demanding that applicants clearly prove each requirement. Correspondingly, many of the significant number of courts that grant intervention apply the criteria more flexibly and pragmatically, requiring considerably less of applicants.[54] Judges, whether they read the rule narrowly or broadly, rely substantially on the provision's language, the purposes underlying the 1966 amendment, and federal intervention-of-right jurisprudence, which has been somewhat unclear.[55]

Many judges and writers have acknowledged the difficulty of precisely defining "interest" as used in Rule 24(a)(2).[56] Numerous courts that restrictively interpret the first condition require that potential intervenors have a direct, significant, legally protectable interest in the litigation's subject matter, often citing the 1971

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51. Public law litigation is a lawsuit that vindicates important social values affecting many people. Thus, abortion cases are an important form of this litigation. *See* Tobias, *supra* note 49, at 279-83 & nn. 54-82 (discussion of public law litigation).

52. *See* FED. R. CIV. P. 24(a)(2), reproduced *supra* note 2.

53. *See, e.g.*, American Nat'l Bank & Trust v. City of Chicago, 865 F.2d 144, 146 (7th Cir. 1989); 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 24.07[1], at 24-50 - 24-51 (2d ed. 1987).

54. Those viewing the rule broadly argue that the amendment's drafters contemplated more flexible, pragmatic application, while those viewing it narrowly claim that less change was envisioned. *See* Nuesse v. Camp, 385 F.2d 694, 700-01 (D.C. Cir. 1967) and Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 403-07 (1967). *But see* United States v. 36.96 Acres of Land, 754 F.2d 855, 858-59 (7th Cir. 1985), *cert. denied*, 476 U.S. 1108 (1986) and Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem,"* 92 HARV. L. REV. 664, 669-76 (1979). For a sense of the Supreme Court's unclear jurisprudence, see F. JAMES & G. HAZARD, CIVIL PROCEDURE § 10.17 (3d ed. 1985) and 7C C. WRIGHT, A. MILLER & M. KANE, *supra* note 47, § 1908, at 264-70.

55. *See supra* note 54 and sources cited therein.

56. *See, e.g.*, Smuck v. Hobson, 408 F.2d 175, 178-80 (D.C. Cir. 1969); 7C C. WRIGHT, A. MILLER & M. KANE, *supra* note 47, § 1908, at 263-88.

Supreme Court decision of *Donaldson v. United States*.[57] Some judges demand that applicants be able to state a claim for relief,[58] while an increasing number of courts requires interests equal to or exceeding those required for standing.[59] Judges rarely find that prospective intervenors have any interest in defending the constitutionality of statutes when governmental defendants are charged by law with doing so.[60] Courts that read the interest criterion expansively demand comparatively less of applicants, essentially treating interest as a minimal threshold requirement.[61] For instance, numerous judges state that the " 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."[62]

Few courts rely on the second criterion of impairment, partly because it is so closely related to interest.[63] Thus, judges who narrowly interpret Rule 24(a)(2) may not reach impairment once

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57. *See, e.g.*, New Orleans Pub. Serv. v. United Gas Pipe Line Co., 732 F.2d 452, 463 (5th Cir.), *cert. denied*, 469 U.S. 1019 (1984); Wade v. Goldschmidt, 673 F.2d 182, 185 (7th Cir. 1982); *see also* Donaldson v. United States, 400 U.S. 517, 531 (1971).

58. *See, e.g.*, Athens Lumber Co. v. Federal Election Comm'n, 690 F.2d 1364, 1366 (11th Cir. 1982) (intervenor must be at least real party in interest); Heyman v. Exchange Nat'l Bank of Chicago, 615 F.2d 1190, 1193 (7th Cir. 1980).

59. *See* United States v. 36.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985), *cert. denied*, 476 U.S. 1108 (1986) (requiring interests exceeding standing); Southern Christian Leadership Conference v. Kelley, 747 F.2d 777, 778-79 (D.C. Cir. 1984) (requiring interests equal to standing).

60. For a sense of this judicial reluctance, see American Nat'l Bank & Trust v. City of Chicago, 865 F.2d 144, 146-48 (7th Cir. 1989); Baker v. Wade, 743 F.2d 236, 240-43 (5th Cir. 1984), *rev'd on rehearing*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986); United Nuclear Corp. v. Cannon, 696 F.2d 141, 143 (1st Cir. 1982). *Cf. infra* notes 67-68 and accompanying text (invoking similar ideas in context of applying inadequate representation requirement). *But see* Washington State Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627, 629-30 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

61. *See, e.g.*, County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980); Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969). These courts often prefer to rely on the impairment or inadequate representation requirements. *See, e.g., County of Fresno*, 622 F.2d at 436; United States v. Reserve Mining Co., 56 F.R.D. 408, 418-20 (D. Minn. 1972).

62. This is Judge Leventhal's articulation in Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967). *Accord* Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 308 (9th Cir. 1989) and Sanguine, Ltd. v. United States Dep't of Interior, 736 F.2d 1416, 1420 (10th Cir. 1984).

63. *See, e.g.*, American Nat'l Bank & Trust v. City of Chicago, 865 F.2d 144, 147 (7th Cir. 1989); 7C C. WRIGHT, A. MILLER & M. KANE, *supra* note 47, § 1908, at 263. The impairment criterion has received such treatment despite a 1966 amendment adopted in response to a confusing Supreme Court opinion. *See* Proposed Amendments to Rules of Civil Procedure for the United States District Courts, FED. R. CIV. P. 24(a) advisory committee's note, 39 F.R.D. 69,109-10 (1966); 7C C. WRIGHT, A. MILLER & M. KANE, *supra* note 47, § 1908, at 301.

they conclude that applicants lack sufficient interest. Correspondingly, courts that flexibly enforce the rule, having found the requisite interest, are predisposed to considering it impaired or prefer to rely on the inadequate representation condition.[64] The few judges who depend substantially on impairment generally focus on the stare decisis effect of a judgment rendered in the applicant's absence.[65] Many courts that restrictively read the requirement find this impact insufficient, often stating that applicants can pursue separate, subsequent litigation.[66] Judges who interpret impairment broadly consider adequate the stare decisis effect, apparently concluding that subsequent litigation would rarely succeed and, even if it did, multiple litigation would be too costly for the judicial system and for applicants.[67]

If an applicant's interests may be impaired, intervention must be granted unless the interests are "adequately represented by existing parties."[68] Many judges who view Rule 24 narrowly, and even a number who do not, find governmental representation sufficient. Some courts demand that potential intervenors with purposes similar to the government show collusion between that litigant and the remaining parties, prove governmental nonfeasance, or show adversity of interest between the applicants and the government.[69] A number of judges employ a presumption of adequacy when one litigant is charged by law with representing applicants, a presumption that can be overcome only with a very compelling showing to the contrary.[70] Numerous courts that read

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64. *See* sources cited *supra* note 61.

65. *See infra* note 67 and accompanying text.

66. *See, e.g.*, Bethune Plaza, Inc. v. Lumpkin, 863 F.2d 525, 533 (7th Cir. 1988); United States v. Allegheny-Ludlum Indus., 517 F.2d 826, 845-46 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). *Cf. American Nat'l Bank & Trust*, 865 F.2d at 148; *Bethune Plaza*, 863 F.2d at 533 (stare decisis effect not sufficient when amicus curiae participation would suffice).

67. *See, e.g.*, United States v. Stringfellow, 783 F.2d 821, 826-27 (9th Cir.), *cert. granted in part*, Stringfellow v. Concerned Neighbors in Action, 476 U.S. 1157, *cert. dismissed*, 478 U.S. 1030, *motion granted*, 478 U.S. 1047 (1986), *vacated*, 480 U.S. 370 (1987); Natural Resources Defense Council v. Costle, 561 F.2d 904, 910-11 (D.C. Cir. 1977), *later proceeding*, Environmental Defense Fund v. Costle, 636 F.2d 1229 (D.C. Cir. 1980).

68. FED. R. CIV. P. 24(a)(2). The treatment in this paragraph is tailored to the contexts the anticipated abortion litigation is likely to present.

69. *See, e.g.*, Hoots v. Pennsylvania, 672 F.2d 1133, 1135 (3d Cir. 1982); Liddell v. Caldwell, 546 F.2d 768, 771 (8th Cir. 1976).

70. *See, e.g.*, United States v. City of Philadelphia, 798 F.2d 81, 90 (3d Cir. 1986); Lelsz v. Kavanaugh, 98 F.R.D. 11, 16-17 (E.D. Tex. 1982), *appeal dismissed*, 710 F.2d 1040 (5th Cir. 1983), *later proceeding*, 807 F.2d 1243 (5th Cir. 1987). The presumption is peculiarly applicable in litigation challenging statutes' constitutionality. *See, e.g.*, American Nat'l Bank & Trust v. City of Chicago, 865 F.2d 144, 148 (7th Cir. 1989); United Nuclear Corp. v. Cannon, 696 F.2d 141, 144 (1st Cir. 1982).

the Rule expansively use more lenient tests of inadequacy and require less of applicants, scrutinizing closely their interests and the litigants' interests. For example, when judges discern any possibility of conflict between them, representation is found insufficient.[71] Some courts invoke the Supreme Court's pronouncement in *Trbovich v. United Mine Workers*:[72] An applicant must only prove that "representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal."[73]

Rule 24(a)(2) also requires "timely application," a command on which the accompanying advisory committee note is silent.[74] The Supreme Court has directed that the timeliness inquiry focus on "all the circumstances."[75] The lower courts have developed numerous criteria to determine timeliness. Most important are how long applicants knew or reasonably should have known of their interests before petitioning, the injury to them should intervention be denied, and prejudice to existing parties attributable to delayed application.[76] Judges who treat the condition narrowly emphasize harm to litigants, often scrutinizing the reasons proffered for delay, any significant passage of time, and applicant prejudice.[77] Courts that are more flexible about timeliness stress harm to applicants and view sympathetically their excuses for delay while evincing less concern about party prejudice and the passage of time.[78]

Courts resolving intervention requests also invoke numerous policies derived from sources other than the language of the Rule's four requirements.[79] Some judges candidly acknowledge that Rule 24(a)(2) has a discretionary dimension. These judges clearly exercise

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71. *See, e.g., Stringfellow*, 783 F.2d at 827-28; Sanguine, Ltd. v. United States Dep't of Interior, 736 F.2d 1416, 1419 (10th Cir. 1984).

72. 404 U.S. 528 (1972).

73. *Trbovich*, 404 U.S. at 538 n.10. *See, e.g., Stringfellow*, 783 F.2d at 827; Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983), *later appeal sub nom.* Sagebrush Rebellion, Inc. v. Hodel, 790 F.2d 760 (9th Cir. 1986).

74. *See* FED. R. CIV. P. 24(a)(2) advisory committee's note.

75. NAACP v. New York, 413 U.S. 345, 366 (1973).

76. *See, e.g.*, Gould v. Alleco, Inc., 883 F.2d 281, 286 (4th Cir. 1989); County of Orange v. Air California, 799 F.2d 535, 537 (9th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987); Garrity v. Gallen, 697 F.2d 452, 455 (1st Cir. 1983).

77. *See, e.g.*, United States v. Metropolitan Dist. Comm'n, 865 F.2d 2, 5-6 (1st Cir. 1989); Lelsz v. Kavanaugh, 98 F.R.D. 11, 24-25 (E.D. Tex. 1982), *appeal dismissed*, 710 F.2d 1040 (5th Cir. 1983), *later proceeding*, 807 F.2d 1243 (5th Cir. 1987). *Cf. Garrity*, 697 F.2d at 458 (undue expenditures of judicial resources relevant factor).

78. *See, e.g.*, Grubbs v. Norris, 870 F.2d 343, 345-46 (6th Cir. 1989); Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989).

79. *See infra* notes 80-82 and accompanying text.

that discretion even though the provision's phrasing is mandatory in contrast to that of Rule 24(b), which is explicitly addressed to judicial discretion.[80] While courts could be criticized for applying policies drawn from sources external to the Rule and for injecting discretionary elements into what is ostensibly a compulsory determination, the express and implicit judicial reliance on these policies warrants their examination.

Judges who interpret the Rule restrictively rely substantially on the policies that come under the rubric of prejudice to existing parties. Such concerns include the litigants' rights to control their own lawsuits and the resources they would have to devote to the participation of intervenors.[81] Related policies implicate effective judicial case management and considerations of judicial economy for overburdened courts. Judges who broadly read Rule 24 rely most on prejudice to applicants. They also find important the applicants' potential contributions to issue resolution—in terms of expertise, the submission of new information, the introduction of questions litigants did not raise, and the adoption of different perspectives on issues in dispute—and corresponding improvements in judicial decisionmaking that the input might foster.[82] Moreover, courts may want to afford applicants an opportunity to be heard, or they may be concerned about governmental accountability or public acceptance of governmental decisionmaking.[83]

2. Rule 24(b)(2)

Applicants typically seek in the alternative permissive intervention under Rule 24(b)(2). This subsection provides that upon timely application, a court may allow intervention "when an applicant's

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80. *See, e.g.*, United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 991 & n.20 (2d Cir. 1984); Smuck v. Hobson, 408 F.2d 175, 178 (D.C. Cir. 1969); 7C C. WRIGHT, A. MILLER & M. KANE, *supra* note 47, § 1913, at 375-76.

81. The most comprehensive judicial exposition of these policies is in the *Hooker Chemicals* opinion. *Cf.* Bethune Plaza, Inc. v. Lumpkin, 863 F.2d 525, 531 (7th Cir. 1988) (providing additional valuable analysis). For additional treatment, see *supra* notes 48-49 and accompanying text; 3B J. KENNEDY & J. MOORE, *supra* note 53, at 24-51 - 24-52.

82. *See, e.g.*, United States v. 36.96 Acres of Land, 754 F.2d 855, 860-62 (7th Cir. 1985) (Cudahy, J., dissenting), *cert. denied*, 476 U.S. 1108 (1986); and Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983), *later appeal sub nom.* Sagebrush Rebellion, Inc. v. Hodel, 790 F.2d 760 (9th Cir. 1986).

83. *See, e.g.*, American Nat'l Bank & Trust v. City of Chicago, 865 F.2d 144, 148-49 (7th Cir. 1989) (Cudahy, J., concurring); New Orleans Pub. Serv. v. United Gas Pipe Line Co., 732 F.2d 452, 473-75 (5th Cir.) (Williams, J., dissenting), *cert. denied*, 469 U.S. 1019 (1984). The public acceptance and accountability ideas have considerable applicability to legislative branch decisionmaking, although they have greater application to administrative agency decisionmaking. *See* Tobias, *supra* note 49, at notes 342-44 and accompanying text.

claim or defense and the main action have a question of law or fact in common," a requirement that has not changed since 1938.[84] Rule 24(b) leaves the determination to the district judge's discretion but prescribes one factor to guide its exercise: whether "intervention will unduly delay or prejudice" adjudication of the parties' rights.[85]

Several considerations complicate the analysis of Rule 24(b) judicial decisionmaking. One is its highly discretionary nature. Another is that precedent is unhelpful, because courts respond to the peculiar factors before them in each case.[86] Moreover, most judicial treatment is very terse. Courts often do not mention the Rule's requirements or offer any justification, even allowing resolution to go unreported. Nevertheless, it is possible to provide an account of permissive intervention decisionmaking premised on available sources.

Many courts that deny intervention of right also reject permissive intervention, especially when applicants lack a Rule 24(a)(2) interest.[87] Correspondingly, some courts state that the common question of law or fact criterion requires an interest that would substantiate a legal claim or defense.[88] Judges employ such approaches even though the absence of the term "interest" from Rule 24(b)(2) suggests that an "interest" requirement may be inadvisable.[89] Even

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84. *See* FED. R. CIV. P. 24(b)(2). *Cf.* 7C C. WRIGHT, A. MILLER & M. KANE, *supra* note 47, § 1911, at 355-56 (provision unchanged but affected by significant 1966 amendment of Rule 24(a)(2)). The timeliness requirement is treated similarly to that for Rule 24(a)(2). *See, e.g., In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1023 (D. Mass.), *later proceeding*, 716 F. Supp. 676 (D. Mass. 1989); Garrity v. Gallen, 697 F.2d 452, 455 (1st Cir. 1983).

85. FED. R. CIV. P. 24(b)(2); United States Postal Serv. v. Brennan, 579 F.2d 188, 191-92 (2d Cir. 1978); 7C C. WRIGHT, A. MILLER & M. KANE, *supra* note 47, § 1913, at 375-79 (broad district court discretion guided by factor characterized as "principal consideration").

86. *See* 7C C. WRIGHT, A. MILLER & M. KANE, *supra* note 47, § 1911, at 393.

87. *See, e.g.*, League of United Latin Am. Citizens v. Clements, 884 F.2d 185, 187-89 (5th Cir. 1989); *New Orleans Pub. Serv.*, 732 F.2d at 463-73.

88. *See, e.g.*, Wade v. Goldschmidt, 673 F.2d 182, 186-87 (7th Cir. 1982); True Gun-All Equip. Corp. v. Bishop Int'l Eng'g. Co., 26 F.R.D. 150, 151 (E.D. Ky. 1960). *Cf.* Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326, 1329 (9th Cir. 1977) (nature and extent of applicant's interest relevant factors).

89. *See* 7C C. WRIGHT, A. MILLER & M. KANE, *supra* note 47, § 1911, at 356-58. The Supreme Court may have created some confusion by stating that Rule 24(b) "plainly dispenses" with any requirement of a direct pecuniary or personal interest but that it demands an interest that would support a legal defense or claim based on the interest. *See* SEC v. United States Realty & Improvement Co., 310 U.S. 434, 459-60 (1940). *Accord* Diamond v. Charles, 476 U.S. 54, 76 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

when there is a common question of law or fact, courts can and do rely on their substantial discretion to deny permissive intervention.

Judges, in exercising this discretion, frequently take into account numerous considerations, some of which are explicitly included in Rule 24(a)(2) or comprise its underlying policies.[90] Courts denying permissive intervention treat as paramount the Rule's expressly stated concern about party prejudice, or they find that prejudice and other factors, including judicial economy, warrant denial.[91] Courts granting permissive intervention are persuaded by other factors, including the applicants' need to participate or their potential contributions to the case's thorough factual development or to the fair adjudication of pertinent legal issues.[92] These courts may find applicant prejudice dispositive or that it and other factors are overriding. Even when the applicants' participation might delay or prejudice the parties' rights, neither the delay nor prejudice is considered "undue."[93]

3. Amicus Curiae

When courts deny intervention of right or permissive intervention, they may allow amicus curiae involvement. They often seem more willing to grant amicus than party status.[94] Judges rarely provide any explanation for permitting or rejecting amicus participation and occasionally invite such involvement sua sponte. An amicus does not become a party to the litigation, is unable to present claims or defenses in the suit, and lacks appellate rights.[95]

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90. *Compare* Rule 24(a)(2)'s requirements, discussed *supra* notes 52-83 and accompanying text, *with* the requirements listed in United States Postal Serv. v. Brennan, 579 F.2d 188, 191-92 (2d Cir. 1978); *Spangler*, 552 F.2d at 1329; *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1023 (D. Mass.), *later proceeding*, 716 F. Supp. 676 (D. Mass. 1989).

91. *See, e.g.*, Bush v. Viterna, 740 F.2d 350, 359 (5th Cir. 1984) (amicus participation more expeditious when applicant presents no new legal questions); Lelsz v. Kavanaugh, 98 F.R.D. 11, 26 (E.D. Tex. 1982), *appeal dismissed*, 710 F.2d 1040 (5th Cir. 1983), *later proceeding*, 807 F.2d 1243 (5th Cir. 1987).

92. For a thorough recent example, see *Acushnet*, 712 F. Supp. at 1023-26.

93. *See, e.g.*, Natural Resources Defense Council v. Tennessee Valley Auth., 340 F. Supp. 400, 408 (S.D.N.Y. 1971), *rev'd on other grounds*, 459 F.2d 255 (2d Cir. 1972) (applicant's expertise helpful and participation would not delay or prejudice defendants).

94. This is true of certain judges whose opinions were analyzed above. *See, e.g.*, *Lelsz*, 98 F.R.D. at 26; Roe v. Casey, 464 F. Supp. 483, 487 (E.D. Pa. 1978). *Cf.* 7C C. WRIGHT, A. MILLER & M. KANE, *supra* note 47, § 1913, at 392 (if intervention is denied, the common practice is to allow amicus participation, but even that is sometimes denied). *See generally* Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963).

95. *See* Krislov, *supra* note 94, at 703, 717-18; 13 J. MOORE, H. BENDIX & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 836.03 (2d ed. 1986).

The grant is completely discretionary; courts may ignore, and frequently do not respond in opinions to, amici submissions. These considerations mean that amicus participation minimizes intervention's disadvantages, such as the risks of prolonging litigation, while affording many of its benefits. For instance, judges can glean most of applicants' potential contributions to issue resolution, especially on legal questions, and provide them some opportunity to be heard.[96]

4. Conditioning Participation

Those applicants allowed to participate as intervenors or even as amici can complicate the issues to be resolved, delay the prompt disposition of litigation, and impose significant costs on the original parties and the judicial system. The advisory committee note to Rule 24(a)(2) states, however, that a grant of "intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."[97] Many judges have recognized the validity and value of structuring participation, and numerous courts have imposed conditions on intervenor and amicus involvement.[98] For example, they have required closely aligned individuals or groups to participate through a single representative.[99] Judges also have restricted the participants in terms of their status, the claims and issues they could raise, the procedures they could invoke, and the stages of proceedings in which they could participate.[100]

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96. The potential benefits and reduced risks of amicus participation probably explain courts' greater willingness to grant it.

97. FED. R. CIV. P. 24(a) advisory committee's note.

98. *See* Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 377-78 (1987) (Brennan, J., concurring) (validity of structuring both types of intervention); United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 991-93 (2d Cir. 1984) (validity of structuring intervention of right and citations to cases doing so); 7C C. WRIGHT, A. MILLER & M. KANE, *supra* note 47, § 1922, at 502-05 (validity of structuring both types of intervention).

99. A valuable example is United States v. Reserve Mining Co., 56 F.R.D. 408, 420 (D. Minn. 1972), *later proceeding*, 380 F. Supp. 11 (D. Minn.), *remanded*, 498 F.2d 1073 (8th Cir. 1974). *Cf.* Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 578 F.2d 1341, 1345-46 (10th Cir. 1978).

100. For examples of the type of restrictive conditions that can be imposed, see *Stringfellow*, 480 U.S. at 373, and *Hooker Chems.*, 749 F.2d at 991-93. *Cf. In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1022-23 (D. Mass.), *later proceeding*, 716 F. Supp. 676 (D. Mass. 1989) (self-imposed conditions to insure permissive intervention granted).

In short, when plaintiffs challenge restrictive abortion regulation, abortion opponents have several means of seeking to participate in the litigation, and the federal judiciary will have numerous ways of responding. The responses of courts to applications submitted in cases identical or analogous to the anticipated abortion cases are analyzed below.

C. Judicial Treatment of Requests To Participate in Abortion Litigation

The courts' responses to participatory requests can be difficult to ascertain. Discerning what some courts have done is impossible, because their decisions have not been reported. For example, courts have resolved applications on motion, in memorandum opinions, or from the bench. When courts' determinations appear in the federal reporter system or are otherwise available, judicial treatment can be quite terse, providing minimal explanation or failing to mention disposition.[101]

Nevertheless, it is possible to offer an account of courts' resolution of participatory requests by consulting the numerous decisions that have been reported or are otherwise available.[102] These sources indicate that a majority of courts has refused to permit intervention of right, although a significant number of judges has granted such intervention or allowed permissive intervention. More courts have permitted amicus curiae participation.[103]

1. Judicial Treatment Denying Participation

Numerous courts rejecting requests to participate have offered comparatively thorough explanations for their determinations, perhaps attempting to justify the denials.[104] Judges rejecting petitions

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101. For example, "[t]he District Court did not indicate whether the intervention was permissive or as of right and it did not describe how Diamond's interests" satisfied the requirements of Rule 24. Diamond v. Charles, 476 U.S. 54, 58 (1986). *Cf.* Keith v. Daley, 764 F.2d 1265, 1268 (7th Cir.), *cert. denied*, 474 U.S. 980 (1985) (district judge denied intervention motion without written opinion).

102. This account is premised on determinations that appeared in the federal reporter system or were available on LEXIS since 1975 and, thus, could be skewed by inaccessible decisionmaking. *Cf.* Tobias, *Rule 11 and Civil Rights Litigation*, *supra* note 48, at 489-91 (similar methodology and cautions in context of analyzing decisionmaking involving Rule 11 sanctions).

103. These obviously are approximations and subject to the caution mentioned *supra* note 102.

104. These courts appear more willing than judges granting requests to reduce to written form and to report their determinations, which also are more expansive. *See infra* notes 146-59 and accompanying text.

to intervene of right generally have found that applicants lacked sufficient interest in the subject matter of the litigation and that, even if they possessed the requisite interest, the governmental defendants were adequate representatives.[105] In exercising their substantial discretion to deny permissive intervention, courts generally have determined that the applicants' defenses lacked any question of law or fact in common with the main action, and that if there were such a question, the prejudice to existing parties, or prejudice and other factors, outweighed the need for intervention.[106]

The Seventh Circuit case of *Keith v. Daley*[107] is similar to the anticipated abortion litigation. It affords the most comprehensive federal court examination of the relevant issues and exemplifies much pertinent judicial treatment. The majority and concurring Supreme Court opinions in the closely related case of *Diamond v. Charles*,[108] discussed earlier, also offer insight into likely judicial treatment of procedural issues in future abortion litigation.

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105. There is an important conceptual link between the two requirements in the context of abortion. *Compare supra* note 60 and accompanying text *with supra* notes 70-73 and accompanying text.

106. Courts seem to recite a standard litany. *See, e.g., infra* notes 123-25, 143-44 and accompanying text. I found no opinions explicitly denying amicus participation, while many courts rejecting intervention granted amicus status or suggested it was appropriate. *See, e.g.*, Diamond v. Charles, 476 U.S. 54, 78 (1986) (O'Connor, J., concurring in part and concurring in the judgment); Keith v. Daley, 764 F.2d 1265, 1268 (7th Cir.), *cert. denied*, 474 U.S. 980 (1985); Roe v. Casey, 464 F. Supp. 483, 487 (E.D. Pa. 1978). The overwhelming majority of courts has rejected applicants' requests to be appointed guardian ad litem for "unborn children." *See, e.g., Roe*, 464 F. Supp. at 486-87 (unborn children not persons with a legally protectable interest within meaning of Rule 24(a)(2) and the appointment of guardians *ad litem* neither warranted nor required). More terse rejections are reported in *Diamond*, 476 U.S. at 58; Center for Reproductive Health v. City of Akron, 604 F. Supp. 1268, 1272 & n.4 (N.D. Ohio 1984); Wynn v. Scott, 448 F. Supp. 997, 1000 (N.D. Ill.), *appeal dismissed sub nom.* Carey v. Wynn, 439 U.S. 8 (1978), *aff'd*, 599 F.2d 193 (7th Cir. 1979). *Cf.* Turnock v. Ragsdale, 110 S. Ct. 38 (denial of motion for leave to represent children unborn and born alive), *motion granted*, 110 S. Ct. 532 (1989); McRae v. Mathews, 421 F. Supp. 533, 542 (E.D.N.Y. 1976) (responding to guardian petition by granting intervention to make contentions for "unborn class" but rejecting substantive arguments), *appeal dismissed sub nom.* Buckley v. McRae, 433 U.S. 916, *vacated sub nom.* Califano v. McRae, 433 U.S. 916 (1977). *But see* Klein v. Nassau County Medical Center, 347 F. Supp. 496, 498 (E.D.N.Y. 1972), *aff'd sub nom.* Ryan v. Klein, 412 U.S. 924, *vacated sub nom.* Commissioner of Social Serv. v. Klein, 412 U.S. 925 (1973) (permitting participation by guardian ad litem for "unborn children").

107. 764 F.2d at 1265.

108. 476 U.S. at 54. The interests applicants asserted in *Keith* and *Diamond* encompass nearly all of the plausible interests that are likely to be alleged in the anticipated abortion litigation. *See generally infra* note 127 and accompanying text.

In *Keith*, doctors who performed abortions challenged the constitutionality of restrictive Illinois legislation.[109] The Illinois Pro-Life Coalition (IPC), a nonprofit organization that advocated the measure throughout its consideration in the statehouse, sought to intervene of right and permissively on the side of the governmental defendants. The district judge denied both requests and the Seventh Circuit affirmed those determinations.[110]

The appellate court, in addressing Rule 24(a)(2), stated that a prospective intervenor must have a "direct, significant and legally protectable interest in the property at issue," an interest premised on the applicant's own right, not that of existing parties, and one so direct that it would support a claim for relief.[111] The circuit panel then reviewed all of the interests IPC asserted to determine if any met its "direct and substantial interest" test.[112]

The court found insufficient IPC's interests as the chief lobbyist for the disputed legislation, its role in promoting restrictive abortion measures, and its need to insure the enactments' proper defense when attacked.[113] The appellate judges characterized IPC's purpose as "essentially communicative and persuasive" and encouraged the "lobbyist" to exercise its first amendment rights to persuade others, observing that "such a priceless right to free expression, however, does not also suggest that IPC has a right to intervene in every lawsuit involving abortion rights, or to forever defend statutes it helped to enact."[114] The court added that the governmental officials charged with defending or enforcing the legislation could be the only defendants in the litigation, implying that they alone had sufficient interests.[115] Moreover, the panel rejected as "far too speculative" for intervention the Coalition's assertion of its members' interest in adopting fetuses surviving abortion.[116] The court summarily dismissed IPC's contention that the interest requirement must be broadly interpreted in public law

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109. 764 F.2d at 1267.

110. *Id.* The trial court granted IPC amicus status, "stating that it would carefully consider 'any briefs'" IPC filed. *Id.* at 1268.

111. *Id.*

112. *Id.* at 1268-72.

113. *Id.* at 1269.

114. *Id.* at 1270. *Cf.* Fox Valley Reproductive Health Care Center v. Arft, 82 F.R.D. 181, 182 (E.D. Wis. 1979), *appeal dismissed*, 622 F.2d 590 (7th Cir. 1980) (voters may not claim significantly protectable interest in every ordinance they support so as to entitle them to intervene of right in cases challenging its constitutionality). *Accord* Fox Hill Surgery Clinic v. Overland Park, No. 77-4120, Slip op. at 3 (D. Kan. Nov. 9, 1977).

115. *Keith*, 764 F.2d at 1269.

116. *Id.* at 1271. The panel also found insufficient IPC's interest in protecting "'unborn' children," observing that the "state alone . . . can assert an interest in the unborn." *Id.*

litigation when public interest groups seek to intervene, proclaiming that "Rule 24(a) precludes a conception of lawsuits, even 'public law' suits, as necessary forums for such public policy debates" as those involving abortion.[117]

The panel, in holding that IPC lacked the requisite interest, purported to discuss only that requirement, but it also referred to the three other criteria included in Rule 24(a).[118] The appeals court stated that the IPC had failed to satisfy the Rule's third command because the defendants were adequately representing the organization.[119] The court rejected IPC's suggestions that the governmental defendants lacked its "conviction and thorough knowledge of the subject area" and that a subjective comparison of applicants' and defendants' commitment to the litigation was the proper test.[120] The panel stated that "adequacy can be presumed when the party on whose behalf the applicant seeks intervention is a governmental body or officer charged by law with representing" the movants' interests,[121] emphasizing that it need not rely solely on the presumption, as the record indicated sufficient representation, and IPC had made no contrary allegations.[122]

The circuit court's affirmance of the district judge's denial of permissive intervention was comparatively terse. It observed that the decision is entrusted to the trial court's discretion and that the determination would be reversed only for an abuse of discretion.[123] The circuit panel stated that the district judge rejected permissive intervention because IPC lacked a "direct claim or right" in the

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117. *Id.* at 1268, 1270. *Accord Arft*, 82 F.R.D. at 182. *Cf.* Roe v. Casey, 464 F. Supp. 483, 486 (E.D. Pa. 1978) (similar general treatment of interest in context of abortion funding challenge); *Overland Park*, Slip op. at 5 (same treatment of abortion ordinance challenge).

118. The panel found timeliness satisfied and only alluded to impairment in analyzing interest and inadequate representation, adding that applicants have the burden of proving all four requirements. *See Keith*, 764 F.2d at 1268. *Cf. Overland Park*, Slip op. at 7-9 (helpful treatment of timeliness and impairment in context of abortion ordinance challenge); Bossier City Medical Suite, Inc. v. Bossier City, 483 F. Supp. 633, 642-43 (W.D. La. 1980) (similar treatment of timeliness, weighing prejudice to existing parties against prejudice to applicant).

119. 764 F.2d at 1270.

120. *Id.*

121. *Id.*

122. *Id. Cf.* Wynn v. Scott, 448 F. Supp. 997, 1000 (N.D. Ill.), *appeal dismissed sub nom.* Carey v. Wynn, 439 U.S. 8 (1978), *aff'd*, 599 F.2d 193 (7th Cir. 1979) ("no doubt as to the adequacy of the representation" defendant state and county officials would provide); *Overland Park*, Slip op. at 10-12 (governmental expertise relevant factor in deciding adequacy of representation in abortion ordinance challenge).

123. *Keith*, 764 F.2d at 1272.

litigation and to prevent undue delay or prejudice to the parties.[124] The Court found that discretion had not been abused.[125]

The Supreme Court opinions in *Diamond*[126] are also pertinent to the intervention issues the abortion litigation will raise,[127] even though *Diamond* differs from *Keith* in certain respects. The concurring justices determined that Dr. Diamond, who asserted somewhat different interests from IPC but was permitted to intervene below, had not been a proper intervenor.[128] The majority did not resolve that issue or more specifically, whether such an applicant must possess standing, although it did make observations relevant to those issues in determining whether Dr. Diamond's interests could support a Supreme Court appeal in the defendants' absence.[129] Dr. Diamond's interests were identical to or resembled those that have been and will be asserted in many abortion cases.

In *Diamond*, physicians who performed abortions attacked the constitutionality of the 1979 Illinois Abortion Law.[130] Dr. Diamond premised his intervention motion on conscientious objection to abortions as well as his status as a pediatrician and as the father of an unemancipated minor girl.[131] The district judge, in granting the petition, neither described the type of intervention allowed nor explained how the physician's interests satisfied Rule 24.[132] The intervenor alone appealed to the Supreme Court,[133] after trial and appellate courts had permanently enjoined several provisions of the abortion statute.[134] The majority dismissed the appeal for want of jurisdiction in the state's absence, because Dr. Diamond lacked any judicially cognizable interest in the legislation.[135]

Although the Court relied on the intervenor's lack of standing and explicitly refrained from deciding whether an applicant seeking to intervene in a district court must have standing, the majority's observations, especially regarding Diamond's claimed interests, are

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124. *Id.*

125. *Id. Cf. Overland Park*, Slip op. at 13 (terse denial of permissive intervention for "same reasons" as intervention of right).

126. 476 U.S. 54 (1986).

127. See *id. See generally supra* note 108.

128. 476 U.S. at 71-78 (O'Connor, J., concurring in part and concurring in the judgment).

129. *Id.* at 61-71.

130. *Id.* at 57.

131. *Id.* at 57-58.

132. *Id.* at 58; *see also supra* note 101.

133. 476 U.S. at 56.

134. *Id.* at 58-61.

135. *Id.* at 71.

instructive.[136] The Court found insufficient Dr. Diamond's asserted interest in the legislation's enforcement because private citizens lack any judicially cognizable interest in the state's prosecution of others.[137] It also characterized as speculative his claim that as a physician he would have more fee-paying patients if the statute were enforced.[138] Moreover, the majority rejected standing premised on parenthood principally because Dr. Diamond had not shown that his daughter was a minor or could not pursue her own rights.[139]

Justice O'Connor, writing a concurrence in which Chief Justice Burger and Justice Rehnquist joined, stated that Dr. Diamond had been improperly permitted to intervene below.[140] She found that his alleged interests fell "well outside the ambit of Rule 24(a)(2)" as elaborated in pertinent case law, which requires a "direct and concrete interest that is accorded some degree of legal protection."[141] The concurrence characterized the "abstract interests advanced [as] less 'significantly protectable' than the interest" considered deficient in *Donaldson v. United States* and emphasized that "only the State has a 'significantly protectable interest'" in defending the standards of its criminal code.[142]

Justice O'Connor also determined that Dr. Diamond had failed to meet the requirement of Rule 24(b) that his asserted defense have a question of law or fact in common with the principal action.[143] She observed that the operative language requires an "interest sufficient to support a legal claim or defense" founded on the interest and that Dr. Diamond proffered "no actual, present

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136. The majority stated: "We need not decide today whether a party seeking to intervene before a district court must satisfy . . . the requirements of Art. III." *Id.* at 68-69. The majority's observations may be compelling for courts that apply the interest requirement strictly, but they also may help to define interest for judges who enforce the criterion more leniently. *See infra* text accompanying notes 173-77.

137. 476 U.S. at 64-65.

138. *Id.* at 66. The Court also rejected Dr. Diamond's claim that as a physician he had standing to litigate the medical standards that ought to be applied in the performance of abortions: "Diamond has an interest, but no direct stake, in the abortion process. . . . Similarly, Diamond's claim of conscientious objection to abortion does not provide a judicially cognizable interest." *Id.* at 67.

139. *Id.* The Court also rejected Dr. Diamond's claim of standing to assert the rights of unborn fetuses as his prospective patients: "Nor can Diamond assert any constitutional rights of the unborn fetus. Only the State may invoke regulatory measures to protect that interest, and only the State may invoke the power of the courts when those regulatory measures are subject to challenge." *Id.*

140. *Id.* at 71 (O'Connor, J., concurring in part and concurring in the judgment).

141. *Id.* at 74-75.

142. *Id.* at 75-76.

143. *Id.* at 76-77.

interest" enabling him to litigate or be sued in a lawsuit sharing common questions with the case he sought to enter.[144]

2. Judicial Treatment Granting Participation

Analyzing the reasoning of courts that have permitted participation is considerably more difficult. Many decisions apparently go unreported, and the available opinions can be cryptic. For example, some courts granting intervention have not stated whether it is of right or permissive.[145] Others have provided only minimal explanation for the decisions, failing even to mention Rule 24's requirements, much less how they were satisfied.[146] Nonetheless, it is possible to glean a sense of judicial treatment by examining the available sources.[147]

Most courts allowing intervention of right have applied Rule 24 flexibly and pragmatically. For example, one circuit judge urged that the interest requirement be expansively interpreted in public law litigation and considered adequate the applicants' "interest in adopting live-born fetuses" because it implicated "fundamental issues . . . of life and death."[148] The judge refused to demand that they possess standing or have interests sufficient to be parties.[149]

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144. *Id.* Justice O'Connor stated that the requirement had remained identical since 1938 and that the "words 'claim or defense' manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit . . . ." *Id. Cf.* Fox Valley Reproductive Health Care Center v. Arft, 82 F.R.D. 181, 183 (E.D. Wis. 1979), *appeal dismissed*, 622 F.2d 590 (7th Cir. 1980) ("lack of clear legal dispute between applicants and plaintiffs" precludes finding that "claim or defense is truly in common with legal or factual issues raised" by principal claim and defense).

145. *See supra* note 101 and accompanying text.

146. *Diamond* is the best example. *See supra* note 101. There are, however, numerous others. *See, e.g.*, Women's Community Health Center v. Cohen, 477 F. Supp. 542, 544 (D. Me. 1979); Wynn v. Scott, 448 F. Supp. 997, 1000 (N.D. Ill.), *aff'd sub nom.* Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978), *later appeal*, 599 F.2d 193 (7th Cir. 1979).

147. I rely on the same sources as are mentioned *supra* note 102, although the treatment is more general rather than focusing on two major cases. The slightly altered factual contexts may explain the results in some cases below. *See, e.g.*, Planned Parenthood v. Citizens for Community Action, 558 F.2d 861, 869 (8th Cir. 1977) (applicants' property interest asserted in context of abortion ordinance challenge is the "most elementary type of right" Rule 24 protects); Planned Parenthood Ass'n v. Kempiners, 531 F. Supp. 320, 323 (N.D. Ill. 1981) (similar treatment of interests of entity providing pregnancy counseling and referral services supported by challenged statute), *vacated*, 700 F.2d 1115 (7th Cir. 1983). *But see* Fox Hill Surgery Clinic v. Overland Park, No. 77-4120, slip op. (D. Kan. Nov. 9, 1977).

148. Keith v. Daley, 764 F.2d 1265, 1273 (7th Cir.) (Cudahy, J., concurring), *cert. denied*, 474 U.S. 980 (1985).

149. *Id.* at 1272-73 (Cudahy, J., concurring). *Cf.* Wynn v. Carey, 599 F.2d 193, 196 (7th Cir. 1979) (no persuasive authority suggests intervening defendant's appeal may be

Courts have accorded little consideration to the impairment requirement. They seem to find it easily satisfied, apparently recognizing that a judgment on the constitutional issues would clearly impair applicants' interests.[150]

Most judges permitting intervention have been willing to employ tests of inadequate representation and corresponding burdens of proof that are relatively solicitous of applicants. When scrutinizing applicants' interests and those of the government, the courts have found sufficient any apparent conflicts or deficiencies. Judges have invoked the Supreme Court's comparatively liberal articulation of insufficiency and what must be shown while ignoring the presumption that governmental defendants are adequate representatives.[151] These courts virtually never mention timeliness, apparently because abortion opponents' strong interest in restrictive legislation led them to seek intervention soon after the litigation's commencement. Insofar as timeliness entered the judges' decisionmaking, they probably considered that prejudice to applicants and their potential contributions to issue resolution outweighed harm to parties or the judicial system.

Courts allowing intervention also have relied expressly or implicitly on policy concepts that underlie or implicate Rule 24 or are exogenous to it. For instance, one judge found significant the magnitude of an applicant's expertise in, and commitment to, the abortion question while arguing that its involvement would not encumber, but clearly further, the "public interest in wise resolution of difficult and important issues presented."[152] Other courts apparently wanted to secure diverse viewpoints, garner information that might improve judicial decisionmaking, or afford those who expended resources lobbying an opportunity to be heard, especially on an issue as controversial and volatile as abortion.[153]

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dismissed for lack of standing; proper analysis to test whether defendant has sufficient interest to appeal is whether court abused discretion in permitting intervention); *Citizens for Community Action*, 558 F.2d at 869 (interest in maintaining property values by defending ordinance imposing moratorium on construction of abortion facilities sufficient).

150. The federal judiciary will be extremely reluctant to reconsider any constitutional issues, and a ruling on an abortion statute's constitutionality will be given weighty effect even if the prospect of multiple litigation is not strong. *See supra* note 67 and accompanying text. *See also Citizens for Community Action*, 558 F.2d at 869 (potential erosion of property values in context of abortion ordinance challenge is sufficient impairment).

151. The best example is *Citizens for Community Action*, 558 F.2d at 869-70.

152. *See Keith*, 764 F.2d at 1273 (Cudahy, J., concurring).

153. These factors may well have influenced courts whose decisionmaking is inaccessible or terse. They also may have led one court to premise intervention in an abortion funding challenge by members of Congress on their citizen-taxpayer status. *See* McRae v. Mathews, 421 F. Supp. 533, 540 (E.D.N.Y. 1976), *appeal dismissed sub nom.* Buckley v. McRae,

The federal judiciary has provided practically no explanation for grants of permissive intervention or amicus status. Courts allowing permissive intervention seemingly found that applicants' asserted defenses shared common questions with the principal action and that their need to participate was more important than prejudice to the litigants or harm to the judicial process. Although amicus participation is the preferred form of involvement in abortion litigation, courts have rarely explained the grants, perhaps deeming it unnecessary as their decisionmaking is wholly discretionary.[154] Amicus participation enables courts to secure most benefits the applicants might provide while reducing the potential disadvantages, namely delay, that party status entails.[155]

One significant aspect of judicial determinations allowing involvement has been some courts' willingness to impose conditions on the grant of participation. The *Akron* litigation, discussed earlier, affords a helpful example.[156] The district judge, perhaps aware of the possible complications of intervention, permitted the applicants to intervene only in their " '. . . individual capacity as parents of unmarried minor daughters of child-bearing age' " and not as guardians ad litem for "unborn children" or "infants born alive as the result of legal abortion."[157] The court limited the scope of intervention, restricting trial involvement, for example, to direct evidence and cross-examination pertaining to the intervenors' claims as parents.[158] "With regard to any other issues, intervenor-defendants' participation was limited to submission of amicus curiae briefs." [159]

In short, some courts have permitted participation by individuals and groups seeking to defend restrictive abortion legislation against attack. Successful applicants have prolonged the resolution of litigation, displacing the original defendants in some lawsuits and

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433 U.S. 916, *vacated sub nom.* Califano v. McRae, 433 U.S. 916 (1977). *But see* Roe v. Casey, 464 F. Supp. 483, 486 (E.D. Pa. 1978) (taxpayer status held too indirect and remote to support intervention).

154. Even courts that seem the least amenable to granting intervention often welcome amicus participation. *See, e.g., Keith*, 764 F.2d at 1268; *Casey*, 464 F. Supp. at 487. *See supra* text accompanying note 103.

155. *See supra* note 96 and accompanying text.

156. Akron Center for Reproductive Health v. City of Akron, 604 F. Supp. 1268 (N.D. Ohio 1984).

157. *Id.* at 1272 & n.4. *See generally supra* note 106 (judicial treatment of guardian ad litem requests).

158. *Akron*, 604 F. Supp. at 1272 & n.4.

159. *Id. See also supra* notes 154-55 and accompanying text (similar approach by courts granting amicus participation).

continuing the litigation without them in the worst cases.[160] The intervenors have demanded the treatment of new issues, participated in discovery, introduced extensive direct testimony, conducted lengthy cross-examination, and filed many papers requiring replies of plaintiffs, even when courts attempted to circumscribe involvement severely.[161] A few participants who were limited to filing amicus briefs nonetheless demanded elaborate responses of plaintiffs and judges.[162] Those abortion opponents granted amicus or party status have been considerably more likely to delay and even obstruct litigation's prompt disposition than to contribute significantly to issue resolution.[163] The effects on plaintiffs have been equally deleterious when permission to participate has been improperly granted.[164] Of course, any type of involvement can impose substantial costs on litigants and the judicial system.[165] Moreover, plaintiffs may be unable to recover attorneys' fees from intervenors in a number of the new abortion cases, notwithstanding the extent of plaintiffs' success or of intervenors' responsibility for prolonging the litigation.[166] That problem is particularly troublesome because evidence of past cooperation between abortion opponents and governmental defendants indicates that they could plan future litigation in ways that may prevent plaintiffs from

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160. *See, e.g.*, Diamond v. Charles, 476 U.S. 54 (1986). *See supra* text accompanying notes 12-17.

161. *See, e.g.*, *Akron*, 604 F. Supp. at 1268. *See also supra* text accompanying notes 19-22.

162. *See supra* note 50 and accompanying text.

163. Remarkably few of the numerous opinions in the federal reporter system or available on computer indicated that abortion opponents had contributed anything substantive to issue resolution.

164. *See Diamond*, 476 U.S. 54. *Cf. id.* at 71, 74-76 (O'Connor, J., concurring in part and concurring in the judgment) (Diamond improper intervenor). *See supra* text accompanying notes 4-18.

165. *See supra* notes 48-49 and accompanying text. Even unsuccessful applications can be costly for parties and judges, although these must be considered part of the fixed costs of litigating in federal court.

166. Plaintiffs may be unable to recover fees if the courts require them to show that "intervenors' action was frivolous, unreasonable, or without foundation." Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732, 2736 (1989). The *Zipes* Court did not address, however, whether its standard would apply to intervenors in abortion cases. In *Zipes*, the intervenor was a union seeking to protect its members who would be adversely affected by the settlement of a sex discrimination class action suit. The Court stated the issue was "only the liability of intervenors who enter lawsuits to defend their *own* constitutional or statutory rights." *Id.* at 2737 n.4. (emphasis added). The Supreme Court also denied Dr. Diamond's petition for a writ of certiorari, allowing to stand a large award of attorneys' fees against him. Diamond v. Charles, 109 S. Ct. 3214 (1989).

securing any fees.[167] Furthermore, while the total number of requests to participate in post-*Roe* abortion litigation has been less than enormous and those granted have not been overwhelming, the future is ominous. Abortion opponents—who may believe themselves closer to victory than ever—are unlikely to forgo any opportunity to defend restrictive measures, especially when that could require trusting their hard-fought victories to the vicissitudes of governmental representation.[168] All of these factors mean that the federal judiciary, lawyers, and litigants must be fully prepared to respond to the participatory requests that inevitably will be submitted in imminent abortion litigation.

D. Suggestions for Treating Participatory Requests in the New Abortion Litigation

The number and strength of arguments against participation are clearly greater than those favoring it. Perhaps most persuasive are the detrimental consequences experienced by judges, lawyers, and parties, even when the courts have consciously attempted to curtail involvement sharply. Thus, the federal judiciary should seriously consider prohibiting any participation. The complications of party involvement should make courts particularly reluctant to permit intervention of right or permissive intervention under Rule 24. Judges who believe that some participation is appropriate should ascertain whether amicus involvement will suffice. Courts allowing any type of participation should impose conditions on that grant whenever necessary.

1. Rule 24(a)(2)

Courts should reject requests to intervene of right, because the complications of such participation render it unnecessary and inadvisable. Many convincing arguments counsel against intervention of right. These are premised on the language of Rule 24(a)(2), its underlying policies, and other policies concerning the fair and expeditious resolution of litigation.

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167. Justice Marshall characterized such future cooperation to avoid any fee liability in the civil rights context as a "likely consequence" of the majority decision in *Zipes*. *Zipes*, 109 S. Ct. at 2746 (Marshall, J., dissenting). For a cogent example of prior cooperation, see *supra* text accompanying note 22.

168. *See generally* Tobias, *supra* note 49, at 329 n.344. Correspondingly, if opposition to abortion were a litmus test for the recent appointment of many federal judges as numerous observers have asserted, those judges may well be receptive to granting abortion opponents' applications.

As a general proposition, courts should read the Rule narrowly, requiring that applicants clearly satisfy each of its four requirements. This approach finds support in the Rule's terminology, in the 1966 amendment, and in considerable judicial application. Many circuit and district courts, particularly in recent opinions, have interpreted the Rule more restrictively.[169] Moreover, Chief Justice Rehnquist's 1989 admonition against broadly reading Rules 19 and 24[170] in the context of public law litigation[171] also supports a narrow interpretation of Rule 24. In short, numerous plausible arguments may be marshaled in favor of a restrictive interpretation of Rule 24.[172]

Those seeking to intervene of right in the anticipated abortion litigation will likely lack the requisite interest. Numerous judges have narrowly read the language of Rule 24(a)(2) to require that applicants show a direct, significant, legally protectable interest in the suit's subject matter.[173] Indeed, a growing number of circuit and district courts has demanded even more; potential intervenors must be able to state a claim for relief or have something equivalent to, or greater than, standing.[174] For these courts, any applicant who asserts interests similar to those of Dr. Diamond or the IPC (in *Keith*) would lack the requisite interest under their own case law and *Diamond*.[175] Even the significant number of judges who apply the demanding, but less stringent, requirement of a direct, significant, legally protectable interest should find that potential intervenors lack sufficient interest in the litigation's subject matter, the constitutionality of a state statute. Individual citizens or groups,

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169. *See, e.g., supra* notes 57-59 and accompanying text. For examples in the abortion context, see Keith v. Daley, 764 F.2d 1265 (7th Cir.), *cert. denied*, 474 U.S. 980 (1985) and Diamond v. Charles, 476 U.S. 54, 71 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

170. Federal Rule of Civil Procedure 19 governs the "joinder of persons needed for just adjudication."

171. In Martin v. Wilks, 109 S. Ct. 2180, 2186-87 (1989), petitioners argued against the Court's application of Rules 19 and 24 because it would be "burdensome and ultimately discouraging to civil rights litigation." *Id.* at 2187. The Chief Justice responded that even were the majority "wholly persuaded by these arguments as a matter of policy, acceptance of them would require a rewriting rather than an interpretation of the relevant [r]ules." *Id.*

172. I am not denying, as the *supra* text accompanying notes 52-83 makes clear, that there are narrow and broad lines of authority. I am saying only that the narrower line has been ascendant of late and that it applies with special cogency in the abortion context.

173. *See supra* note 57 and accompanying text.

174. *See supra* notes 58-59 and accompanying text.

175. *See supra* notes 136-42 and accompanying text (Supreme Court analysis of Dr. Diamond's interest); *supra* notes 111-17 and accompanying text (Seventh Circuit's analysis of IPC's interest).

even those that have successfully lobbied for legislation, simply have no Rule 24 interest in defending the legislation against attack. Only the state and its attorney general, local district attorneys, or others empowered to defend or enforce abortion statutes have the authority to defend them and the requisite Rule 24 interest.[176]

Even judges who employ expansive approaches to the interest criterion may find that the requirement cannot be satisfied. Under the broadest articulation of the interest condition—that it is primarily a guide to disposing of lawsuits by involving as many apparently interested parties as is consistent with efficiency and due process—such factors as fairness, party control, and expeditious dispute resolution outweigh the participatory needs of applicants with interests as minuscule and attenuated as those of abortion opponents.[177]

Courts that find applicants lack the requisite interest have no obligation to consider the remaining three requirements of Rule 24(a)(2). Nevertheless, for judges who doubt that the interest condition has been satisfied and for courts that clearly have found it met, the other criteria (impairment of interest, inadequacy of representation, and timeliness of application) require analysis.

Courts determining that applicants have little interest would be unlikely to consider it impaired, because the impairment condition is closely related to the interest idea. Even judges who believe that potential intervenors have greater interests may find them insufficiently substantial to suffer much prejudice. Conversely, courts that consider the applicants' interests significant may well find them impaired. Those thought to have a Rule 24 interest in defending restrictive abortion legislation will appear threatened by its challenge, especially because any adverse substantive determination rendered could be highly prejudicial.[178]

There are many convincing arguments that those seeking to intervene of right cannot satisfy the inadequate representation requirement. A substantial number of circuit and district courts apply a presumption of adequacy when the defendant is a governmental body charged by law with representing the potential intervenors. This presumption can be overcome only with a very compelling showing of insufficiency. The presumption will be

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176. *See supra* text accompanying notes 60, 115, 141. *See also supra* text accompanying notes 70 and 137.

177. *See supra* text accompanying note 62. Moreover, Chief Justice Rehnquist's recent rejection of a broad reading of Rules 19 and 24 undermines this and other flexible approaches to interest. *See* Martin v. Wilks, 109 S. Ct. 2180, 2186-87 (1989).

178. *See supra* notes 67, 150, and accompanying text.

peculiarly difficult to surmount in the abortion context. State statutes authorize or even command attorneys general or others charged with enforcing restrictive abortion legislation to defend its constitutionality or validity.[179] It will be difficult to show inadequate governmental representation, especially in areas such as constitutional law and statutory interpretation. The presumption also enables courts to avoid delicate questions involving state officials' competence or their dedication to defending the legislation.[180] Moreover, numerous courts that failed to apply the presumption found representation sufficient or were reluctant to rule that the government inadequately represented the state's citizenry.[181] These judges have employed relatively restrictive tests of inadequacy, requiring, for example, proof of governmental nonfeasance or collusion with other parties.

The peculiar nature of governmental representation, such as officials' expertise on the critical issues and the close alignment of defendants' and applicants' interests, means that even the courts taking a flexible approach to adequacy requirements may determine that the requirements have not been satisfied. Even searching judicial scrutiny of governmental representation is unlikely to reveal any inadequacy.[182]

Courts should find that abortion opponents who fail to file intervention requests promptly have not satisfied the timeliness condition. Judges should rigorously apply the principal factors developed to test timeliness.[183] They must examine closely the period that has passed since the suit's commencement and any reasons proffered for delay in seeking intervention. The highly

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179. *See, e.g.*, ILL. ANN. STAT. ch. 14, para. 4, 5 (Smith-Hurd 1963 & Supp. 1989); MO. ANN. STAT. § 27.050-27.060 (Vernon 1969 & Supp. 1990).

180. The ideas in this paragraph have been analyzed at several points in this Article. *See, e.g., supra* note 176 and accompanying text. A finding of "inadequacy" does not mean deficiency, but judges may still be reluctant to make that finding in the case of governmental defendants, because it implicates delicate relationships between federal courts and the state officials.

181. *See supra* note 69 and accompanying text. *See also supra* note 122 and accompanying text.

182. *See* American Nat'l Bank & Trust v. City of Chicago, 865 F.2d 144, 148-49 (7th Cir. 1989) (Cudahy, J., concurring); Keith v. Daley, 764 F.2d 1265, 1273 (7th Cir.) (Cudahy, J., concurring), *cert. denied*, 474 U.S. 980 (1985).

183. *See supra* text accompanying notes 76-77. A rigorous application is especially appropriate in this context. The notoriety of the abortion issue means opponents will have few persuasive reasons for delayed application and little cause to complain. Moreover, there is minimal likelihood of a "sudden revelation of a divergence of interests" among applicants and defendants, such as the unpredictable settlement negotiations between the government and plaintiffs that may occur in other contexts. *See, e.g., In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1023 (D. Mass. 1989).

controversial nature of abortion and opponents' strong commitment to restrictive legislation mean that judges should view with circumspection any passage of time, being especially alert to delay for tactical purposes. Courts also should be particularly sensitive to the potential for prejudicing existing parties and for imposing costs on the judicial system, finding applications untimely on these bases alone.[184] Judges should also find that any significant difficulties for the litigants or for courts outweigh such factors as prejudice to applicants and their potential contributions to issue resolution. The potential for delay to harm parties and the judicial system should be compelling when there has been any passage of time, especially in light of applicants' minimal interests and the concomitant prejudice and questionable nature of any excuses for delay.

Numerous policies that directly underlie or relate to Rule 24(a)(2) also warrant denial of requests to intervene of right. Perhaps most important is the possibility of prejudice to existing parties. The active involvement of intervenors could deprive litigants of control over their cases. Considerable time, money, and effort may be consumed in responding to issues that intervenors raise, to their direct testimony and cross-examination, and to their appeals. Correspondingly, federal courts will have to devote significant resources to intervenors' participation.

In comparison, the need for applicants' participation as parties in this context is relatively insubstantial.[185] The central issues in the anticipated abortion litigation—which will overwhelmingly involve constitutional questions, statutory interpretation, and legislative intent—require limited factual development and can be efficaciously treated through the submission of amicus briefs. Concomitantly, applicants are not likely to have much relevant expertise or many new ideas to contribute to issue resolution, or to improve judicial decisionmaking, especially in light of governmental defendants' effective representation and the minimal value of abortion opponents' input in past cases. Denying intervenor status also will cause little loss in terms of the public values at stake in this litigation. Abortion opponents will already have had an ample opportunity to be heard in the legislature and to hold

184. The emphasis on judicial economy is justified by mounting concerns over the litigation explosion and the escalating costs of civil litigation, although courts typically do not list it among the most important timeliness factors. *See supra* notes 49, 76, and accompanying text.

185. This discussion of policy, in both organizational and conceptual treatment, departs slightly from the rule's requirements. In this paragraph, for example, applicants' minimal need to participate is contrasted with party prejudice.

elected officials accountable; party participation is unlikely to make more palatable an adverse judicial determination.[186] All of these policies argue strongly against permitting intervention of right. Indeed, Justice Marshall just last term suggested the propriety of amicus participation for applicants with interests similar to those of abortion opponents.[187]

Even judges who flexibly apply the Rule or generally would be inclined to grant intervention of right might find these policies overriding, especially in conjunction with applicants' comparatively weak case for meeting the Rule's requirements. For instance, the courts may consider the potential harm to original parties and to the judicial system more compelling than the relatively minimal need for the applicants' participation.

2. Rule 24(b)

Courts also should reject permissive intervention requests. A number of arguments, some of which are similar to those against intervention of right, support denial. Courts should first consider the common question of law or fact requirement, which some judges state demands an interest sufficient to support a legal claim or defense.[188] Thus, courts that doubt the applicants have the requisite interest to meet the first condition of Rule 24(a)(2) should closely examine the related condition in Rule 24(b). Even if applicants satisfy the requirement, judges can deny permissive intervention when exercising their substantial discretion in light of other relevant factors.

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186. *See generally supra* text accompanying notes 82-83. I realize that these ideas and others in this paragraph are controversial and could be criticized. For example, critics could argue that, insofar as the central issues in abortion cases involve legal questions and require little factual development, the potential for abortion opponents to delay resolution is correspondingly lessened. This assertion is undermined by the example of the *Akron* litigation, in which abortion opponents caused significant complications despite the sharp limits on their participation. *See supra* text accompanying notes 19-22. At the same time, the idea that opponents' interests will not be impaired because they can pursue later, separate litigation can be criticized in light of such litigation's limited prospects for success. I clearly provide for that possibility, however. *See supra* text accompanying notes 67, 150, 178.

187. *See* Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732, 2745 n.8 (1989) (Marshall, J., dissenting) (citing *Diamond* and *Akron* as examples). One reason for that suggestion was the possibility of cooperation between successful intervenors and defendants to avoid fee liability. *See supra* note 167 and accompanying text. Judges should be alert to this prospect in abortion litigation, which is an additional reason warranting denial of intervention requests.

188. *See supra* notes 88, 143-44, and accompanying text.

Courts should treat as paramount the express command of Rule 24(b) that they consider whether intervention will unduly delay or prejudice existing parties' rights. Judges should analyze closely applicants' requests and estimate the time and cost of their involvement, remembering that abortion opponents have substantially complicated numerous earlier cases even when their activity was severely circumscribed. If courts believe that there is any significant potential for delay or prejudice, denial of permissive intervention will be warranted. If judges find that prejudice to parties is not compelling, they should balance that factor against other pertinent factors, especially the need for judicial economy and the potential harm to applicants. Even courts that apply Rule 24(b) more broadly or are predisposed to allowing permissive intervention might exercise their discretion to deny it in the abortion context because they believe that prejudice to parties is overriding, or, in combination with other factors, is more important than the applicants' need to participate.

In short, Judge Wyzanski's 1943 exposition on party involvement under the 1938 Rule retains considerable saliency:

> Additional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair. Where he presents no new questions, a third party can contribute usually most effectively and always most expeditiously by a brief amicus curiae and not by intervention.[189]

Numerous courts still recite this passage or apply these ideas in resolving intervention questions under the current version of Rule 24(b)(2).[190]

3. Amicus Participation

Judges should seriously consider whether there is any need for amicus curiae participation. Several abortion cases indicate that district courts and litigants have spent significant resources treating submissions of amici.[191] They may have raised issues that the original parties did not, provided new arguments on questions already in dispute, or tendered duplicative or irrelevant material. Plaintiffs probably have felt compelled to address many of these

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189. Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., 51 F. Supp. 972, 973 (D. Mass. 1943).

190. *See, e.g.*, Lelsz v. Kavanaugh, 98 F.R.D. 11, 22-23 (E.D. Tex. 1982), *appeal dismissed*, 710 F.2d 1040 (5th Cir. 1983), *later proceeding*, 807 F.2d 1243 (5th Cir. 1987); British Airways Bd. v. Port Auth., 71 F.R.D. 583, 585 (S.D.N.Y. 1976).

191. *See, e.g.*, cases cited at *supra* note 50.

submissions, regardless of their persuasiveness, lest the ideas convince the court, thereby requiring an unnecessary appeal. Correspondingly, judges may choose to respond to amicus input because of fairness considerations or to dissuade defendants from appealing decisions. The potential costs to litigants and the judicial system could well outweigh applicants' needs. Abortion opponents' "interest" in defending restrictive legislation probably will be capably represented by governmental defendants. The opponents' "right to be heard" can be satisifed through lobbying before the legislature. Even courts predisposed to permitting amicus involvement might find the potential for unnecessary complications overriding in the abortion context.

Notwithstanding those possible complications, some courts may be reluctant to deny participation altogether. For these judges, amicus involvement is a felicitous solution because it affords numerous benefits of party participation while minimizing its disadvantages. For example, applicants can have as much impact on the constitutional and statutory questions that likely will predominate by submitting amicus briefs. Amicus status also enables courts to capitalize on applicants' expertise and their contributions to issue resolution, potentially improving judicial decisionmaking. Moreover, it affords an opportunity to be heard, albeit truncated. Furthermore, amicus participation reduces significantly the possibility that applicants will impose great costs on litigants or the judicial system.

4. Conditioning Participation

If courts decide that some party or amicus involvement is appropriate, they should seriously consider conditioning that participation.[192] Judges should estimate as precisely as possible how participation might impede expeditious dispute resolution and tailor involvement accordingly. They may want to limit participation in terms of raising new issues, taking discovery or filing motions, introducing direct evidence or conducting cross-examination at trial, or appealing.

CONCLUSION

Intervention exemplifies many procedural questions that courts, lawyers, and litigants are likely to encounter in the anticipated abortion litigation. Analysis of intervention requests illustrates the

192. For further discussion of the ideas in this paragraph, see *supra* text accompanying notes 97-100, 156-59.

importance of the requirements in the federal rules and other authoritative sources, such as Title 28 of the United States Code. Application of these factors shows that potential intervenors in abortion cases should be permitted to participate, if at all, only as amici curiae. A comparatively straightforward interpretation of the language of Rule 24(a)(2) demonstrates that abortion opponents lack the type of interest required and that governmental defendants will adequately represent any interest they might assert. Moreover, the original parties' need to control the litigation, and the concerns of parties and judges about expeditious resolution and effective case management are significant. These factors are compelling in light of the potential complications raised by intervention, the limited need for applicants to participate as parties, and the minimal likelihood that they will contribute to issue resolution and improve judicial decisionmaking.

An examination of intervention also identifies additional concerns relevant in the context of abortion litigation. Intervention demonstrates how resource disparities among parties and litigation financing issues can drive much modern litigation.[193] Abortion opponents' attempts to participate cogently illustrate how what might seem to be a comparatively obscure point of procedural law can assume importance out of all proportion to its apparent magnitude. Correspondingly, intervention shows the inseparability of process and substance and how process can shade into, become, and even dictate substance. Perhaps most striking, the procedural effort to intervene in abortion litigation replicates the substantive effort of the state to intrude into women's reproductive decisionmaking. Finally, intervention illustrates which voices are entitled to be, and actually are, heard in federal court, for whom they speak and under what conditions, and at what cost on the abortion question, the most divisive domestic legal issue of our time.

193. *See supra* notes 18, 48, 165-66, and accompanying text.