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## *ARTICLES*

### INTERVENTION

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*Ever since the late 1960s, many lower federal courts have interpreted the Federal Rules of Civil Procedure to give outsiders broad rights to become parties to pending lawsuits. Intervention of this sort affects the dynamics of a lot of cases, including many of the highest-profile cases that the federal courts hear. Yet it raises fundamental questions about the structure of litigation: Should status as a party be limited to people who have legal claims or defenses, or do the Federal Rules of Civil Procedure invite intervention by everyone who will feel the practical effects of a judgment? For the last half century, many federal judges and law professors have pushed for expansive understandings of the right to intervene. That impulse is consistent with the “interest representation” model of litigation, which analogizes judicial decisionmaking to other types of policymaking and touts the benefits of broad participation. According to this Article, however, the Federal Rules of Civil Procedure instead reflect a more traditional view of litigation, under which the parties to a case need to be proper parties to a claim for relief.*

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## INTRODUCTION

The American system of civil litigation draws important differences between the parties to a case and everyone else. For instance, each party to a suit in federal district court normally can use the full panoply of discovery mechanisms to demand information from other people, and the court stands ready to enforce those demands. Nonparties have no similar power to gather information, even in cases that may affect their interests.<sup>1</sup> Likewise, when the district court enters judgment, only a party normally can appeal.<sup>2</sup> The judgment’s preclusive effect is correspondingly limited: although the practical consequences of a judgment can radiate outward, typically only the parties are formally bound.<sup>3</sup>

Given the importance of the distinction between parties and other people, one might expect federal courts to have thought hard about who is eligible to become a party. Under the rubric of “standing” to sue, there has indeed been much discussion of who can initiate a suit in federal court against whom. Once a suit is launched, though, outsiders who are interested in the outcome often seek to intervene as additional parties so

<sup>1</sup> See Fed. R. Civ. P. 30(a) (authorizing “[a] party” to take depositions); Fed. R. Civ. P. 33(a) (authorizing “a party” to propound interrogatories to any other party); Fed. R. Civ. P. 34(a) (authorizing “[a] party” to demand documents and electronically stored information from any other party); Fed. R. Civ. P. 45(a)(3) (enabling “a party” to use subpoenas duces tecum to obtain documents and electronically stored information from nonparties).

<sup>2</sup> See, e.g., *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); cf. *Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375, 384 (4th Cir. 2018) (discussing a “limited exception” to this general rule).

<sup>3</sup> See *Taylor v. Sturgell*, 553 U.S. 880, 893–95 (2008) (identifying some categories of nonparty preclusion, but casting them as exceptions to the general rule).

that they can conduct discovery, participate fully at trial, and pursue an appeal in the event of an adverse judgment. The law governing such motions is a mess.

The rules that govern intervention in civil actions in federal district court might seem straightforward. Federal Rule of Civil Procedure 24(a) says:

- On timely motion, the court *must* permit anyone to intervene who:
- (1) is given an unconditional right to intervene by a federal statute;
  - or
  - (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.<sup>4</sup>

Rule 24(b)(1) adds:

- On timely motion, the court *may* permit anyone to intervene who:
- (A) is given a conditional right to intervene by a federal statute;
  - or
  - (B) has a claim or defense that shares with the main action a common question of law or fact.<sup>5</sup>

Of these two provisions, Rule 24(b)(1) is easier to interpret. The Federal Rules of Civil Procedure consistently use the word “claim” to mean a “claim for relief.”<sup>6</sup> Likewise, a “defense” is a particular type of legal argument that the targets of a claim assert to explain why the court should not grant relief against them.<sup>7</sup> If these words mean the same thing in Rule 24(b)(1) that they mean elsewhere in the Federal Rules of Civil Procedure, then (in the absence of special statutory authorization) an outsider cannot use Rule 24(b) to become a party to a case simply because

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<sup>4</sup> Fed. R. Civ. P. 24(a) (emphasis added).

<sup>5</sup> Fed. R. Civ. P. 24(b)(1) (emphasis added).

<sup>6</sup> See, e.g., Fed. R. Civ. P. 8(a) (specifying what must appear in “[a] pleading that states a claim for relief,” and requiring “a short and plain statement of the claim showing that the pleader is entitled to relief”); Fed. R. Civ. P. 18(a) (discussing joinder of claims); Fed. R. Civ. P. 54(b) (discussing judgment “[w]hen an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim”); see also Simona Grossi, *The Claim*, 55 *Hous. L. Rev.* 1, 7 (2017) (referring to the claim as “the basic litigation unit” under the Rules).

<sup>7</sup> See, e.g., Fed. R. Civ. P. 8(b)(1)(A) (“In responding to a pleading, a party must . . . state in short and plain terms its defenses to each claim asserted against it . . .”).

the outsider has a practical stake in the outcome. Instead, the outsider needs to be a proper party to a claim for relief. Many judges, however, now permit intervention “even in ‘situations where the existence of any nominate “claim” or “defense” is difficult to find.’”<sup>8</sup>

The criteria for intervention of right under Rule 24(a) are even less certain. In the words of a leading treatise, “There is not any clear definition of the nature of the ‘interest relating to the property or transaction that is the subject of [the] action’ that is required for intervention of right [under Rule 24(a)(2)].”<sup>9</sup> Commentators agree that the cases on this topic are impossible to reconcile.<sup>10</sup>

The confusion stems partly from the language of the rule. Lawyers often use the word “interest” in a specifically legal sense, to mean a right or other advantage that the law gives one person as against another person.<sup>11</sup> (Think, for instance, of what lawyers mean when they refer to present or future “interests” in property.) But the word can also be used in a less technical sense to refer to anything that a person wants, whether

<sup>8</sup> *EEOC v. Nat’l Children’s Ctr.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) (quoting *Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967) (citation and internal quotation marks omitted)). But see *City of Herriman v. Bell*, 590 F.3d 1176, 1184 (10th Cir. 2010) (“[T]o intervene under Rule 24(b) the proposed intervenor must have a claim or defense that shares at least some aspect with a claim or defense presented in the main action. Here, . . . Herriman City has no claim and thus cannot satisfy Rule 24(b)’s requirements.”).

<sup>9</sup> 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1908.1, at 300 (3d ed. 2007).

<sup>10</sup> See Susan Bandes, *The Idea of a Case*, 42 *Stan. L. Rev.* 227, 250–51, 254 (1990) (noting “the lack of consensus about the type of interest needed for intervention” and citing many different formulations); Carl Tobias, *Standing to Intervene*, 1991 *Wis. L. Rev.* 415, 434 n.132 (concluding that, if anything, “Professor Bandes may have underestimated the number of formulations and the degree of inconsistency”); Eunice A. Eichelberger, *Annotation, What Is “Interest” Relating to Property or Transaction Which Is Subject of Action Sufficient to Satisfy That Requirement for Intervention as Matter of Right Under Rule 24(a)(2) of Federal Rules of Civil Procedure*, 73 *A.L.R. Fed.* 448, 458 (1985) (“The courts have developed no discernible standards or criteria, other than [a few] general guidelines . . . , which would explain their divergent rulings in cases involving similar types of litigation and proposed intervenors.”).

<sup>11</sup> See *Restatement of Prop. § 5, Note on the Use of the Word Interest in the Restatement (Am. Law Inst. 1936)* (indicating that with the exception of the *Restatement of Torts*, all the *Restatements* published by the American Law Institute use “interest” as “a word denoting a legal relation or relations”); see also *id.* § 5 (“The word ‘interest’ is used in this *Restatement* both generically to include varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of them.”); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L.J.* 16, 30 (1913) (laying out the taxonomy of legal relations to which this passage refers); cf. *Restatement (Second) of Torts* § 1 cmt. f (Am. Law Inst. 1965) (confirming that most of the *Restatements* use the word “interest” to “denot[e] the beneficial side of legal relations”).

or not the law protects that desire.<sup>12</sup> Although lower-court opinions have long reflected this ambiguity,<sup>13</sup> the Supreme Court has provided little guidance about the nature of the “interest” required for intervention of right.<sup>14</sup> Nor has the Supreme Court ever clarified exactly how the relevant interest must “relat[e] to” a particular transaction or item of property.

To give readers a sense of how some lower federal courts have handled these uncertainties, Part I of this Article surveys cases that have applied Rule 24(a) broadly. Especially in suits about issues of public moment, many federal judges have read Rule 24 to invite intervention by an extraordinary array of people who are not proper parties to any relevant claim for relief but who nonetheless have reason to care about the outcome of the case. In the late 1960s, Judge Harold Leventhal stated the animating idea behind this interpretation: “[T]he ‘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.”<sup>15</sup>

Part II canvasses the history of Rule 24 and concludes that this broad reading is wrong. To be sure, the 1966 amendment that produced the current version of Rule 24(a) was designed to authorize intervention of right by some outsiders who previously would have qualified only for permissive intervention, and who would have been relegated to separate litigation if their requests for permissive intervention were denied. But the 1966 amendment was not intended to authorize intervention of right by

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<sup>12</sup> See Restatement (Second) of Torts § 1 (Am. Law Inst. 1965) (“The word ‘interest’ is used throughout the Restatement of this Subject to denote the object of any human desire.”); *id.* cmt. a (specifying that the word “carries no implication that the interest is or is not given legal protection”).

<sup>13</sup> Compare *United States v. Perry Cty. Bd. of Educ.*, 567 F.2d 277, 279 (5th Cir. 1978) (“[W]e have adopted a somewhat narrow reading of the term ‘interest’ . . .”), with *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997) (“This circuit has opted for a rather expansive notion of the interest sufficient to invoke intervention of right.”). See also *Conservation Law Found. of New England v. Mosbacher*, 966 F.2d 39, 41–42 (1st Cir. 1992) (contrasting the “liberal approach” of the Second, Sixth, Tenth, and D.C. Circuits with the “more restrictive criteria” applied in the Fifth, Seventh, Eleventh, and Federal Circuits).

<sup>14</sup> See Tobias, *supra* note 10, at 434 (noting the “relative dearth of Supreme Court precedent”).

<sup>15</sup> *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967); accord *Smuck v. Hobson*, 408 F.2d 175, 179–80 (D.C. Cir. 1969) (en banc) (plurality opinion of Bazelon, C.J.) (quoting *Nuesse* and urging courts to focus less on the “interest” requirement than on “the criteria of practical harm to the applicant and the adequacy of representation by others”); see also Tobias, *supra* note 10, at 435 (“Insofar as the courts [that take a broad view of Rule 24(a)] rely on any definition of interest, they subscribe to Judge Harold Leventhal’s 1967 enunciation . . .”).

people who previously would not have been proper parties at all (such as the intervenors in the cases described in Part I).

Part III links the technical debate over intervention to fundamental questions about the goals of litigation and the proper role of the courts. In 1976, based partly on then-recent developments in intervention doctrine, Professor Abram Chayes speculated that “[w]e are witnessing the emergence of a new model of civil litigation”—one in which courts decide questions about “the operation of public policy” and “anyone whose interests may be significantly affected by the litigation . . . [is] presumptively entitled to participate in the suit on demand.”<sup>16</sup> Professor Chayes himself hailed the capacity of courts to hear from “the range of interests that will be affected” and to devise better solutions to policy problems than the “bureaucracies” in other parts of the government.<sup>17</sup> But the current Supreme Court may well be less sanguine about that prospect, and less willing to cast each federal district judge in the role of “policy planner and manager.”<sup>18</sup>

Unless one is affirmatively trying to facilitate that role, much modern doctrine about intervention seems mistaken. When given its most natural reading, Rule 24 does not depart from traditional party structures nearly as much as current practice assumes.

#### I. MODERN UNDERSTANDINGS OF THE RIGHT TO INTERVENE

For the sake of concreteness, this Part describes a number of cases in which lower federal courts have recognized broad rights to intervene. Section I.A offers examples. Section I.B notes the longstanding circuit split over whether intervenors need “Article III standing,” but suggests that the courts’ focus on this issue has diverted attention from more important questions about the nature of the “interest” required for intervention of right. Section I.C notes that courts have failed to supply consistent answers to those questions.

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<sup>16</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1281, 1282, 1290, 1302, 1310 (1976).

<sup>17</sup> *Id.* at 1308–10.

<sup>18</sup> *Id.* at 1302.

*A. The Astonishing Breadth of Intervention in Some Lower Courts**1. A Few Initial Examples*

In 1976, Planned Parenthood of Minnesota bought land in St. Paul for the purpose of constructing an abortion clinic. The city council promptly enacted an ordinance that temporarily forbade the construction of freestanding abortion clinics. Arguing that this ordinance was unconstitutional, Planned Parenthood sued the city and various local officials.

Two couples who owned homes in the vicinity of the proposed clinic, and who did not want the clinic to be built, sought to intervene as additional parties on the defendants' side. So did a neighborhood association whose members included other local homeowners. The district court denied their motions, but the Eighth Circuit reversed. According to the Eighth Circuit, Rule 24(a) gave the would-be intervenors a right to become parties to Planned Parenthood's suit against the city—not because they were proper targets of any claim for relief, and not because they would have any claim for relief of their own if the clinic were built, but simply because the construction of an abortion clinic in the neighborhood might reduce their property values.<sup>19</sup>

The Sixth Circuit took a similarly broad view of Rule 24(a) in the high-profile cases of *Gratz v. Bollinger* and *Grutter v. Bollinger*,<sup>20</sup> where white plaintiffs who had been denied admission to the University of Michigan were suing University officials to challenge the constitutionality of the University's affirmative-action policies. In both cases, the Sixth Circuit held that prospective minority applicants had a right to intervene—not because they alleged any legal right to continuation of the University's policies, but simply because of their practical interest “in gaining admission to the University.”<sup>21</sup>

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<sup>19</sup> *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 869–70 (8th Cir. 1977).

<sup>20</sup> 188 F.3d 394 (6th Cir. 1999) (addressing intervention in *Gratz* as well as *Grutter*).

<sup>21</sup> *Id.* at 399. Elsewhere, results on this sort of motion have varied. Compare *Students for Fair Admissions Inc. v. Univ. of N.C.*, 319 F.R.D. 490, 497 (M.D.N.C. 2017) (granting intervention under Rule 24(b)), with *Students for Fair Admissions, Inc. v. President of Harvard Coll.*, 807 F.3d 472, 475 (1st Cir. 2015) (affirming denial of intervention because Harvard adequately represented the would-be intervenors' interest). See also Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 Mich. J. Race & L. 263, 282–83 (1999) (siding with the Sixth Circuit).



The D.C. Circuit's decision in *United States v. Philip Morris USA Inc.*<sup>22</sup> is even more striking. There, the federal government had filed a civil suit seeking injunctive relief under the Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>23</sup> against nine cigarette manufacturers and two trade groups that allegedly had conspired to deceive consumers about the harmful effects of smoking. The remedies that the government was seeking would not have been available to private plaintiffs; although RICO creates a private cause of action for damages in favor of people who are injured in their business or property by reason of a violation, RICO does not create a private cause of action for injunctive relief.<sup>24</sup> Nonetheless, both the district court and the D.C. Circuit held that various health and anti-smoking groups had a right to intervene in the government's suit for the purpose of urging the court to award the government more extensive remedies than the government itself was seeking.<sup>25</sup> To explain why the intervenors were entitled to force their way into the case even though they were not proper parties to a claim for relief, the D.C. Circuit observed that "intervention of right only requires 'an 'interest' in the litigation—not a 'cause of action' or 'permission to sue.'"<sup>26</sup>

Many other courts have made statements along similar lines. According to the Third Circuit, "A proposed intervenor's interest need not be a legal interest, provided that he or she 'will be practically disadvantaged by the disposition of the action.'"<sup>27</sup> Sitting en banc, the Tenth Circuit has reached the same conclusion: "The central concern in deciding whether intervention is proper is the practical effect of the litigation on the applicant for intervention."<sup>28</sup> The Ninth Circuit appears to agree: "[W]e have taken the view that a party has a sufficient interest

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<sup>22</sup> 566 F.3d 1095 (D.C. Cir. 2009).

<sup>23</sup> 18 U.S.C. §§ 1961–68 (2018).

<sup>24</sup> See *id.* § 1964(a)–(c).

<sup>25</sup> *Philip Morris*, 566 F.3d at 1145–47.

<sup>26</sup> *Id.* at 1145 (quoting *Jones v. Prince George's County*, 348 F.3d 1014, 1018 (D.C. Cir. 2003)).

<sup>27</sup> *Benjamin v. Dep't of Pub. Welfare*, 701 F.3d 938, 951 (3d Cir. 2012) (quoting *Benjamin v. Dep't of Pub. Welfare*, 432 F. App'x 94, 98 (3d Cir. 2011), which in turn was slightly misquoting *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 970 (3d Cir. 1998), which in turn was quoting 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1908, at 301 (2d ed. 1986)).

<sup>28</sup> *San Juan County v. United States*, 503 F.3d 1163, 1193 (10th Cir. 2007) (en banc).

for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation.”<sup>29</sup>

## *2. Intervention by Advocacy Groups and the Sponsors of Ballot Initiatives*

Innumerable examples could be used to illustrate how broadly many federal courts read Rule 24(a). But the following pattern is as telling as any. Imagine that an interest group successfully lobbies for the enactment of a law that benefits the group or its members, but plaintiffs later challenge the law’s constitutionality and sue government officials to enjoin its enforcement. A number of cases suggest that the group might have a right to intervene as an additional party to defend the law, unless the government is so committed to the same cause that the existing defendants adequately represent the group’s interests.

Consider the Sixth Circuit’s decision in *Michigan State AFL-CIO v. Miller*.<sup>30</sup> In 1976, Michigan had enacted a Campaign Finance Act that prohibited corporations from making contributions or expenditures to support or oppose the election of any candidate for state office.<sup>31</sup> In the 1980s, the Michigan Chamber of Commerce had brought a lawsuit challenging the constitutionality of the restriction on expenditures. That suit had gone all the way to the Supreme Court, but the Chamber lost.<sup>32</sup> The Chamber then took a new tack: it lobbied the Michigan legislature to extend the Campaign Finance Act to restrict unions as well as corporations.<sup>33</sup> In 1994, the legislature did so.<sup>34</sup> Advancing constitutional arguments of their own, four unions sued state officials to enjoin enforcement of some of the new restrictions on unions. The Chamber of Commerce promptly moved to intervene as an additional defendant to support enforcement of those restrictions. The district court denied this motion, but the Sixth Circuit reversed. In discussing the Chamber’s “interest,” the Sixth Circuit emphasized that

the Chamber was (1) a vital participant in the political process that resulted in legislative adoption of the 1994 amendments in the first

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<sup>29</sup> California ex rel. Lockyer v. United States, 450 F.3d 436, 441 (9th Cir. 2006).

<sup>30</sup> 103 F.3d 1240 (6th Cir. 1997).

<sup>31</sup> Act No. 388, §§ 4, 6, 54(1), 1976 Mich. Pub. Acts 1268, 1269–70, 1287.

<sup>32</sup> See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990). Twenty years later, the Court overruled *Austin* in *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>33</sup> See *Mich. State AFL-CIO*, 103 F.3d at 1244.

<sup>34</sup> Act No. 117, 1994 Mich. Pub. Acts 460.

place, (2) a repeat player in Campaign Finance Act litigation, (3) a significant party which is adverse to the challenging union in the political process surrounding Michigan state government's regulation of practical campaign financing, and (4) an entity also regulated by at least three of the four statutory provisions challenged by plaintiffs.<sup>35</sup>

Of course, none of these facts made the Chamber a proper party to any claim for relief in the suit. Nonetheless, the Sixth Circuit concluded that “the Chamber has a substantial legal interest in this litigation” and “is entitled to intervention as of right.”<sup>36</sup>

The Ninth Circuit has reached similar conclusions in suits challenging the legality of actions taken by administrative agencies. The Ninth Circuit has repeatedly held that if a public-interest group participated in the administrative process and supported the action that the agency took, the group has a right to intervene as an additional defendant in the suit, unless the existing parties adequately represent the group's interests.<sup>37</sup> The Ninth Circuit has stated this principle generally: “A public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported.”<sup>38</sup>

The Ninth Circuit has applied the same idea in suits challenging the constitutionality of provisions adopted by direct vote of the people. The litigation over same-sex marriage in California is a high-profile example. In 2008, well before the United States Supreme Court's decision in *Obergefell v. Hodges*,<sup>39</sup> the California Supreme Court held that state statutes restricting marriage to opposite-sex couples violated California's

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<sup>35</sup> *Mich. State AFL-CIO*, 103 F.3d at 1247.

<sup>36</sup> *Id.* at 1247–48. The Sixth Circuit arguably has narrowed this holding in later cases. See *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 343–46 (6th Cir. 2007) (holding that a group formed to advocate the enactment of a statute restricting abortion was not entitled to intervene in a suit challenging the constitutionality of that statute, and portraying the group's interest as “ideological” rather than “legal”); see also *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 780–83 (6th Cir. 2007) (relying on *Northland Family Planning* to conclude that two advocacy groups had no right to intervene in a suit challenging the constitutionality of an initiative that they had shepherded onto the ballot and supported); cf. *id.* at 785 (Kennedy, J., concurring in part and dissenting in part) (observing that *Northland Family Planning* is in tension with *Michigan State AFL-CIO*).

<sup>37</sup> See *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397–98 (9th Cir. 1995); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527–28 (9th Cir. 1983).

<sup>38</sup> *Idaho Farm Bureau Fed'n*, 58 F.3d at 1397.

<sup>39</sup> 135 S. Ct. 2584 (2015).

state constitution.<sup>40</sup> Opponents of same-sex marriage responded with a campaign to amend the state constitution by initiative. Under California law, one or more members of the electorate can submit a proposed amendment and become its “proponent,” responsible for collecting the necessary signatures and shepherding the proposal onto the ballot.<sup>41</sup> Using this process, five individuals became the proponents of a proposal to add the following language to the state constitution: “Only marriage between a man and a woman is valid or recognized in California.”<sup>42</sup> This proposal became Proposition 8 on the statewide ballot in November 2008, and the voters approved it.<sup>43</sup>

A few months later, two same-sex couples filed a lawsuit in a federal district court, seeking a declaratory judgment that the new amendment to the state constitution violated the *federal* Constitution and asking the district court to enjoin its enforcement.<sup>44</sup> The named defendants were various state and local officials who might have some role in enforcing or applying Proposition 8. Concerned that these officials did not support enforcement, the five proponents of Proposition 8 moved to intervene as additional parties.

Although the proponents later portrayed themselves as litigating agents for the state itself, their initial motion to intervene appears to have been

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<sup>40</sup> *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

<sup>41</sup> See *Perry v. Brown*, 265 P.3d 1002, 1017 (Cal. 2011) (describing California law).

<sup>42</sup> *Id.* at 1007.

<sup>43</sup> *Id.*

<sup>44</sup> Although the plaintiffs did not purport to sue as representatives of a class, they asked the district court “to enjoin . . . all enforcement of Prop. 8” (not just its application to the plaintiffs). See Complaint at 1, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-cv-02292). Ultimately, the district court appeared to grant this relief without addressing whether the plaintiffs were eligible to seek it. See *Perry*, 704 F. Supp. 2d at 1004 (“Because Proposition 8 is unconstitutional . . . , the court orders entry of judgment permanently enjoining its enforcement; prohibiting the official defendants from applying or enforcing Proposition 8[;] and directing the official defendants that all persons under their control or supervision shall not apply or enforce Proposition 8.”); cf. Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 *Hastings Const. L.Q.* 243, 248–49 (2016) (calling this relief “overbroad” because it was not limited to the plaintiffs). For criticisms of such injunctions, see Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 *Harv. L. Rev.* 417 (2017); Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 *Harv. J.L. & Pub. Pol’y* 487 (2016); Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 *Lewis & Clark L. Rev.* 335 (2018). For attempted defenses, see Amanda Frost, *In Defense of Nationwide Injunctions*, 93 *N.Y.U. L. Rev.* 1065 (2018); Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 *Harv. L. Rev.* 920 (2020).

based on their own alleged interest in defending the constitutionality of the measure that they had sponsored.<sup>45</sup> That interest was essentially ideological; they had no personal stake in the denial of marriage licenses to same-sex couples. As a legal matter, moreover, the proponents had no claims or defenses of their own to assert. Nonetheless, the Ninth Circuit had already recognized “a virtual *per se* rule” that when a successful ballot initiative is later challenged as unconstitutional, its sponsors have the sort of “interest” that Rule 24(a) requires for intervention of right.<sup>46</sup> Ninth Circuit precedent on this point was so clear that no one opposed the proponents’ motion to intervene, and the district court agreed that “the proponents have established their entitlement to intervene as of right.”<sup>47</sup>

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<sup>45</sup> Motion to Intervene (May 28, 2009) at 1, *Perry*, 704 F. Supp. 2d 921 (No. 3:09-cv-02292) (“Proposed Intervenors respectfully request an order allowing them to intervene in this case to guard their significant protectable interest in the subject matter of this lawsuit.”).

<sup>46</sup> *Yniguez v. Arizona*, 939 F.2d 727, 733 (9th Cir. 1991), vacated as moot sub nom. *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); see also, e.g., *Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006) (“[F]or purposes of intervention as of right, a public interest group that has supported a measure (such as an initiative) has a ‘significant protectable interest’ in defending the legality of the measure.”); *Wash. State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982) (“DWW, as the public interest group that sponsored the initiative, was entitled to intervention as a matter of right under Rule 24(a).”).

<sup>47</sup> Order (June 30, 2009) at 2–3, *Perry*, 704 F. Supp. 2d 921 (No. 3:09-cv-02292). But see Suzanne B. Goldberg, *Private Parties, Legislators, and the Government’s Mantle: On Intervention and Article III Standing* 11 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 12-325, 2012), <http://ssrn.com/abstract=2193601> (doubting that the proponents satisfied Rule 24).

The proponents’ status became more controversial after the district court entered final judgment for the plaintiffs. The officials whom the plaintiffs had sued did not file a notice of appeal, but the proponents did. Normally, only someone with “Article III standing” can keep a case alive in this way, see *infra* text accompanying note 61, and the proponents had no apparent litigable interests of their own. According to the proponents, however, when the voters have approved an initiative that is subsequently challenged in court and that state officials refuse to defend, California law authorizes the initiative’s proponents to “assert the State’s interest in defending the constitutionality of its laws.” Defendant-Intervenors-Appellants’ Opening Brief at 19, *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011) (No. 10-16696), 2010 WL 3762119, at \*19. In response to a certified question, the California Supreme Court endorsed this understanding of California law, see *Perry v. Brown*, 265 P.3d 1002, 1033 (Cal. 2011), and the Ninth Circuit therefore entertained the proponents’ appeal. See *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (affirming the district court’s judgment).

Ultimately, the United States Supreme Court held that the proponents “are plainly not agents of the State” and should not have been allowed to appeal. *Hollingsworth v. Perry*, 570 U.S. 693, 713–15 (2013) (concluding that the Ninth Circuit had lacked jurisdiction). But the Supreme Court said nothing about what had happened at the district-court level. Insofar as the proponents purported to intervene to protect their own asserted interests, why were they permitted to become parties to a case in which they had no discernible claim against any of

*B. “Interest” Versus “Injury in Fact”*

For more than a generation, there has been a circuit split about one specific question relating to the requirements for intervention: Do would-be intervenors need what the modern Supreme Court calls “Article III standing”?<sup>48</sup> This Section briefly explains the issue, but then argues that it has distracted courts from more important questions. In particular, too many courts have acted as if the presence of an “injury in fact” (of the sort required for Article III standing) is enough to establish the sort of “interest” required for intervention under Rule 24(a).

*1. The Concept of “Article III Standing”*

When a lawsuit is getting off the ground, the identity of the proper parties depends on the claims for relief that the applicable substantive law recognizes. In order to initiate and maintain a suit against any particular defendant, the plaintiff must assert a viable claim for relief against that defendant.<sup>49</sup> This requirement is the main determinant of who can sue whom for what.

Still, the Supreme Court has understood Article III of the Constitution to impose a few outer limits on the types of claims that Congress can

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the existing parties and in which none of the existing parties had any discernible claim against them?

<sup>48</sup> For commentary on this issue, see Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 *Fordham L. Rev.* 1539, 1560–66 (2012); Joan Steinman, *Irregulars: The Appellate Rights of Persons Who Are Not Full-Fledged Parties*, 39 *Ga. L. Rev.* 411, 426–39 (2005); Zachary N. Ferguson, Note, *Rule 24 Notwithstanding: Why Article III Should Not Limit Intervention of Right*, 67 *Duke L.J.* 189 (2017); Amy M. Gardner, Comment, *An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenor*, 69 *U. Chi. L. Rev.* 681 (2002); Juliet Johnson Karastelev, Note, *On the Outside Seeking In: Must Intervenor Demonstrate Standing to Join a Lawsuit?*, 52 *Duke L.J.* 455 (2002); Gregory R. Manring, Note, *It’s Time for an Intervention!: Resolving the Conflict Between Rule 24(a)(2) and Article III Standing*, 85 *Fordham L. Rev.* 2525 (2017); Tyler R. Stradling & Doyle S. Byers, Comment, *Intervening in the Case (or Controversy): Article III Standing, Rule 24 Intervention, and the Conflict in the Federal Courts*, 2003 *BYU L. Rev.* 419; Elizabeth Zwickert Timmermans, Note, *Has the Bowsher Doctrine Solved the Debate?: The Relationship Between Standing and Intervention as of Right*, 84 *Notre Dame L. Rev.* 1411 (2009); Melissa Waver, Student-Written Article, *Where Standing Closes a Door, May Intervention Open a Window? Article III, Rule 24(a), and Climate Change Solutions*, 42 *Envtl. L. Rep. News & Analysis* 10945 (2012); Kerry C. White, Note, *Rule 24(a) Intervention of Right: Why the Federal Courts Should Require Standing to Intervene*, 36 *Loy. L.A. L. Rev.* 527 (2002).

<sup>49</sup> See Fed. R. Civ. P. 12(b)(6) (allowing motions to dismiss for “failure to state a claim upon which relief can be granted”).

allow plaintiffs to pursue in federal court. Article III says that the federal government's judicial power extends to various categories of "Cases" and "Controversies,"<sup>50</sup> and the Supreme Court has held that those terms require suits in federal court to fit a certain template: the plaintiff must have suffered (or be at sufficiently imminent risk of suffering) a concrete "injury in fact" that is "fairly traceable" to the defendant's conduct and that "is likely to be redressed by a favorable judicial decision."<sup>51</sup> The Supreme Court has described these criteria as "the irreducible constitutional minimum" for what the Court calls "standing" to sue.<sup>52</sup> Under current doctrine, plaintiffs whose claims do not satisfy these criteria are said to lack "Article III standing," and they cannot proceed in federal court even if a statute purports to say that they can.<sup>53</sup>

Because the concept of "Article III standing" is simply an outer limit on the kinds of suits that federal courts can be authorized to adjudicate, it is not very demanding. Even a trivial harm can count as an "injury in fact"; if Congress decides to let people make federal cases out of the loss of a few dollars, Article III will not stand in the way.<sup>54</sup> The Supreme Court has approvingly quoted Professor Kenneth Culp Davis's observation that "an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."<sup>55</sup> Nor do harms need to be monetary. In 1970, when the Court first articulated the "injury in fact" requirement and associated it with Article III, the Court specifically indicated that Congress can authorize people to bring suit in federal court over "'aesthetic, conservational, and recreational' as well as economic values."<sup>56</sup> A wide

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<sup>50</sup> U.S. Const. art. III, § 2.

<sup>51</sup> See, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

<sup>52</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>53</sup> See *id.* at 571–78.

<sup>54</sup> See *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'"); *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) ("[T]he amount is irrelevant. A dollar of economic harm is still an injury-in-fact for standing purposes.>").

<sup>55</sup> *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 613 (1968)); see also *infra* notes 76–78 and accompanying text (noting that the injury-in-fact test can be traced to Professor Davis himself).

<sup>56</sup> *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970) (quoting *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 616 (2d Cir. 1965)).

variety of other real-world harms have also qualified as “injur[ies] in fact.”<sup>57</sup>

To be sure, the injury-in-fact requirement is not toothless; it can be an obstacle to certain types of private lawsuits that Congress might like to authorize.<sup>58</sup> Some commentators have sharply attacked this limitation on Congress as a power grab by the Supreme Court.<sup>59</sup> But the fact that the limitation is controversial does not mean that it is especially restrictive. In most settings, the need for Article III standing is a relatively minor constraint on the suits that can get off the ground in federal court.<sup>60</sup>

## 2. *The Misguided Focus on Article III Standing as a Test for Intervention*

Ever since the 1980s, federal courts of appeals have disagreed with each other about whether and how the concept of “Article III standing”

<sup>57</sup> See, e.g., *FEC v. Akins*, 524 U.S. 11, 21 (1998) (holding that a group of voters who opposed the views of the American Israel Public Affairs Committee (AIPAC), and who believed that having information about AIPAC’s electoral expenditures “would help them . . . to evaluate candidates for public office . . . and to evaluate the role that AIPAC’s financial assistance might play in a specific election,” had suffered “injury in fact” from the FEC’s failure to force AIPAC to make disclosures allegedly required by federal law); *Data Processing*, 397 U.S. at 154 (“A person . . . may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause.”); see also *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 134 (3d Cir. 2015) (“Though the ‘injury must affect the plaintiff in a personal and individual way,’ this standard does not demand that a plaintiff suffer any particular type of harm to have standing.” (quoting *Def. of Wildlife*, 504 U.S. at 560 n.1)).

<sup>58</sup> See *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–10 (1983) (preventing suits for prospective relief by plaintiffs who cannot show that they themselves are sufficiently likely to be subjected to the unlawful conduct that they want a court to enjoin); see also, e.g., *Raines v. Byrd*, 521 U.S. 811, 814–18 (1997) (refusing to give effect to a statutory provision purporting to let individual members of Congress bring suit to challenge the constitutionality of the Line Item Veto Act); *Def. of Wildlife*, 504 U.S. at 571–78 (refusing to give full effect to the “citizen-suit” provision of the Endangered Species Act).

<sup>59</sup> See William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 231–34 (1988) (explaining that the injury-in-fact test is not and cannot be purely “factual,” and describing the test as “a way for the Court to enlarge its powers at the expense of Congress” by restricting Congress’s ability “to define and protect against certain kinds of injury that the Court thinks it improper to protect against”); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 Mich. L. Rev. 163, 167 (1992) (arguing that “the injury-in-fact requirement should be counted as a prominent contemporary version of early twentieth-century substantive due process,” and criticizing the test for “inject[ing] common law conceptions of harm into the Constitution”).

<sup>60</sup> See, e.g., *Cottrell v. Alcon Labs.*, 874 F.3d 154, 162 (3d Cir. 2017) (“The injury-in-fact requirement is ‘very generous’ to claimants . . .” (quoting *Bowman v. Wilson*, 672 F.2d 1145, 1151 (3d Cir. 1982))).



relates to intervention. Throughout this period, the Supreme Court has held that if someone intervenes in a case but is dissatisfied with the district court's eventual judgment, and if none of the other parties files a notice of appeal, the intervenor needs "Article III standing" in order to take an appeal on its own.<sup>61</sup> Recently, the Supreme Court made clear that even at the district-court level, "an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests."<sup>62</sup> But there is an ongoing split about whether outsiders need Article III standing when they want to intervene in a pending case simply for the purpose of urging the court to grant or to deny the relief that a party with standing has requested and is continuing to seek.

There are two possible sources for such a requirement: Article III and Rule 24. The Eighth Circuit has held that Article III requires "all parties" to a suit in federal court, including everyone who becomes a party through intervention, to meet the constitutional requirements for "standing."<sup>63</sup> The D.C. Circuit may agree.<sup>64</sup> Most federal courts of appeals, however, have rejected this interpretation of the Constitution. According to the majority view, as long as two or more of the parties to a suit in federal court are adverse in the sense necessary to create a "Case" or "Controversy," Article III does not prevent other people who lack "Article III standing" from participating in that case as intervenors.<sup>65</sup>

Of course, even if the Constitution does not itself require would-be intervenors to demonstrate "Article III standing," Rule 24 might. In a series of cases, the D.C. Circuit has equated the "interest" that Rule

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<sup>61</sup> See *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736–37 (2016); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64–65 (1997); *Diamond v. Charles*, 476 U.S. 54, 68–69 (1986).

<sup>62</sup> *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017).

<sup>63</sup> *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996); see also, e.g., *Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 974 (8th Cir. 2014) ("In the Eighth Circuit, a prospective intervenor must 'establish Article III standing in addition to the requirements of Rule 24.'" (quoting *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 833 (8th Cir. 2009))).

<sup>64</sup> See, e.g., *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1232 (D.C. Cir. 2018) ("Intervenors become full-blown parties to litigation, and so all would-be intervenors must demonstrate Article III standing."); see also *infra* note 66.

<sup>65</sup> See *King v. Governor of N.J.*, 767 F.3d 216, 245 (3d Cir. 2014); *Perry v. Schwarzenegger*, 630 F.3d 898, 906 (9th Cir. 2011); *San Juan County v. United States*, 503 F.3d 1163, 1171–72 (10th Cir. 2007) (en banc); *Dillard v. Chilton Cty. Comm'n*, 495 F.3d 1324, 1337 (11th Cir. 2007); *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 318 (6th Cir. 2005); *Ruiz v. Estelle*, 161 F.3d 814, 832–33 (5th Cir. 1998); *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978).

24(a)(2) requires for intervention of right with the “injury in fact” that a plaintiff must show in order to have Article III standing.<sup>66</sup> Other courts deny that the two requirements are identical, but disagree about which is easier to satisfy. According to the Seventh Circuit, the “interest” requirement that Rule 24(a)(2) establishes for intervention of right is more demanding than the injury-in-fact requirement that the Constitution establishes for Article III standing.<sup>67</sup> By contrast, the Sixth Circuit has said the opposite: “[T]he ‘injury in fact’ requirement is stricter.”<sup>68</sup> Thus,

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<sup>66</sup> See *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015); *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1146 (D.C. Cir. 2009); *Jones v. Prince George’s County*, 348 F.3d 1014, 1018–19 (D.C. Cir. 2003); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003); see also, e.g., *Forest Cty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 13 n.8 (D.D.C. 2016) (referring to “the principle firmly grounded in D.C. Circuit case law that a showing of Article III standing is sufficient to meet the ‘interest’ requirement of Rule 24(a)”).

Early on, the D.C. Circuit spoke as if the Constitution itself might require intervenors to have Article III standing—the position later adopted by the Eighth Circuit. In *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777 (D.C. Cir. 1984), Senator Jesse Helms had tried to intervene in two related cases six years after judgment for the purpose of unsealing the record. After asserting that Rule 24(a)(2) requires would-be intervenors to demonstrate a “legally protectable” interest, the court added that “[s]uch a gloss upon the rule is in any case required by Article III of the Constitution,” and the court proceeded to discuss whether Senator Helms had “standing.” *Id.* at 779–81 (concluding that he did not and therefore affirming the denial of his motion to intervene). A different panel of the D.C. Circuit subsequently summarized this decision as follows: “*Kelley* establishes that a movant for leave to intervene under Rule 24(a)(2) must have Article III standing to participate in proceedings before the district court.” *City of Cleveland v. Nuclear Regulatory Comm’n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994).

In a later opinion, however, the D.C. Circuit suggested that this holding might be limited to intervention of right under Rule 24(a)(2) and might not apply to permissive intervention under Rule 24(b). See *In re Endangered Species Act Section 4 Deadline Litig.*, 704 F.3d 972, 976, 980 (D.C. Cir. 2013). For that suggestion to make sense, the D.C. Circuit would need to cast its earlier opinions as interpreting only Rule 24(a)(2) and not the Constitution. On this view, the D.C. Circuit has held that the word “interest” in Rule 24(a)(2) requires applicants for intervention of right to have “Article III standing,” but not that the Constitution itself restricts intervention in this way. Cf. *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (denying that Article III requires all would-be intervenors to “demonstrate . . . standing in addition to meeting the requirements of Rule 24,” but adding that “[t]he standing cases . . . are relevant to help define the type of interest that the intervenor must assert”).

<sup>67</sup> See, e.g., *City of Chicago v. FEMA*, 660 F.3d 980, 985 (7th Cir. 2011); *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009); see also *United States v. 36.96 Acres of Land*, 754 F.2d 855, 859–60 (7th Cir. 1985) (concluding that “[t]he interest of a proposed intervenor . . . must be greater” than “the ‘interest’ which is sufficient for standing to bring an action under the [Administrative Procedure Act]”).

<sup>68</sup> *Providence Baptist*, 425 F.3d at 318; see also *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999) (observing that “in this circuit we subscribe to a ‘rather expansive notion of the interest sufficient to invoke intervention of right,’” and adding that “an intervenor need not

in the Sixth Circuit (and also in the D.C. Circuit), anyone who faces “injury in fact” from the outcome of a lawsuit apparently will be said to have the “interest” required for intervention of right.

That conclusion is puzzling. The injury-in-fact requirement marks the outer boundaries of the kinds of claims that Congress has the constitutional authority to let federal courts adjudicate. The mere fact that someone satisfies this requirement does not mean that the applicable law supplies a claim for relief. As a result, having “Article III standing” does not automatically make someone a proper plaintiff. By contrast, Rule 24(a) is about which would-be litigants are indeed entitled to become parties to suits in federal court. There is no obvious reason to treat “the irreducible constitutional minimum of standing”<sup>69</sup>—the threshold that must be satisfied for Congress even to have the *option* of allowing someone to initiate litigation in federal court—as the key metric for deciding whether Rule 24 does indeed authorize intervention in suits that have gotten under way. On this point, the Seventh Circuit seems exactly right: “[S]o little is required for Article III standing that if no more were required for intervention as a matter of right, intervention would be too easy and clutter too many lawsuits with too many parties.”<sup>70</sup>

As a historical matter, moreover, Part II of this Article argues that in the context of intervention, the word “interest” has been used to refer to *legal* interests rather than purely practical interests. If so, then the word should not be equated with an “injury in fact.” Indeed, when Justice Douglas first articulated the “injury in fact” requirement as a gloss on Article III, he specifically contrasted it with what he called “[t]he ‘legal interest’ test.”<sup>71</sup>

The many critics of the “injury in fact” requirement have already described its emergence.<sup>72</sup> Under traditional principles of equity jurisprudence as applied in the 1930s, plaintiffs who were asking a court

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have the same standing necessary to initiate a lawsuit” (quoting *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)).

<sup>69</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>70</sup> *Chicago*, 660 F.3d at 985.

<sup>71</sup> *Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151–53 (1970); see also, e.g., Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 *Colum. L. Rev.* 1432, 1445 (1988) (“The Court [in *Data Processing*] replaced the legal interest test with a factual inquiry into the existence of harm; the existence of a ‘legal’ interest was utterly irrelevant.”). For my own take on *Data Processing*, see Caleb Nelson, “Standing” and Remedial Rights in Administrative Law, 105 *Va. L. Rev.* 703 (2019).

<sup>72</sup> See, e.g., Elizabeth Magill, *Standing for the Public: A Lost History*, 95 *Va. L. Rev.* 1131, 1160–63 (2009); Sunstein, *supra* note 59, at 183–86.

to enjoin unlawful behavior by governmental officials needed to show more than simply that the behavior was unlawful; to make out a claim for injunctive relief, plaintiffs needed to show that the defendants' conduct violated "legal rights" belonging to the plaintiffs themselves.<sup>73</sup> This principle was about the scope of claims for relief that were recognized as a matter of unwritten law, but the Supreme Court frequently discussed it under the rubric of "standing."<sup>74</sup> In the 1940s, though, the Court made clear that this aspect of "standing" was subject to congressional control: at least if plaintiffs were facing some sort of practical harm because of the defendant's unlawful conduct, Congress could authorize them to seek relief in court even if the conduct did not violate any duties that were owed to them personally.<sup>75</sup> In the 1950s, Professor Kenneth Culp Davis concluded that the Supreme Court had recognized Congress's power to let anyone "who is in fact adversely affected" by governmental action sue to challenge the legality of that action.<sup>76</sup> According to Professor Davis, "the constitutional concept of 'case' or 'controversy' as interpreted by the Supreme Court requires adverse effect," not the deprivation of a "legal right" or "legally-protected interest" belonging to the plaintiff.<sup>77</sup> In 1970, Justice Douglas's opinion in *Association of Data Processing Service Organizations v. Camp* embraced this understanding of Article III.<sup>78</sup> Justice Douglas portrayed the "injury in fact" test as a threshold requirement that did not require inquiry into "the merits" of a plaintiff's legal arguments.<sup>79</sup>

<sup>73</sup> See, e.g., *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940); *Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 137 (1939); *Ala. Power Co. v. Ickes*, 302 U.S. 464, 478–79 (1938).

<sup>74</sup> See, e.g., *Perkins*, 310 U.S. at 125; *Ala. Power*, 302 U.S. at 480. For the seminal article about the nature of this aspect of "standing," see Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 *Yale L.J.* 425, 432–42 (1974).

<sup>75</sup> See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476–77 (1940). In *Sanders Bros.*, the Supreme Court had no occasion to discuss whether Congress could authorize private plaintiffs to seek relief against behavior that was unlawful but was not causing any harm to the plaintiffs themselves.

<sup>76</sup> Kenneth Culp Davis, *Standing to Challenge Governmental Action*, 39 *Minn. L. Rev.* 353, 363–65 (1955).

<sup>77</sup> *Id.* at 356, 360–65; see also *id.* at 363 (describing *Sanders Bros.* as "[p]erhaps the most prominent Supreme Court case recognizing standing in absence of violation of a 'legal right' of the plaintiff").

<sup>78</sup> 397 U.S. 150, 151–53 (1970).

<sup>79</sup> *Id.* at 153; see also, e.g., Magill, *supra* note 72, at 1161–62 (observing that at least on the surface, the point of the test "was to ask whether a party was factually injured by government

By contrast, as we will see in Part II, deciding whether would-be intervenors have the sort of “interest” that entitles them to become parties to a case has historically required attention to legal relations. To be sure, if a would-be intervenor is claiming a relevant “interest,” Rule 24(a) directs the court to ask whether disposing of the case “may as a practical matter impair or impede the [would-be intervenor’s] ability to protect its interest.”<sup>80</sup> But this practical inquiry comes into play only if the would-be intervenor is indeed claiming a relevant “interest.”<sup>81</sup> Historically, the mere concern that an outsider will suffer an “injury in fact” if the court enters judgment for one side or the other has not been enough to satisfy that requirement.

### 3. “*Injury in Fact*,” *Party Status*, and the *Right to Appeal*

One of the bizarre effects of equating the “interest” required for intervention of right with a mere “injury in fact” is that intervenors can become parties to a case as a whole without being proper parties to any

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action, rather than ask whether the challenger could assert injury to a legally recognized right or privilege”).

Admittedly, some subsequent Supreme Court opinions have obscured this point. In an oft-quoted passage, Justice Scalia’s majority opinion in *Lujan v. Defenders of Wildlife* defined an “injury in fact” as “an invasion of a legally protected interest which is (a) concrete and particularized and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’”<sup>80</sup> 504 U.S. 555, 560 (1992) (citations and footnote omitted); accord, e.g., *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018). Although this sentence purported simply to recite established doctrine, Justice Scalia’s reference to “a legally protected interest” arguably introduced a legal component into what Justice Douglas had cast as a purely factual inquiry.

A few years later, though, Justice Scalia omitted that reference when he again defined the concept of an “injury in fact.” See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 103 (1998) (defining an “injury in fact” as “a harm suffered by the plaintiff that is ‘concrete’ and ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’” (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990))). As Judge Stephen F. Williams has observed, moreover, a different passage in *Defenders of Wildlife* used the adjective “cognizable” rather than “legally protected.” See *Judicial Watch, Inc. v. U.S. Senate*, 432 F.3d 359, 363–64 (D.C. Cir. 2005) (Williams, J., concurring) (citing *Defs. of Wildlife*, 504 U.S. at 562–63). Thus, Justice Scalia may simply have been trying to suggest that not every real-world harm can serve as the foundation for “Cases” and “Controversies” in federal court. See *id.* at 365; *DePuy, Inc. v. Zimmer Holdings, Inc.*, 384 F. Supp. 2d 1237, 1240 (N.D. Ill. 2005) (Posner, J.) (“Probably all the Court meant was just that not any old injury can satisfy Article III—after all, there is a sense in which I am ‘injured’ when I become upset by reading about the damage caused that fine old vineyard in Burgundy by a band of marauding teetotalers, yet that injury would not be an injury to the kind of personal interest that is necessary to support an invocation of the federal judicial power created by Article III.”).

<sup>80</sup> Fed. R. Civ. P. 24(a)(2).

<sup>81</sup> See *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 227 (3d Cir. 2005).

claim for relief. That effect does not sit well either with traditional notions of party structure or with the language of Rule 24. As if to confirm that the word “interest” in Rule 24(a) refers to legal relations, Rule 24(c) requires all would-be intervenors (including those who assert a right to intervene under Rule 24(a) as well as those seeking permission to intervene under Rule 24(b)) to submit “a pleading that sets out the claim or defense for which intervention is sought.”<sup>82</sup> Not surprisingly, courts that recognize a right to intervene on the strength of a mere injury in fact have had difficulty applying this requirement.<sup>83</sup>

Courts that take a broad view of the “interest” required for intervention of right often cite a classic law-review article that Professor David Shapiro published in 1968, two years after the last major revision of Rule 24.<sup>84</sup> Professor Shapiro began his analysis with the following observation: “Perhaps it should go without saying, but it must be understood that there is a difference between the question whether one is a proper plaintiff or defendant in an initial action and the question whether one is entitled to intervene.”<sup>85</sup> After surveying relevant cases, Professor Shapiro concluded that “[w]hether a sufficient interest exists to make intervention appropriate calls for considerable and careful judgment.”<sup>86</sup> But in his view, “there are a number of instances in which intervention may be appropriate even though a person does not . . . have a ‘claim,’ or a ‘defense’ to a claim that might be asserted against him.”<sup>87</sup>

Still, Professor Shapiro did not necessarily want to handle those instances through broad readings of Rule 24(a). Rather than proposing “an expansion of the right to intervene,”<sup>88</sup> he advocated amending Rule 24 so as to broaden the availability of *permissive* intervention.

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<sup>82</sup> Fed. R. Civ. P. 24(c); see also Edward H. Levi & James Wm. Moore, Federal Intervention: II. The Procedure, Status, and Federal Jurisdictional Requirements, 47 Yale L.J. 898, 904 (1938) (“The proposed complaint or answer of the intervenor must state a well pleaded claim or defense.”).

<sup>83</sup> See, e.g., *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 834 (8th Cir. 2009) (holding that a “statement of interest” can be adequate to satisfy Rule 24(c)); see also *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 314 (6th Cir. 2005) (contrasting circuits that “have taken a lenient approach to the requirements of Rule 24(c)” with circuits that “have taken a stricter approach”).

<sup>84</sup> See David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721 (1968); see also, e.g., *Texas v. United States*, 805 F.3d 653, 659 n.4 (5th Cir. 2015) (citing Shapiro).

<sup>85</sup> Shapiro, *supra* note 84, at 726.

<sup>86</sup> *Id.* at 740.

<sup>87</sup> *Id.* (quoting Fed. R. Civ. P. 24(b)).

<sup>88</sup> *Id.* at 758.

Specifically, he proposed giving district courts discretion to allow intervention whenever they considered it “appropriate” in light of a laundry list of factors.<sup>89</sup> Nowhere did Professor Shapiro argue that all outsiders with a practical stake in the outcome of a case should automatically be deemed to have an “interest” of the sort that warrants intervention of right.

While Professor Shapiro wanted district courts to have broad discretion to permit intervention, moreover, he did not think that all intervenors should have “all the rights of a party at the trial and appellate levels.”<sup>90</sup> For instance, he suggested that someone could have an “interest” sufficient to intervene and to participate as a party at the trial level without having the sort of “interest” that is necessary to appeal an adverse judgment.<sup>91</sup>

When modern courts take a broad view of the right to intervene, and do not moderate it in the way that Professor Shapiro suggested, strange things can happen. Consider the Sixth Circuit’s opinion in *Cherry Hill Vineyards, LLC v. Lilly*.<sup>92</sup> Kentucky statutes restricted the circumstances in which wineries could sell and ship wine directly to Kentucky consumers.<sup>93</sup> Complaining that the restrictions violated the dormant Commerce Clause, an out-of-state winery and some in-state consumers sued state officials to enjoin enforcement of the allegedly unconstitutional state laws. The Wine and Spirits Wholesalers of Kentucky, a trade group whose members benefited from the statutory restrictions on direct sales, intervened on the side of the state officials. Ultimately, the district court held that one of the challenged restrictions did indeed violate the Constitution, and the district court enjoined the state officials from enforcing that restriction.<sup>94</sup> The state officials did not file a notice of

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<sup>89</sup> See *id.* at 761–62; see also *id.* at 759 (noting that the current version of Rule 24(b) assumes that everyone seeking permission to intervene will be asserting a “claim or defense,” but advocating amendments “to free the question of intervention from this conceptual limitation and to recognize that even one lacking a claim or defense may have a good case for intervention”).

<sup>90</sup> *Id.* at 727.

<sup>91</sup> See *id.* at 753.

<sup>92</sup> 553 F.3d 423 (6th Cir. 2008).

<sup>93</sup> The content of the restrictions changed over time. Until 2006, Kentucky law explicitly distinguished between out-of-state wineries and in-state wineries. After the Supreme Court’s decision in *Granholm v. Heald*, 544 U.S. 460 (2005), the state legislature amended the relevant statutes. See *Cherry Hill Vineyards, LLC v. Hudgins*, 488 F. Supp. 2d 601, 603–06 (W.D. Ky. 2006) (summarizing the statutory scheme that was scheduled to take effect in 2007).

<sup>94</sup> See *Cherry Hill*, 488 F. Supp. 2d at 625.

appeal, but the trade group did. Because the group’s members had an “economic . . . stake in the outcome of the case,” they satisfied the requirements for Article III standing, and the Sixth Circuit concluded that they had the same right to appeal as any other party.<sup>95</sup> Thus, the Sixth Circuit allowed the trade group to appeal the injunction that had been entered against the state officials—not because the injunction imposed any legal obligations on the trade group, and not because the trade group asserted any right to have the state officials enforce Kentucky law against the plaintiffs, but simply because non-enforcement would cause the trade group’s members to suffer some practical harm.

This result is exceptionally odd. The trade group lacked the sort of legal interests that would give it a claim or defense of the sort that parties normally assert. Nonetheless, because the trade group’s members had *practical* interests at stake, the group was allowed to become a party at the district-court level. Because the group’s practical interests satisfied the test for “Article III standing,” moreover, the Sixth Circuit applied the normal principle that parties get to appeal adverse decisions. The Sixth Circuit did not consider the possibility that this principle should apply only to conventional parties who are asserting conventional legal interests—the people whose remedial rights and duties have been adjudicated by the district court. Under the Sixth Circuit’s approach, a private trade group that had no claim against any of the existing parties, that was not itself the subject of any such claim, and that faced no legal obligations under the district court’s judgment was allowed to keep the case alive despite the fact that the parties with legal interests were all willing to give up their fight.<sup>96</sup>

### *C. Inconsistencies in Application*

Of course, even if a court *says* that a mere “injury in fact” is sufficient to establish the “interest” required for intervention of right, the court probably does not really mean it. Whether the plaintiff or the defendant wins a case can have practical ramifications for a host of people—a party’s creditors, suppliers, employees, and competitors; a movie studio that has acquired rights to the story; and more. It seems highly unlikely

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<sup>95</sup> See *Cherry Hill*, 553 F.3d at 428–30.

<sup>96</sup> While *Cherry Hill* strikes me as bizarre, it is not unique. The Fifth Circuit reached a similar conclusion in *Cooper v. Texas Alcoholic Beverage Commission*, 820 F.3d 730 (5th Cir. 2016).



that everyone who stands to suffer any sort of concrete loss from the outcome of a lawsuit automatically has the sort of “interest” contemplated by Rule 24(a).

Not surprisingly, then, courts that have used “Article III standing” as a touchstone for intervention in some cases have applied different ideas in other cases. The Sixth Circuit is a good example. As noted above, the Sixth Circuit has suggested that everyone who will suffer practical harm if a case is decided in a particular way automatically has an “interest” of the sort required by Rule 24(a).<sup>97</sup> In a different published opinion, though, the Sixth Circuit held that a would-be intervenor who appeared to have an “injury in fact” nonetheless lacked “the level of . . . substantial interest required to intervene.”<sup>98</sup> In unpublished opinions, moreover, the Sixth Circuit has repeatedly held that various would-be intervenors with financial reasons to care about the outcome of a case lacked the “legal interest” required for intervention of right.<sup>99</sup>

Several courts that take a more restrictive approach than the Sixth Circuit have stated categorically that “[a]n economic interest in the outcome of the litigation is not itself sufficient to warrant mandatory intervention.”<sup>100</sup> In the leading case that articulated this principle, the

<sup>97</sup> See *supra* note 68 and accompanying text.

<sup>98</sup> *United States v. Tennessee*, 260 F.3d 587, 596 (6th Cir. 2001) (rebuffing intervention of right by an association whose members were facing at least temporary financial burdens because of the outcome of a case).

<sup>99</sup> See *Atlas Noble, LLC v. Krizman Enters.*, 692 F. App’x 256, 269 (6th Cir. 2017) (“Croxtton does not have a substantial legal interest in this litigation. . . . At best, he is one ‘who ‘might anticipate a benefit from a judgment in favor of one of the parties to a lawsuit.’” (quoting *ReliaStar Life Ins. Co. v. MKP Invs.*, 565 F. App’x 369, 372 (6th Cir. 2014))); *ReliaStar*, 565 F. App’x at 371–73 (rebuffing a motion to intervene by a bank that was suing the same defendant in a separate case and that therefore wanted to defeat other claims upon the defendant’s assets); *Blount-Hill v. Bd. of Educ.*, 195 F. App’x 482, 485–86 (6th Cir. 2006) (holding that a company in the business of providing management services to certain schools lacked a right to intervene in a suit challenging the constitutionality of the state statute funding those schools, because the company “does not have a substantial legal interest for purposes of Rule 24(a)”).

<sup>100</sup> *Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 485 F.3d 1006, 1008 (8th Cir. 2007); accord *Mt. Hawley Ins. Co. v. Sandy Lake Props., Inc.*, 425 F.3d 1308, 1311 (11th Cir. 2005); *New Orleans Pub. Serv., Inc. [(NOPSI)] v. United Gas Pipe Line Co.*, 732 F.2d 452, 464, 466 (5th Cir. 1984).

Judge Posner has called this formulation “confusing,” because “most civil litigation is based on nothing more than an ‘economic interest.’” *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009). This criticism, however, focuses on the motivation for lawsuits and ignores the legal basis of the parties’ positions. In standard civil litigation, plaintiffs do not simply say that they would benefit economically if the court awarded them the relief that they want, and defendants do not simply say that this relief would cost them money. Normally, the parties

Fifth Circuit explained that the “interest” required by Rule 24(a)(2) is “one which the substantive law recognizes as belonging to or being owned by the applicant.”<sup>101</sup> Thus, the Fifth Circuit held that in a suit between the parties to a contract about whether the contract is valid, outsiders are not entitled to intervene simply because they would benefit from performance; the court needs to ask whether the outsiders are claiming rights of their own under the contract, and whether the applicable law provides a basis for this claim.<sup>102</sup> Similarly, suppose that a plaintiff brings

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advance legal claims or defenses. At least apart from the possibility of intervention, the typical lawsuit is based on the legal relations between the parties, not just their economic interests.

Still, some of the courts that require would-be intervenors to assert a legal interest, and that call mere “economic” interests insufficient, do not apply these categories coherently. For instance, remember the *Planned Parenthood* case described in the text accompanying note 19: Planned Parenthood of Minnesota sued city officials to enjoin enforcement of an ordinance that temporarily blocked the construction of abortion clinics in St. Paul, and the Eighth Circuit held that people who owned homes in the vicinity of a proposed clinic had a right to intervene “to assure that their property values are not adversely affected by the creation of an abortion clinic in their neighborhood.” *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 869 (8th Cir. 1977). The Eighth Circuit spoke as if the homeowners were asserting “property interests” of a sort protected by law. *Id.* But the homeowners’ legal interests were neither disputed nor threatened: Planned Parenthood was not denying that the homeowners owned their homes, and the homeowners were not claiming that the proposed clinic would violate any of the rights that belonged to them. (For instance, the homeowners did not claim that the clinic would be an actionable nuisance.) The basis for the homeowners’ motion to intervene was simply that a judgment for Planned Parenthood might reduce the value of their homes. That asserted interest is best described as “economic” rather than legal.

Some other circuits have vacillated about the significance of this distinction. In 1995, a panel of the Third Circuit asserted that “[i]n general, a mere economic interest in the outcome of the litigation is insufficient to support a motion to intervene.” *Mountain Top Condo. Ass’n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995). In 1998, a second panel retreated from this statement. See *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 970 (3d Cir. 1998) (“Phraseology such as ‘mere economic interest[]’ . . . has been used but has not proved decisive . . .”). In 2005, a third panel went back to what the first panel had said. See *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 220–25 (3d Cir. 2005) (quoting *Mountain Top* extensively and relying on its analysis); *id.* at 225 (“*Kleissler* . . . certainly could not overrule *Mountain Top*.”). In 2012, a fourth panel seemed to agree with the second panel. See *Benjamin v. Dep’t of Pub. Welfare*, 701 F.3d 938, 951 (3d Cir. 2012) (“A proposed intervenor’s interest need not be a legal interest, provided that he or she “‘will be practically disadvantaged by the disposition of the action.’” (quoting an unpublished opinion that in turn was quoting *Kleissler*, 157 F.3d at 970)).

<sup>101</sup> *NOPSI*, 732 F.2d at 463–64 (emphasis omitted).

<sup>102</sup> See *id.* at 466–69 (examining Louisiana law about which contracts confer rights upon third-party beneficiaries). In a separate line of cases, however, the Fifth Circuit has instead said that “intervention as of right must be measured by a practical rather than technical yardstick.” *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 841 (5th Cir. 1975). On the strength of this adage, the Fifth Circuit has sometimes recognized broader rights to intervene than *NOPSI* would suggest. See *Texas v. United States*, 805 F.3d 653, 659 (5th Cir.

a tort suit against a defendant, who becomes embroiled in separate litigation with the defendant's insurer about whether the defendant's insurance contract covers this potential liability. Unless the applicable law gives the tort plaintiff a claim against the defendant's insurer,<sup>103</sup> several circuits have held that the tort plaintiff does not have an "interest" of the sort that would entitle her to intervene in the coverage litigation—even if the defendant does not have enough other assets to cover the judgment that might be rendered in the tort suit, and even if the tort plaintiff therefore has a practical stake in the scope of the defendant's insurance coverage.<sup>104</sup>

By contrast, the Ninth and Tenth Circuits have explicitly held that some "economic" interests can be good enough to satisfy Rule 24(a)(2). In 2002, indeed, a panel of the Tenth Circuit stated broadly that "[t]he threat of economic injury from the outcome of litigation undoubtedly gives a petitioner the requisite interest."<sup>105</sup> Sitting en banc a few years later, the Tenth Circuit was less absolute, but it continued to focus on whether "the practical effect on the prospective intervenor justifies its participation in

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2015) ("[A]n interest is sufficient if it is of the type that the law deems worthy of protection, even if the intervenor does not have an enforceable legal entitlement or would not have standing to pursue her own claim."); *City of Houston v. Am. Traffic Sols.*, 668 F.3d 291, 294 (5th Cir. 2012) (holding that two Houston citizens, who had spearheaded a successful ballot initiative to amend the city charter in a way that forced the city to terminate a contract with a private company, had a right to intervene in the ensuing lawsuit between the contractor and the city, where the contractor challenged the validity of the amendment and city officials could not be counted upon to defend it); see also *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 567 (5th Cir. 2016) ("*NOPSI* did not create a bar preventing all intervention premised on 'economic interests.'").

<sup>103</sup> Cf. *Axis Energy Corp. v. St. Paul Surplus Lines Ins. Co.*, No. 3:16-cv-672, 2017 WL 2559731, at \*2 (M.D. La. June 13, 2017) (relying on Louisiana's Direct Action Statute to find the "interest" required for intervention of right in the coverage litigation).

<sup>104</sup> See *Med. Liab. Mut. Ins. Co.*, 485 F.3d at 1008–09; *Mt. Hawley Ins. Co.*, 425 F.3d at 1311–12; *Liberty Mut. Ins. Co.*, 419 F.3d at 220–27. But see *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991) (acknowledging a split of authority on this question, but recognizing a right to intervene); see also *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1380–81 (7th Cir. 1995) (recognizing a right to intervene at least when the insured person would otherwise default in the coverage litigation).

<sup>105</sup> *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002).

the litigation.”<sup>106</sup> The Ninth Circuit has agreed that “a non-speculative, economic interest may be sufficient to support a right of intervention.”<sup>107</sup>

Still, no one thinks that *everyone* who will feel economic effects because of the outcome of a case has a right to intervene in the case. For instance, the Ninth Circuit has held that a party’s unsecured creditors are not entitled to intervene in all suits that may affect the party’s finances—even if the creditors would like the party to win those suits so that the party has money to pay the creditors.<sup>108</sup> More generally, the Ninth Circuit has said that “[t]o trigger a right to intervene, . . . an economic interest must be concrete and related to the underlying subject matter of the action.”<sup>109</sup> That limitation need not be attributed to the word “interest”; by its terms, Rule 24(a)(2) requires would-be intervenors to claim an interest “relating to the property or transaction that is the subject of the action.”<sup>110</sup> But what sort of relationship is necessary? If an outsider does not need to assert any legal interests in the relevant property or transaction, and instead can intervene simply because the court’s judgment will affect the outsider in a practical sense, how should courts decide whether the outsider’s “interest” in avoiding adverse effects is sufficiently related to the property or transaction that is the subject of the action?

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<sup>106</sup> *San Juan County v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007) (en banc); see also *id.* at 1193 (criticizing prior cases for saying that an interest must be “legally protectable” to count, and asserting that this formulation “misses the point” because “[t]he central concern in deciding whether intervention is proper is the practical effect of the litigation on the applicant for intervention”).

<sup>107</sup> *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). But see *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993) (agreeing that “[n]o specific legal or equitable interest need be established,” but adding that “[a]n economic stake in the outcome of the litigation, even if significant, is not enough”); cf. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep’t of Agric.*, 143 F. App’x 751, 753 (9th Cir. 2005) (“We have allowed intervention based upon such ‘legally protected interests’ as contractual rights and federal pollution permits. We have made clear, however, that pure economic expectancy is not a legally protected interest for purposes of intervention.” (citations omitted)).

<sup>108</sup> See, e.g., *Alisal*, 370 F.3d at 920; *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002); cf. *Deutsche Bank Nat’l Tr. Co. v. FDIC*, 717 F.3d 189, 195 (D.C. Cir. 2013) (“[O]ther circuits have generally concluded that a party may not intervene in support of a defendant solely to protect judgment funds that the party wishes to recover itself. We would therefore be quite hesitant to suggest that a creditor’s general economic interest in receivership funds, even if sufficient to support Article III standing, would necessarily be an interest relating to any action that threatens those funds.” (citations omitted)).

<sup>109</sup> *Alisal*, 370 F.3d at 919.

<sup>110</sup> Fed. R. Civ. P. 24(a)(2).

Rather than demanding a *legal* relationship, courts that read the word “interest” broadly have tended to focus on causal relationships. For instance, when an outsider asserts a right to intervene in a case because the judgment could have adverse effects on the outsider, courts often ask whether those effects would be “direct.”<sup>111</sup> Likewise, courts sometimes have asked whether the adverse effects would follow inevitably from the judgment or instead are “contingent upon future events” that might not happen.<sup>112</sup> As the Tenth Circuit has noted, however, these adjectives are neither easy to apply nor obviously relevant.<sup>113</sup>

For its part, the Tenth Circuit has said that Rule 24(a)(2) “is not a mechanical rule,” and “[w]e cannot produce a rigid formula that will produce the ‘correct’ answer in every case.”<sup>114</sup> Instead, to decide whether an outsider has a right to intervene, courts in the Tenth Circuit are supposed to use “a process of equitable balancing” to decide “whether the strength of the interest and the potential risk of injury to that interest justify intervention” under the totality of the circumstances.<sup>115</sup> That flexible approach may have some advantages, but it is unlikely to generate consistent results.

<sup>111</sup> See, e.g., *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) (“[T]he polestar for evaluating a claim for intervention is always whether the proposed intervenor’s interest is direct or remote. . . . [I]ntervenors should have an interest that is specific to them, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought.”); cf. 6 James Wm. Moore, *Moore’s Federal Practice* § 24.03[2][b] (3d ed. 2019) (observing that a would-be intervenor’s desire to avoid “an indirect economic effect” normally is not regarded as an “interest sufficient to justify intervention”).

<sup>112</sup> See *Payne v. Tri-State Careflight, LLC*, No. CIV 14-1044, 2016 WL 9738302, at \*13–14 (D.N.M. July 12, 2016) (discussing split of authority on this question); see also *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 638 (1st Cir. 1989) (rejecting an asserted interest because “it is contingent”); 6 James Wm. Moore, *Moore’s Federal Practice* § 24.03[2][a] (3d ed. 2019) (“[A]n interest that is . . . contingent on the future occurrence of a sequence of events is insufficient.”).

<sup>113</sup> See *San Juan County v. United States*, 503 F.3d 1163, 1192–93 (10th Cir. 2007) (en banc) (“Whether an interest is direct or indirect could be a matter of metaphysical debate because almost any causal connection can be represented as a chain of causation in which intermediate steps separate the initial act from the impact on the prospective intervenor.”); *id.* at 1202 (criticizing the idea that “every contingent interest fails to satisfy Rule 24(a)(2)”).

<sup>114</sup> *Id.* at 1199. But cf. *Statewide Masonry v. Anderson*, 511 F. App’x 801, 806 (10th Cir. 2013) (“Although we noted in *San Juan County* that not every interest that could be characterized as indirect or contingent ipso facto fails under Rule 24(a), we also acknowledged that interests may simply be ‘too indirect’ and ‘too contingent’ to support intervention as of right . . . .” (quoting *San Juan County*, 503 F.3d at 1202)).

<sup>115</sup> *San Juan County*, 503 F.3d at 1195, 1199.

Disarray in the case law probably is inevitable as long as courts read the word “interest” in Rule 24(a) to encompass purely practical concerns (such as a would-be intervenor’s desire to avoid adverse effects that a particular disposition of the case might cause). People have many different types of practical interests, and there are many different settings in which those interests might be threatened. The text of Rule 24(a) does not help courts distinguish among these different interests and settings. Yet courts need some stopping points. In Judge Posner’s words, “the effects of a judgment . . . can ramify throughout the economy,” and it cannot be true that *everyone* who stands to gain or lose from the outcome of a case has a right to become a party.<sup>116</sup>

That line of thought suggests two possible conclusions. Perhaps the drafters of Rule 24(a) simply did a bad job; the Rule does not help courts draw the distinctions that turn out to be necessary. But it is also possible that modern courts have misunderstood the Rule. To investigate that possibility, the next Part turns to history.

## II. THE EVOLUTION OF RULE 24

Although “the complete and correct history of the procedural device of intervention” has yet to be written,<sup>117</sup> scholars have surveyed the history that bears most directly on Rule 24.<sup>118</sup> This Part adds some details, but it focuses specifically on what the word “interest” has traditionally meant in this context.

Section II.A discusses intervention in federal courts before the Federal Rules of Civil Procedure were promulgated. During that period, the word “interest” already appeared in provisions about intervention in the Federal Admiralty Rules, the Federal Equity Rules, and various state codes of civil procedure (which federal courts followed in actions at law). Section

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<sup>116</sup> *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009).

<sup>117</sup> Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 *Wash. U. L.Q.* 215, 241 (2000).

<sup>118</sup> The leading work on intervention in federal courts before the Federal Rules of Civil Procedure remains James Wm. Moore & Edward H. Levi, *Federal Intervention: I. The Right to Intervene and Reorganization*, 45 *Yale L.J.* 565 (1936). See Appel, *supra* note 117, at 241–46 (calling Moore and Levi’s account the “standard history,” though identifying some inaccuracies); see also *infra* notes 179–98 and accompanying text (noting the connection between Moore and Levi’s article and the original version of Rule 24). Various scholars have discussed subsequent developments, but the most detailed treatment is Appel, *supra* note 117, at 246–79.

II.A notes that the word was consistently understood to refer to legal interests rather than purely practical interests.

This theme continued after the Federal Rules of Civil Procedure took effect. As Section II.B explains, the original version of Rule 24 was designed to reflect existing practice, and courts interpreted the word “interest” accordingly.

Section II.C takes a close look at the 1966 amendment. The amendment was designed to affect the balance between Rule 24(a) and Rule 24(b): some people who previously would have qualified only for “permissive” intervention were now eligible for intervention “of right.” But there is little reason to think that the amendment fundamentally changed the meaning of the word “interest,” so that people who would not previously have been eligible to intervene at all now had a *right* to do so. The text of the amendment, the motivations behind it, and contemporaneous changes to other provisions in the Federal Rules all support a more restrained reading.

#### *A. Intervention in Federal Courts Before the Federal Rules of Civil Procedure*

##### *1. Intervention in Admiralty*

Intervention has a longer history in admiralty proceedings than in equity or at law.<sup>119</sup> That stands to reason. Traditionally, many admiralty cases proceeded *in rem*, and the point of those proceedings was to declare rights to a particular piece of property as against everyone in the world. If the judgment in the case was truly going to bind all people who might assert an interest in the property, there needed to be a mechanism for them to appear and participate in the case.<sup>120</sup>

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<sup>119</sup> See Moore & Levi, *supra* note 118, at 568.

<sup>120</sup> See *id.* at 569–70; see also, e.g., *The Mary Anne*, 16 F. Cas. 953, 954 (D. Me. 1826) (No. 9195) (“As a general principle, . . . in admiralty process in rem, all persons having an interest in the thing may intervene pro interesse suo, file their claims and make themselves parties to the cause, to defend their own interest. . . . [A]ll who have a legal interest may appear . . . .”); *United States v. The Anthony Mangin*, 24 F. Cas. 833, 834 (D. Pa. 1802) (No. 14,461) (“The proceeding being in rem, all the world become parties to the sentence, as far as the right of property is involved; and of course all persons in any wise interested in the property in question, are admissible to claim and defend their interests.”). Of course, suits *in rem* were nominally brought against a thing—a vessel, its cargo, or the like. But as Erastus Benedict observed in his 1850 treatise, the suit “is, in substance, a suit against all persons having any interest in the thing, to the extent of their interest in it.” Erastus C. Benedict, *The American*

In the United States, early federal courts handled admiralty cases according to uncodified practices rather than written rules of procedure.<sup>121</sup> But when the Supreme Court did promulgate a set of written rules for admiralty cases in 1845,<sup>122</sup> those rules explicitly recognized several mechanisms for interested people to join proceedings *in rem*. The relevant rules retained essentially the same form for the next century.

Upon the filing of the libel in a suit *in rem*, the court typically issued a warrant directing the marshal to arrest (or take possession of) the property in question.<sup>123</sup> That could prompt someone other than the libellant to appear and file a “claim” seeking to regain possession of the property. Admiralty Rule 26 addressed the procedure for making a claim of this sort, which included averring “that the claimant, by whom or on whose behalf the claim is made, is the true and bonâ fide owner, and that no other person is the owner thereof.”<sup>124</sup> A person who filed a claim became a full-fledged party to the proceeding; in the words of a later court, “he would assume the situation of a defendant as respects the libellant, and as such would be required to answer the libel.”<sup>125</sup>

Separate and apart from “claims” under Rule 26, two other Admiralty Rules addressed what they called “interven[tion].” First, Admiralty Rule

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Admiralty 238 (New York, Banks, Gould & Co. 1850); see also *id.* (“All the world are said to be parties to such a suit, and are bound by the decree, so far as the property proceeded against is concerned, and may intervene and make themselves actual and nominal parties to it, and bring their rights before the court.”).

<sup>121</sup> Cf. Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276 (indicating that in cases of admiralty and maritime jurisdiction, federal courts should proceed “according to the principles, rules and usages which belong to . . . courts of admiralty . . . as contradistinguished from courts of common law . . . , subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same”); Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93–94 (“[T]he forms and modes of proceedings in causes . . . of admiralty and maritime jurisdiction[] shall be according to the course of the civil law.”).

<sup>122</sup> See Brainerd Currie, *Unification of the Civil and Admiralty Rules: Why and How*, 17 Me. L. Rev. 1, 3–4 n.12 (1965) (discussing the date of these rules and indicating that Justice Story probably drafted them); see also Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 516, 518 (providing the statutory authority for these rules).

<sup>123</sup> See Benedict, *supra* note 120, at 238.

<sup>124</sup> Admiralty R. 26, 44 U.S. (3 How.) ix (1845) (rescinded in 1920); see also *id.* (adding that “where the claim is put in by an agent or consignee, he shall also make oath, that he is duly authorized thereto by the owner, or if the property be at the time of the arrest in the possession of the master of a ship, that he is the lawful bailee thereof for the owner”). In 1920, this rule was renumbered, but the key language remained the same. See Admiralty R. 25, 254 U.S. 689–90 (1920) (rescinded in 1966).

<sup>125</sup> *The Two Marys*, 12 F. 152, 154 (S.D.N.Y. 1882).



34 regulated the procedure to be followed “[i]f any third person shall intervene in any cause of admiralty and maritime jurisdiction in rem, for his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard for his own interest therein.”<sup>126</sup> According to later courts, intervention under Rule 34 was available to some people who were not eligible to file claims under Rule 26 because they were not demanding possession of the property, but who nonetheless owned liens on the property that they wanted the court’s decree to respect.<sup>127</sup> Still, the “interest” contemplated by Rule 34 was widely understood to be a legally recognized interest such as a lien, not just a practical reason for caring about the outcome of the case.<sup>128</sup>

Second, Admiralty Rule 43 added that “[a]ny person having an interest in any proceeds in the registry of the court, shall have a right by petition and summary proceeding to intervene p[ro] interesse suo, for a delivery thereof to him . . . .”<sup>129</sup> (The Latin phrase *pro interesse suo* means “for his own interest.”) Unlike Rule 34, Rule 43 could operate even in actions *in personam*, but only when the court had custody of the property in question. Again, the “interest” contemplated by this rule was widely understood to be a claim or lien on the fund that the court was holding.<sup>130</sup>

<sup>126</sup> Admiralty R. 34, 44 U.S. (3 How.) xi (1845) (rescinded in 1920). Again, essentially the same language remained in the Admiralty Rules for the next century. See Admiralty R. 34, 254 U.S. 693–94 (1920) (rescinded in 1966).

<sup>127</sup> See *The Two Marys*, 12 F. at 154; see also *The Ruth E. Merrill*, 286 F. 355, 356–57 (2d Cir. 1922) (“The difference between claimants and interveners is set forth . . . in *The Two Marys* . . . .”); *The Old Concord*, 18 F. Cas. 642 (E.D. Mich. 1870) (No. 10,482) (observing that Rule 26 “relate[s] exclusively to the conditions to be complied with to entitle a claimant to avoid an arrest of the property, or to obtain its discharge after it shall have been arrested”).

<sup>128</sup> See Rufus Waples, *A Treatise on Proceedings in Rem* 110 (Chicago, Callaghan & Co. 1882) (indicating that the typical intervenor “has a right *in* the ship but not a right *to* the ship”); see also, e.g., *The Cartona*, 297 F. 827, 828 (2d Cir. 1924) (“[I]f the action is in rem, [an intervenor] must have an interest in the res. . . . [P]ersons who for reasons of their own pay another to give a stipulation for value have no interest in the res released by the stipulation . . . . They are interested, doubtless, in escaping the consequences of their obligation, but that is not enough. In order to intervene in this suit in rem they must show an interest in the *Cartona*, and this they have not done and cannot do.”).

<sup>129</sup> Admiralty R. 43, 44 U.S. (3 How.) xiii (1845) (rescinded in 1920). The Admiralty Rules of 1920 included a slightly revised version of this provision as Rule 42. See Admiralty R. 42, 254 U.S. 19 (1920) (rescinded in 1966).

<sup>130</sup> See, e.g., *The Chief*, 142 F. 349, 353 (3d Cir. 1905) (“Rule 43 evidently refers to cases where a person claims such an interest in the proceeds in the registry of the court, as entitles him to recover the whole or part thereof as rightfully belonging to him, without the necessity of further adjudication than that authorized and required by the rule.”); *The Wabash*, 296 F. 559, 561–62 (D. Conn. 1923) (observing that “it has been frequently held that courts of admiralty can only marshal the proceeds of a sale of a vessel between the lienors, maritime or

As time went on, a leading treatise asserted that these written rules about intervention were “not exclusive.”<sup>131</sup> In particular, although Rule 34 applied only in suits *in rem*, the treatise argued that “intervention may be had in suits *in personam* by the same method pointed out in Rule 34.”<sup>132</sup> Courts did not necessarily agree.<sup>133</sup> But whatever the scope of this idea, the treatise did not suggest that uncodified principles of admiralty practice permitted intervention on the basis of practical rather than legal interests. While the treatise spoke of intervention in a salvage proceeding by crew members who “desire[d] to be heard personally for their own claims,” or by an insurance company that had paid a loss and “desire[d] to press its claim [for subrogation]” in a suit for collision damage, the treatise did not offer examples of intervention by people who had neither a legally recognized claim against one of the existing parties nor a legally recognized interest in property in the court’s custody.<sup>134</sup>

## 2. Intervention in Equity

The nineteenth-century Supreme Court also promulgated written rules of practice for suits in equity in federal courts.<sup>135</sup> Perhaps because “in all suits in Equity the primary decree is *in personam* and not *in rem*,”<sup>136</sup> the initial versions of those rules did not address intervention. Nonetheless, federal courts sitting in equity did permit some species of intervention in various circumstances.

One set of circumstances again involved property over which the court had taken control. Even in suits *in personam*, courts of equity sometimes ordered the “sequestration” or attachment of property allegedly belonging

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otherwise, and the owners,” and “it is perfectly obvious that the forty-second admiralty rule refers to a lien interest in the proceeds”).

<sup>131</sup> Erastus C. Benedict, *The American Admiralty* 275 (Edward Grenville Benedict ed., 4th ed. 1910).

<sup>132</sup> *Id.*

<sup>133</sup> See *Def. Plant Corp. v. U.S. Barge Lines*, 145 F.2d 766, 767 (2d Cir. 1944) (“Intervention is permissible in an admiralty suit only if (a) the suit is *in rem* (Admiralty Rule 34 . . . ) or (b) the intervenor has an interest in proceeds in the registry of the court (Admiralty Rule 42).”).

<sup>134</sup> See Benedict, *supra* note 131, at 274–75; see also Moore & Levi, *supra* note 118, at 570 n.28 (reading Benedict’s treatise to argue that federal courts sitting in admiralty should “adopt[] the present practice of other federal courts” with respect to intervention in actions *in personam*).

<sup>135</sup> See *Equity R.* 1–92, 42 U.S. (1 How.) xli–lxx (1842) (rescinded in 1912); *Equity R.* 1–33, 20 U.S. (7 Wheat.) v–xiii (1822) (rescinded in 1842).

<sup>136</sup> 2 Joseph Story, *Commentaries on Equity Jurisprudence* 49 (Boston, Hilliard, Gray & Co. 1836).

to a party.<sup>137</sup> Likewise, courts of equity sometimes foreclosed upon mortgages<sup>138</sup> or put the property of an insolvent firm into the hands of a receiver.<sup>139</sup> In all such cases, outsiders might appear and assert either an interest in the specific property that the court was controlling or a right to be paid out of the resulting fund. Federal courts recognized various ways for outsiders to make such claims. In line with the traditional English practice, the outsider might petition the court for an “examination *pro interesse suo*” at which he could try to establish his title.<sup>140</sup> (By the beginning of the twentieth century, such a request was often simply called a “petition of intervention.”<sup>141</sup>) Alternatively, the outsider might file a “dependent” or “ancillary” bill in equity, thereby initiating “a new but subordinate litigation.”<sup>142</sup> As a technical matter, an outsider who sought an examination *pro interesse suo* or who filed a dependent bill was not thereby becoming a party to the original suit.<sup>143</sup> Still, he was formally appearing in a related proceeding for the explicit purpose of protecting his interest in the property that the court was controlling in the main action.

A second set of circumstances in which nineteenth-century federal courts often permitted intervention in a suit in equity involved

<sup>137</sup> See, e.g., John Newland, *The Practice of the High Court of Chancery 18–22* (London, J. Butterworth 1813) (discussing sequestration in cases where the defendant either could not be found in the jurisdiction or escaped and refused to appear in person).

<sup>138</sup> See, e.g., 2 Thomas Atkins Street, *Federal Equity Practice* § 1368 (1909).

<sup>139</sup> See *id.* § 1367. That became especially common in the second half of the nineteenth century, when equity receiverships emerged as a leading means of corporate reorganization. See Warner Fuller, *The Background and Techniques of Equity and Bankruptcy Railroad Reorganizations—A Survey*, 7 *L. & Contemp. Probs.* 377, 378–79 (1940).

<sup>140</sup> See 1 Edmund Robert Daniell, *A Treatise on the Practice of the High Court of Chancery* 644 (London, J. & W.T. Clarke 1837) (noting that an examination *pro interesse suo* is “[t]he proper course to be pursued by any person who claims title to an estate or other property sequestrated, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration”); 2 Joseph Story, *Commentaries on Equity Jurisprudence* 39 (Isaac F. Redfield ed., Boston, Little, Brown & Co., 8th ed. 1861) (discussing this procedure in the context of receiverships); see also Moore & Levi, *supra* note 118, at 570–71 (“The examination *pro interesse suo* in equity was granted to a third person who claimed an interest in property under the control of the court, in *custodia legis*. The property may have come under court control by sequestration or receivership.”).

<sup>141</sup> 2 C.L. Bates, *A Treatise on the Procedure in Suits in Equity in the Circuit Courts of the United States* 665 (1901).

<sup>142</sup> Street, *supra* note 138, §§ 1349–50; see also *Krippendorf v. Hyde*, 110 U.S. 276, 282–84 (1884) (referring both to examinations *pro interesse suo* and to dependent bills).

<sup>143</sup> See W.S. Simkins, *A Federal Equity Suit* 491 (2d ed. 1911); Street, *supra* note 138, § 1350.

applications by someone who had not been named as a party to the suit, but who nonetheless was at risk of being bound by the court's judgment—as when one of the existing parties was litigating in a representative capacity, and a member of the group being represented wanted to participate directly. For instance, it was common for an individual member of a class to be allowed to intervene in a class action.<sup>144</sup> Likewise, a beneficiary of a trust might be allowed to intervene in an action by or against the trustee (though normally only if there was reason to doubt the adequacy of the trustee's representation).<sup>145</sup>

Federal courts sitting in equity also permitted intervention in some other circumstances.<sup>146</sup> By the early twentieth century, indeed, a

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<sup>144</sup> See 1 Roger Foster, *A Treatise on Federal Practice in Civil Causes* § 201 (Boston, Boston Book Co., 2d ed. 1892) (“In a suit brought by a member of a class on behalf of himself and others similarly interested, another member of the class who desires the success of the complainant can always intervene, even after a decree for a sale, provided there has been no distribution of the assets, upon payment of his share of the costs, expenses, and reasonable counsel fees which have been previously paid or incurred. . . . If he intends to act in hostility to the original complainant, the court may, in its discretion, add him to the defendants.” (footnotes omitted)).

<sup>145</sup> See *id.* (“In suits brought by or against a trustee, or otherwise affecting trust property, the beneficiaries of the trust . . . will frequently be allowed to intervene for the purpose of protecting their interests; but ordinarily the right to intervene will be denied them in the absence of fraud, neglect, inability, collusion, or bad faith by the trustee.” (footnotes omitted)); see also *Toler v. E. Tenn., Va. & Ga. Ry. Co.*, 67 F. 168, 171–72 (C.C.E.D. Tenn. 1894) (quoting this passage); *Chester v. Life Ass’n of Am.*, 4 F. 487, 491–92 (C.C.W.D. Tenn. 1880) (similarly identifying a few exceptions to the general rule that a person could not make himself a defendant to a suit in equity over the plaintiff's objection).

<sup>146</sup> See, e.g., *Curran v. St. Charles Car Co.*, 32 F. 835, 836 (C.C.E.D. Mo. 1887). In *Curran*, the plaintiffs had sued the St. Charles Car Company for using a machine that allegedly infringed the plaintiffs' patent. Upon application by the machine's manufacturer (which was “under obligations to the St. Charles Car Company to protect that company against all suits for infringement”), the court permitted the manufacturer “to be made a party defendant for the purpose of defending their vendee against the suit of these complainants.” *Id.* Similar patterns came up frequently in later years. See *Chandler & Price Co. v. Brandtjen & Kluge, Inc.*, 296 U.S. 53, 57 (1935) (observing that petitioner had not alleged facts “show[ing] that as a matter of equitable right [it] is entitled to intervene,” but “[t]he showing presents a situation familiar in patent infringement cases brought against a user where the maker of the accused article is upon its application and in the discretion of the court permitted to intervene” (emphasis added)).

In cases of this sort, the reason the manufacturer could become a party was not simply that it had an economic interest in protecting the market for its product. Cf. *Angier v. Anaconda Wire & Cable Co.*, 48 F.2d 612, 613 (D. Del. 1931) (indicating that a manufacturer is ineligible to intervene where it has “only a commercial interest in this litigation” and not “a legal interest”). Rather, the manufacturer had its own legal relations with the patent owner; if the patent owner were correct that the product infringed its patent, the patent owner had a cause of action against the manufacturer as well as the user of the product. Often, moreover, the

commentator observed that “[t]he federal reports contain a great and undigested mass of cases dealing with this subject.”<sup>147</sup> Eventually, the written rules governing suits in equity in federal court acknowledged the topic. In the Equity Rules that the Supreme Court promulgated in 1912, Rule 37 authorized intervention in the following terms: “Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.”<sup>148</sup>

As with the Admiralty Rules, the “interest” to which Equity Rule 37 referred was not simply a practical interest in the outcome of a case or the precedent that it set. To the contrary, other provisions in Equity Rule 37 used the same word to describe the legal positions of the original parties themselves. For instance, like many state codes of civil procedure,<sup>149</sup> Rule 37 adopted the following criterion for the permissive joinder of co-plaintiffs and co-defendants at the outset of a suit: “All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff.”<sup>150</sup> Courts addressing intervention quickly concluded that throughout Rule 37, the word

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manufacturer was at risk of being bound by the preclusive effect of the court’s judgment, for either of two reasons. First, manufacturers often assumed the defense of their customers in such suits, and courts had long held that judgments bound nonparties who were “directly interested” in a lawsuit and who openly controlled the litigation on behalf of an existing party. *Lovejoy v. Murray*, 70 U.S. (3 Wall.) 1, 18–19 (1866); see also, e.g., *Penfield v. C. & A. Potts & Co.*, 126 F. 475, 480 (6th Cir. 1903) (applying this doctrine to a manufacturer in patent litigation); Note, *Joinder of Controlling Non-Parties: Eliminating Hide-and-Seek in Patent Litigation*, 70 *Yale L.J.* 1166, 1167 (1961) (adding that “more recent opinions have held the [controlling person] to be bound where his participation, concealed during the litigation, is subsequently discovered”). Second, if the manufacturer had a duty to indemnify the existing defendant, the defendant might be able to put the manufacturer at risk of being bound simply by notifying the manufacturer of the suit and offering to let the manufacturer control its defense. Cf. *Matt Neiderman & John L. Reed, Vouching in Under the U.C.C.: Its History, Modern Use, and Questions About Its Continued Viability*, 23 *J.L. & Com.* 1, 2–4 (2003) (discussing the history of “vouching in” an indemnitor).

<sup>147</sup> Charles P. Williams, *The New Equity Rules in the Federal Courts*, 2 *Wash. U. Stud.* 3, 20 (1914).

<sup>148</sup> Equity R. 37, 226 U.S. 659 (1912) (rescinded in 1938).

<sup>149</sup> See Fleming James, Jr. & Geoffrey C. Hazard, Jr., *Civil Procedure* 470 (3d ed. 1985) (discussing the joinder provisions in the early Field Codes); see also *infra* note 153.

<sup>150</sup> Equity R. 37, 226 U.S. 659 (1912) (rescinded in 1938).

“interest” meant “a ‘legal interest,’ as those words are understood in the law.”<sup>151</sup>

### 3. *Intervention at Law*

Before 1938, there was no counterpart to the Admiralty Rules or the Equity Rules for civil actions at law. Instead of following a nationally uniform set of procedures, federal trial courts hearing civil actions at law usually were supposed to follow the practices of the *state* courts in the state where they sat.<sup>152</sup>

Over the course of the nineteenth century, most states had adopted written codes of civil procedure.<sup>153</sup> With respect to intervention, commentators agreed that the state codes fell into two groups.<sup>154</sup> Many states took a narrow approach: apart from the special case of necessary parties,<sup>155</sup> they authorized intervention only in “an action for the recovery of real or personal property,” and only by “a person claiming an interest in the property.”<sup>156</sup> A second group of states went further. For instance, California’s Code of Civil Procedure authorized intervention by anyone

<sup>151</sup> *Consol. Gas Co. of N.Y. v. Newton*, 256 F. 238, 245 (S.D.N.Y.), *aff’d*, 260 F. 1022 (2d Cir. 1919), *rev’d* for lack of appellate jurisdiction *sub nom.* *City of New York v. Consol. Gas Co. of N.Y.*, 253 U.S. 219 (1920); see also, e.g., *Universal Oil Prods. Co. v. Standard Oil Co. of Ind.*, 6 F. Supp. 37, 43 (W.D. Mo. 1934) (“The ‘interest in the litigation’ which will support intervention must be some legal or equitable interest in the subject of the action which a decree might or would affect.”), *aff’d sub nom.* *German v. Universal Oil Prods. Co.*, 77 F.2d 70 (8th Cir. 1935); cf. *U.S. Cas. Co. v. Taylor*, 64 F.2d 521, 526 (4th Cir. 1933) (“[I]t is well established that, if the party applying for intervention has a direct legal interest in the pending litigation, so that he will obtain immediate gain or suffer loss from any judgment that may be rendered between the original parties, the court is authorized, in its discretion, to allow the intervention to take place . . .”).

<sup>152</sup> See Rev. Stat. § 914 (1872); Conformity Act, ch. 255, § 5, 17 Stat. 196, 197 (1872).

<sup>153</sup> See Kellen Funk & Lincoln A. Mullen, *The Spine of American Law: Digital Text Analysis and U.S. Legal Practice*, 123 *Am. Hist. Rev.* 132, 134 fig.2 (2018) (depicting the spread of the Field Code, which New York adopted in 1848 and which thirty more states and territories had adopted by 1900).

<sup>154</sup> See Charles E. Clark, *Handbook of the Law of Code Pleading* 288 (1928); John Norton Pomeroy, *Remedies and Remedial Rights by the Civil Action, According to the Reformed American Procedure* § 411 (Boston, Little, Brown & Co. 1876); Moore & Levi, *supra* note 118, at 575.

<sup>155</sup> See, e.g., Ohio Code Ann. § 11262 (Baldwin 1936).

<sup>156</sup> *Id.* § 11263; see also John Norton Pomeroy, *Code Remedies: Remedies and Remedial Rights by the Civil Action According to the Reformed American Procedure* § 308 (Walter Carrington ed., 5th ed. 1929) (indicating that as of the 1920s, a majority of the states still had provisions of this type).

with “an interest in the matter in litigation,” or “an interest . . . in the success of either of the parties,” or “an interest against both.”<sup>157</sup>

In provisions of the first type, the phrase “interest in the property” plainly referred to a legally recognized interest, such as an ownership share or a lien. In provisions of the second type, the requisite “interest” did not necessarily have to involve property, but there is evidence that the word still referred to legal relations rather than purely practical considerations. Not only did provisions of the second type commonly describe intervenors as parties to a claim or demand,<sup>158</sup> but the progenitor of these provisions—the section about “Intervention or Interpleading” in the Code of Practice that Louisiana adopted in 1825 for civil cases<sup>159</sup>—assumed that anyone who was eligible to intervene would also have been eligible to be an original party to a lawsuit.<sup>160</sup>

As early as 1830, moreover, the Supreme Court of Louisiana held that when the Code of Practice authorized intervention by anyone with “an interest in the success of either of the parties to the suit,”<sup>161</sup> it was referring only to “a direct interest by which the intervening party is to obtain immediate gain, or suffer loss by the judgment, which may be rendered between the original parties.”<sup>162</sup> In the 1850s, when the Louisiana provision migrated to California,<sup>163</sup> the California Supreme Court agreed. Speaking through Justice Stephen Field, the court glossed the key language as follows:

<sup>157</sup> Cal. Code Civ. Proc. § 387 (Curtis Hillyer ed., 1935).

<sup>158</sup> See, e.g., *id.* (“An intervention takes place when a third person is permitted to become a party to an action or proceedings between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant . . .”).

<sup>159</sup> See La. Code of Practice art. 389 (1825) (“An intervention or interpleader, is a demand by which a third person requires to be permitted to become a party in a suit between other persons; either by joining the plaintiff in claiming the same thing, or something connected with it, or by uniting with the defendant in resisting the claims of the plaintiff.”); *id.* art. 390 (“In order to be entitled to intervene, it is enough to have an interest in the success of either of the parties to the suit.”); see also An Act to Amend the Code of Practice of the State of Louisiana, § 10, 1826 La. Acts 166, 172 (amending these provisions so that “where his interest requires it,” an intervenor could “oppose both” the plaintiff and the defendant instead of having to join one or the other).

<sup>160</sup> See La. Code of Practice art. 391 (1825) (indicating that courts should not allow intervention to delay the main action, “because [the would-be intervenor] has always his remedy by a separate action to vindicate his rights”).

<sup>161</sup> *Id.* art. 390.

<sup>162</sup> *Gasquet v. Johnson*, 1 La. 425, 431 (1830).

<sup>163</sup> See Act of May 15, 1854, ch. 54, § 71, 1854 Cal. Laws 59, 73.

The interest mentioned in the statute . . . must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. . . . To authorize an intervention, . . . the interest must be that created by a claim to the demand, or some part thereof, in suit, or a claim to, or lien upon, the property, or some part thereof, which is the subject of litigation.<sup>164</sup>

In the 1890s, the Federal Supreme Court endorsed this gloss and applied it to the intervention provision in the Code of Civil Procedure for the Dakota Territory.<sup>165</sup>

By the early twentieth century, if not before, commentators were suggesting some dissatisfaction with Justice Field's formulation.<sup>166</sup> Phrases like "the direct legal operation and effect of the judgment" might seem to refer to principles of preclusion, and no one is subject to the preclusive effect of a judgment *in personam* "unless he is a party or in privity with a party to the proceeding."<sup>167</sup> On one interpretation of Justice Field's formulation, then, only "privies" would be eligible to intervene. As various commentators noted, courts had not actually applied the intervention statutes so restrictively.<sup>168</sup>

Still, even commentators agreed that intervenors needed to be asserting "a definite legal right" of the sort that *would* be bound by the judgment if intervention was permitted.<sup>169</sup> John Norton Pomeroy put the point this way:

The intervenor's interest must be such, that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought; or if the action had first been brought against him as the defendant, he would have been able to defeat the recovery in part at least. His interest may be either legal or equitable. If

<sup>164</sup> Horn v. Volcano Water Co., 13 Cal. 62, 69–70 (1859) (Field, J.).

<sup>165</sup> See Smith v. Gale, 144 U.S. 509, 518–19 (1892); see also Baltic Mining Co. v. Township of Adams, 1 L. Rev. L. Dep't U. Detroit 45, 48 (Mich. Circ. Ct. 1916) (concluding that "the overwhelming majority of the Courts" accept this gloss).

<sup>166</sup> See, e.g., Intervention, 123 Am. St. Rep. 280, 298 (1909); Note, The Necessary Interest to Intervene, 25 Va. L. Rev. 606, 607 (1939) ("[D]espite the homage paid to [Justice Field's formulation], the words bespeak their own inaccuracy.").

<sup>167</sup> Intervention, supra note 166, at 298.

<sup>168</sup> See id.; Note, supra note 166, at 607.

<sup>169</sup> Note, supra note 166, at 614.



equitable, it must be of such a character as would be the foundation for a recovery or for a defence, as the case might be, in an independent action in which he was an original party.<sup>170</sup>

This analysis implies that would-be intervenors needed the sort of interest that would make them proper parties to a free-standing action. Indeed, Pomeroy described intervention as “the grafting of one action upon another,”<sup>171</sup> for the sake of avoiding a succession of separate lawsuits.<sup>172</sup>

### *B. The Original Version of Federal Rule of Civil Procedure 24*

#### *1. Rule 24 as an Amplification of Existing Practice*

In 1934, the Rules Enabling Act authorized the Supreme Court to promulgate a nationally uniform set of procedural rules for civil actions at law in federal district courts—and, if the Court chose, to “unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both.”<sup>173</sup> At first, it was not clear that the Court would accept the latter invitation; there was talk of retaining the existing Equity Rules, promulgating a separate set of rules for actions at law, and worrying about unification later.<sup>174</sup> But in May 1935, Chief Justice Hughes announced that “the Court has decided not to prepare rules limited to common law cases but to proceed with the preparation of a unified system of rules for cases in equity and actions at law . . . .”<sup>175</sup> (Admiralty cases remained outside the fold until 1966.)<sup>176</sup>

<sup>170</sup> Pomeroy, *supra* note 154, § 430.

<sup>171</sup> *Id.*

<sup>172</sup> See *id.* § 411 (“The fundamental notion [behind intervention provisions of the second type] is, that the person ultimately and really interested in the result of a litigation—the person who will be entitled to the final benefit of the recovery—may . . . intervene and be made a party, so that the whole possible controversy shall be ended in one action and by a single judgment.”).

<sup>173</sup> Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934).

<sup>174</sup> See Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules* (pt. 1), 15 *Tenn. L. Rev.* 551, 555 (1939) (recalling early support for that idea, which Clark opposed); see also Stephen N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, in *Judge Charles Edward Clark* 115, 116–37 (Peninah Petruck ed., 1991) (describing Clark’s efforts to encourage immediate unification and his other activities in the first half of 1935).

<sup>175</sup> Address of Chief Justice Hughes, 21 *A.B.A. J.* 340, 342 (1935).

<sup>176</sup> See Harold K. Watson & Ifigeneia Xanthopoulou, *Evolution and Unification of the Federal Admiralty Rules and Federal Rules of Civil Procedure*, 92 *Tul. L. Rev.* 1123, 1125–27 (2018).

The following month, the Court appointed an Advisory Committee to work on this project.<sup>177</sup> As the committee's Reporter or lead drafter, the Court named Charles E. Clark, who was then the dean of Yale Law School and had already been involved in plans for the reform.<sup>178</sup>

To help him perform his duties, Dean Clark assembled a set of research assistants headed by James William Moore,<sup>179</sup> who earned his J.S.D. from Yale in 1935 and with whom Clark had already been working.<sup>180</sup> Over the next three years, Moore did an astonishing amount of work. Not only did he help draft the Federal Rules of Civil Procedure (which were completed in 1937 and took effect in 1938),<sup>181</sup> but he and a fellow research assistant also wrote *Moore's Federal Practice*—a multivolume treatise that guided lawyers through the new system and laid the foundation for Moore's distinguished career as a law professor.<sup>182</sup>

Moore devoted particular attention to intervention, which he researched with Edward Levi.<sup>183</sup> In February 1936, Moore and Levi

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<sup>177</sup> See Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1935).

<sup>178</sup> *Id.* at 774–75; see *supra* note 174.

<sup>179</sup> See, e.g., George W. Pugh, Book Review, 22 La. L. Rev. 907, 907 (1962) (describing Moore as having been “Chief Research Assistant on the Reporter’s Staff of the Supreme Court’s Advisory Committee in its preparation of the Federal Rules”); see also Charles E. Clark, The Influence of Federal Procedural Reform, 13 L. & Contemp. Probs. 144, 150 (1948) (noting that as soon as the Advisory Committee was set up, “[a] reporter’s staff for research and drafting was immediately organized”).

<sup>180</sup> Clark and Moore were in the process of publishing a two-part article providing historical background for the reform and discussing the shape that the new rules should take. See Charles E. Clark & James Wm. Moore, A New Federal Civil Procedure (pts. 1 & 2), 44 Yale L.J. 387, 1291 (1935); see also Subrin, *supra* note 174, at 133 (reporting that in May 1935, in response to an inquiry from the prospective chairman of the Advisory Committee, “Clark . . . explained that he had time to be Reporter, so long as Moore . . . was appointed assistant”).

<sup>181</sup> See Report of the Advisory Committee on Rules for Civil Procedure vii (1937) (“The rules, other than those on depositions, discovery, and summary judgments, were drafted under the supervision of Charles E. Clark, the Reporter, on whose staff James William Moore, Joseph M. Friedman, and others have rendered valuable service.”).

<sup>182</sup> See James Wm. Moore & Joseph Friedman, *Moore’s Federal Practice* (1938).

<sup>183</sup> Levi, who had just earned his J.D. from the University of Chicago and was spending a year in a fellowship at Yale, would ultimately become the eighth president of the University of Chicago and the seventy-first Attorney General of the United States. For accolades, see Gerald R. Ford, In Memoriam, Edward H. Levi (1912–2000), 67 U. Chi. L. Rev. 975, 976–77 (2000) (calling Levi “a great patriot” who “helped give us back our government” after the Nixon era, and concluding that “Ed Levi is the Attorney General against whom all others are measured”); Hanna Holborn Gray, Edward Hirsch Levi, 146 Proc. Am. Phil. Soc’y 297, 299 (2002) (“As provost and as president of the University of Chicago, Edward Levi emerged as a second founder of the university itself.”); Robert H. Bork, The Greatest Lawyer of His Time,

published the first installment of a two-part article on the topic. The article began with the following definition: “Intervention may be defined as the procedural device whereby a stranger can present a claim or defense in a pending action or in a proceeding incidental thereto, and become a party for the purpose of the claim or defense presented.”<sup>184</sup> After sketching “[a] composite case picture . . . as to what parties and interests will support intervention” under the state codes,<sup>185</sup> the article undertook “a detailed study of the right to intervene in the federal courts,” focusing on practice under Equity Rule 37.<sup>186</sup>

Like other commentators, Moore and Levi asserted that “[t]he right to intervene seems to be of two types: absolute, and discretionary.”<sup>187</sup> Admittedly, the text of Equity Rule 37 “makes no such distinction,” but instead “speaks in the language of permission for all intervenors[:] ‘Any one claiming an interest in the litigation *may* at any time be permitted to intervene.’”<sup>188</sup> As Moore and Levi noted, though, there were some situations in which district judges did not truly have the option of denying a request for intervention, because appellate courts would regard that as an “abuse of discretion.”<sup>189</sup> In such situations, Moore and Levi concluded, the applicant has an “absolute right” to intervene, and “it seems artificial to talk in terms of discretion.”<sup>190</sup>

Moore and Levi went on to identify two categories of cases in which federal courts had recognized this “absolute right.” First, there were cases “where the intervenor claims an interest in property subject to the control

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Wall St. J., Mar. 13, 2000, at A46 (“Edward Levi was as distinguished a man of the law as we shall know in our time.”).

<sup>184</sup> Moore & Levi, *supra* note 118, at 565.

<sup>185</sup> *Id.* at 576.

<sup>186</sup> *Id.* at 568, 580–607. As Professor Subrin has noted, Clark and Moore had already advocated basing the new Federal Rules of Civil Procedure on practice in equity rather than practices at law. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 970 (1987).

<sup>187</sup> Moore & Levi, *supra* note 118, at 581; see also, e.g., Benjamin Wham, *Intervention in Federal Equity Cases*, 17 A.B.A. J. 160, 161 (1931) (“[T]here are two classes of intervention: one which is discretionary with the Court, and the other in which the right to intervene is absolute.”). This distinction predated Equity Rule 37. See, e.g., *Minot v. Mastin*, 95 F. 734, 739 (8th Cir. 1899).

<sup>188</sup> Moore & Levi, *supra* note 118, at 581 (quoting Equity Rule 37 with added emphasis). Moore and Levi slightly misquoted Equity Rule 37. Instead of “permitted to intervene,” Equity Rule 37 used the phrase “permitted to assert his right by intervention.” See *supra* note 148 and accompanying text.

<sup>189</sup> Moore & Levi, *supra* note 118, at 581.

<sup>190</sup> *Id.*

of a court” and the court’s processes were apt to “injur[e] his rights.”<sup>191</sup> (Moore and Levi noted that the requisite interest “[o]bviously . . . must be an interest known and protected by the law”—if not “a claim of ownership,” then an interest that could properly “be denominated a lien, equitable or legal.”<sup>192</sup>) Second, there were cases “where a petitioner is represented in a proceeding,” so that “he will be bound by a decree of the court,” but “the representation is shown to be inadequate.”<sup>193</sup>

Moore and Levi said less about the “discretionary” right to intervene. Like Pomeroy,<sup>194</sup> though, they cast it as a method of promoting efficiency by “facilitat[ing] the disposal in one action of claims involving common questions of law or fact.”<sup>195</sup> Specifically, they described permissive intervention as “a corollary of . . . permissive joinder” and other procedural mechanisms “predicated upon the theory that when claims or defenses have a question of law or fact common to each other[,] a sound administrative scheme . . . should encourage one action or hearing rather than a multiplicity of actions or hearings.”<sup>196</sup>

Moore and Levi’s research provided the template for what became Federal Rule of Civil Procedure 24. As proposed by the Advisory Committee and approved by the Supreme Court, the version of the rule that took effect in 1938 read as follows:

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant’s interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the

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<sup>191</sup> *Id.* at 582.

<sup>192</sup> *Id.* at 582–83. Moore and Levi asserted that “the tendency of the cases is apparently towards a liberal definition of ownership and lien,” *id.* at 583, but they did not take this point too far: “Where a legal interest in property is lacking, there can be no lien, and hence no absolute right to intervene.” *Id.* at 587.

<sup>193</sup> *Id.* at 591.

<sup>194</sup> See *supra* text accompanying notes 171–72.

<sup>195</sup> Moore & Levi, *supra* note 118, at 607.

<sup>196</sup> *Id.*

United States confers a conditional right to intervene; or (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.

(c) PROCEDURE. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. . . .<sup>197</sup>

This rule closely tracked Moore and Levi's description of existing practice, both with respect to the circumstances in which intervention "shall" be permitted and with respect to the additional circumstances in which intervention "may" be permitted. The Advisory Committee's Note on Rule 24 acknowledged as much.<sup>198</sup>

## 2. *Early Interpretations of Rule 24*

Within the universe of cases in which Rule 24 authorized intervention, one might have expected federal district judges to read Rule 24(a) relatively narrowly and to funnel most applications for intervention into Rule 24(b). Not only did the language of the rule invite this approach, but emphasizing "permissive intervention" over "intervention of right" might seem to maximize district judges' discretion to reach sensible decisions under the circumstances of each case.

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<sup>197</sup> Fed. R. Civ. P. 24, 308 U.S. 690–91 (1938).

<sup>198</sup> See Am. Bar Ass'n, Rules of Civil Procedure for the District Courts of the United States, with Notes as Prepared Under the Direction of the Advisory Committee, and Proceedings of the Institute on Federal Rules, Cleveland, Ohio, July 21, 22, 23, 1938, at 53 (William W. Dawson ed., 1938) [hereinafter Am. Bar Ass'n, Cleveland Proceedings] (Advisory Committee Note on Rule 24) ("This rule amplifies and restates the present federal practice at law and in equity. . . . See generally Moore and Levi, *Federal Intervention: I The Right to Intervene and Reorganization* (1936), 45 Yale L. J. 565."); see also Am. Bar Ass'n, Federal Rules of Civil Procedure: Proceedings of the Institute at Washington, D.C., October 6, 7, 8, 1938, and of the Symposium at New York City, October 17, 18, 19, 1938, at 67 (Edward H. Hammond ed., 1939) (statement of Charles E. Clark) ("Rule 24, Intervention, is another case where, by stating the rule more in detail, we have tried to cover the existing law without very substantial change, but more by way of clarification. Here again I cannot stop to discuss the provisions. Mr. Moore has worked up the subject in 45 Yale Law Journal 565, and again in 47 Yale Law Journal 898.").

Then-existing doctrines about subject-matter jurisdiction, however, created a countervailing pressure. Federal courts were said to enjoy “ancillary” jurisdiction over matters raised via intervention of right, but permissive intervention was different; in actions *in personam*, outsiders who sought to intervene under Rule 24(b) needed to establish an independent jurisdictional basis for the claims that they wanted the court to adjudicate.<sup>199</sup> In many cases, then, federal courts could not hear outsiders’ claims unless the outsiders qualified for intervention of right.<sup>200</sup>

From the standpoint of appellate courts, there was another practical reason to try to fit some applications for intervention into Rule 24(a) rather than Rule 24(b). Longstanding doctrine suggested that the denial of an application for permissive intervention might not be appealable at all, and it certainly was not subject to *de novo* review.<sup>201</sup> As a result, when appellate courts believed that a district court should have granted an application to intervene, they had an incentive to analyze the case under the rubric of intervention of right.<sup>202</sup>

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<sup>199</sup> See Levi & Moore, *supra* note 82, at 927; see also Carole E. Goldberg, The Influence of Procedural Rules on Federal Jurisdiction, 28 Stan. L. Rev. 395, 422 (1976) (“After introduction of original Rule 24, the distinction between intervention as of right and permissive intervention became the basis for the boundary between situations in which independent jurisdictional grounds would be required for intervention and situations in which it would not . . .”). This doctrine persisted until 1990, when 28 U.S.C. § 1367 largely superseded it. See 28 U.S.C. § 1367(a) (2018) (granting supplemental jurisdiction over many claims involving intervenors); *id.* § 1367(b) (withholding supplemental jurisdiction in diversity cases over certain “claims by plaintiffs against persons made parties under Rule . . . 24” and certain “claims by persons . . . seeking to intervene as plaintiffs under Rule 24,” but drawing no distinction between Rule 24(a) and Rule 24(b)); see also 7C Wright et al., *supra* note 9, § 1917 (“[I]t now is clear that in diversity cases, ancillary (now supplemental) jurisdiction cannot be invoked for plaintiff intervenors, whether they are of right or permissive.”).

<sup>200</sup> See 2 William W. Barron & Alexander Holtzoff, Federal Practice and Procedure § 597 (Charles Alan Wright rev. ed. 1961) (citing commentators who advocated reading Rule 24(a) narrowly because “Rule 24(b) gives added flexibility to the court,” but responding that “[t]his argument overlooks the jurisdictional difficulties which in many cases will bar intervention altogether if it is considered to be permissive rather than as of right”). Of course, one can question whether the scope of the right to intervene under Rule 24(a) *should* have determined the circumstances in which federal district courts had ancillary jurisdiction. See Fed. R. Civ. P. 82 (“These rules do not extend or limit the jurisdiction of the district courts . . .”); Goldberg, *supra* note 199, at 421–24, 473–76 (discussing this issue).

<sup>201</sup> See Moore & Levi, *supra* note 118, at 581 & n.85.

<sup>202</sup> Cf. *Ar-Tik Sys., Inc. v. Dairy Queen, Inc.*, 22 F.R.D. 122, 124 (E.D. Pa. 1958) (complaining that some appellate courts had given Rule 24(a)(2) a “strained interpretation” for this reason).

As we shall see, different judges may have reacted to these incentives in different ways. But while early courts took a range of approaches to Rule 24, very few suggested that intervention was available to everyone who had a practical reason to care about the outcome of a case. Instead, most courts allowed intervention only by people who were asserting legally recognized claims or defenses.

*a. Intervention of Right Under Rule 24(a)(2)*

Start with interpretations of Rule 24(a)(2), which authorized intervention of right “when the representation of the applicant’s interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action.” As one might expect, most courts understood the phrase “bound by a judgment” to refer to formal doctrines of *res judicata*.<sup>203</sup> On that interpretation, Rule 24(a)(2) came into play only in the relatively unusual situations in which the preclusive effects of the judgment in a case might extend beyond the parties. Some courts, however, opted for a broader interpretation of the word “bound,” so that an applicant had a right to intervene when the judgment “might result in . . . property being placed beyond the [applicant’s] reach,”<sup>204</sup> or might void a zoning order that the applicant would otherwise have a cause of action to enforce,<sup>205</sup> or might “permanently deprive[]” an existing party of the means of fulfilling a legal obligation that the party owed the applicant.<sup>206</sup> In cases that otherwise would have raised concerns about jurisdiction or appealability, a few courts read the word “bound” even more leniently.<sup>207</sup>

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<sup>203</sup> See *Sutphen Estates, Inc. v. United States*, 342 U.S. 19, 21 (1951) (finding Rule 24(a)(2) inapplicable because “[t]he decree in this case . . . is not *res judicata* of the rights sought to be protected through intervention”); Note, *Intervention and the Meaning of “Bound” Under Federal Rule 24(a)(2)*, 63 *Yale L.J.* 408, 410 (1954) [hereinafter *Yale Note*] (“It is generally held that an applicant may be ‘bound’ within the meaning of Rule 24(a)(2) only when he may be subject to *res judicata*.”); Note, *Intervention of Private Parties Under Federal Rule 24*, 52 *Colum. L. Rev.* 922, 924 (1952) (“That a person may be adversely affected by a court decision does not render him ‘bound.’”).

<sup>204</sup> *Int’l Mortg. & Inv. Corp. v. Von Clemm*, 301 F.2d 857, 861–62 (2d Cir. 1962).

<sup>205</sup> *Wolpe v. Poretsky*, 144 F.2d 505, 507 (D.C. Cir. 1944).

<sup>206</sup> *Ford Motor Co. v. Bisanz Bros.*, 249 F.2d 22, 28 (8th Cir. 1957).

<sup>207</sup> See *Kozak v. Wells*, 278 F.2d 104, 110–12 (8th Cir. 1960) (Blackmun, J.) (reading Rule 24(a)(2) to confer a right to intervene in a case where the federal courts would have lacked supplemental jurisdiction if intervention had merely been permissive); *Clark v. Sandusky*, 205 F.2d 915, 918–19 (7th Cir. 1953) (acknowledging that the would-be intervenor “could . . . assert [her] rights in an independent action [in state court] against all the original

For its part, the D.C. Circuit drew a distinction between “conventional” lawsuits and cases seeking judicial review of administrative action.<sup>208</sup> In *Textile Workers Union v. Allendale Co.*, the union and an employer in a high-wage region had petitioned the Secretary of Labor to use his authority under the Walsh-Healey Public Contracts Act<sup>209</sup> to prescribe a nationally uniform minimum wage that certain government contractors would have to pay their employees. The Secretary had done so, but employers who were adversely affected filed suit in a federal district court to obtain judicial review.<sup>210</sup> Trying to defend the victory that they had won at the administrative level, the union and the company that had instigated the administrative proceeding sought to intervene in this lawsuit. The district court held that they had no right to do so, but the D.C. Circuit disagreed. In the course of his opinion, Judge David Bazelon opined that Rule 24 was better suited to “conventional litigation” than to “[a]dministrative cases,” and he argued that “failure to come within the precise bounds of Rule 24’s provisions does not necessarily bar intervention if there is a sound reason to allow it.”<sup>211</sup> Alternatively, though, Judge Bazelon suggested that Rule 24(a)(2) could be made to suit his purpose: while the word “bound” was properly understood to refer to *res judicata* in “ordinary” lawsuits, “atypical cases” like the one at hand required a less “literal” approach.<sup>212</sup>

Still, even when courts read Rule 24(a)(2) broadly, they typically were not authorizing intervention by people who lacked any relevant legal claims. In *Allendale*, for instance, if intervention had been denied, and if the district court had set aside the Secretary’s wage determination, the would-be intervenors could have brought their own suit for judicial review of whatever revised wage determination the Secretary then made.<sup>213</sup> More generally, if *A* seeks administrative action that *B* opposes, and if whichever party loses at the administrative level would be able to

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parties to this cause,” but reading Rule 24(a) “liberally” so as “to avoid multiplicity of suits and settle all related controversies in one action”).

<sup>208</sup> See *Atl. Ref. Co. v. Standard Oil Co.*, 304 F.2d 387, 393–94 (D.C. Cir. 1962); *Textile Workers Union v. Allendale Co.*, 226 F.2d 765, 767–68 (D.C. Cir. 1955).

<sup>209</sup> Ch. 881, 49 Stat. 2036 (1936).

<sup>210</sup> See Defense Production Act Amendments of 1952, ch. 530, § 301, 66 Stat. 296, 308 (amending the Walsh-Healey Act to provide for judicial review of wage determinations).

<sup>211</sup> *Allendale*, 226 F.2d at 766–68.

<sup>212</sup> *Id.* at 767–68.

<sup>213</sup> See *id.* at 769 (“[I]f appellants are excluded from this action, and a judgment is entered invalidating the wage determinations, appellants will eventually bring the controversy back to court to assert the position they ask to present now.”).



seek judicial review, there is something to be said for letting the winning party participate in the same review proceeding; otherwise, if the court sets aside the agency's decision and the agency then makes the opposite decision, there would need to be another review proceeding brought by the new losing party. Thus, Judge Bazelon cast his opinion in *Allendale* as a way to avoid “[m]ultiplicity of suits.”<sup>214</sup>

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<sup>214</sup> *Id.*; see also *Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Scofield*, 382 U.S. 205, 212–13, 217 n.10 (1965) (appearing to endorse this argument).

Congress itself acted on a similar theory in the Hobbs Administrative Orders Review Act of 1950, ch. 1189, 64 Stat. 1129, which is now 28 U.S.C. §§ 2341–51 (2018). See Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378, 621 (reenacting the Hobbs Act as chapter 158 of title 28). While many administrative orders can be challenged through proceedings in federal *district* courts (where intervention will be handled according to Federal Rule of Civil Procedure 24), the Hobbs Act listed certain categories of orders that instead were subject to review through proceedings initiated in *circuit* courts. Specifically, the Hobbs Act provided that “[a]ny party aggrieved by a final order reviewable under this Act may, within sixty days after entry of such order, file in the court of appeals . . . a petition to review such order.” § 4, 64 Stat. at 1130 (current version at 28 U.S.C. § 2344). This action in court was to be “brought against the United States,” *id.*, but other interested parties who had participated in the administrative proceeding had a right to join the action. See *id.* § 8, 64 Stat. at 1131 (“The agency, and any party or parties in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review such order.”) (current version at 28 U.S.C. § 2348). Thus, rather than having to initiate sequential actions for judicial review, parties who were aggrieved by the agency's order and parties who would be aggrieved by a different order could both participate in the same action.

Section 8 of the Act added that “[c]ommunities, associations, corporations, firms, and individuals, whose interests are affected by the agency's order, may intervene in any proceeding to review such order.” *Id.*; see *Montship Lines, Ltd. v. Fed. Mar. Bd.*, 295 F.2d 147, 152 (D.C. Cir. 1961) (interpreting the Act as giving circuit courts “discretion . . . to permit intervention” by these persons). This provision authorized intervention by some people who had not participated in the administrative proceeding and who therefore could not have brought their own action for judicial review. Cf. Hobbs Act § 4, 64 Stat. at 1130 (authorizing any “party aggrieved” by an agency's order to file a petition for judicial review); *ACLU v. FCC*, 774 F.2d 24, 25 (1st Cir. 1985) (“The courts have consistently interpreted the term ‘party aggrieved’ to require that a petitioner have participated in the agency proceedings.”). But cf. *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1247 (11th Cir. 2006) (indicating that a person who did not participate in the initial administrative proceedings, but who wants to be eligible to seek judicial review, can sometimes become a “party aggrieved” simply by asking the agency to reconsider its order). Still, if the court that was hearing an action for judicial review decided to set aside the agency's order, most of the people who were eligible to intervene in the action under Section 8 probably could have chosen to participate in the subsequent administrative proceedings, and they could have brought their own action for judicial review if they were aggrieved by the final order that resulted from those proceedings. Thus, the category of people who were eligible to intervene under Section 8 may not have been much bigger than the category of people who would potentially be eligible to initiate their own action for judicial review.

*b. Intervention of Right Under Rule 24(a)(3)*

Apart from Rule 24(a)(2), outsiders also had a right to intervene in situations covered by Rule 24(a)(3). At first, Rule 24(a)(3) operated only when property was “in the custody of the court or of an officer thereof”—and even then, some early cases restricted intervention of right to people who claimed either an ownership interest or a lien.<sup>215</sup> Effective in 1948, however, Rule 24(a)(3) was amended to cover property that is “in the custody or subject to the control or disposition of the court or an officer thereof,”<sup>216</sup> and some courts read the new language expansively.

The leading example is the Ninth Circuit’s opinion in *Formulabs, Inc. v. Hartley Pen Co.*<sup>217</sup> The Formulabs company had developed a secret formula for ink. This formula was “a trade secret belonging to Formulabs,” but Formulabs licensed it to the Hartley Pen Company on condition that Hartley not disclose it to anyone else.<sup>218</sup> Hartley followed the formula in making the ink for its pens, using dye that Hartley bought from E.I. du Pont de Nemours & Company. Ultimately, Hartley alleged that two lots of this dye were defective, and Hartley sued du Pont for breach of warranty. In discovery, du Pont sought to learn the secret formula, and the district court told Hartley to disclose the formula or to face dismissal of its suit against du Pont. Formulabs thereupon moved to intervene so that it could seek to enjoin Hartley from disclosing Formulabs’s trade secrets.<sup>219</sup> The district court denied the motion for intervention, but the Ninth Circuit held that Formulabs came within the terms of Rule 24(a)(3). The Ninth Circuit reasoned that Formulabs “is the owner of the secret formula and secret testing procedures,” which apparently qualified as “property.”<sup>220</sup> According to the Ninth Circuit, moreover, this property could fairly be said to be “subject to the control or disposition of the court” within the meaning of Rule 24(a)(3), because the court was directing Hartley to disclose the information.<sup>221</sup>

This conclusion obviously gave Rule 24(a)(3) a broad reading. But the breadth was more about the line between intervention of right and

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<sup>215</sup> See, e.g., *Gross v. Mo. & Ark. Ry. Co.*, 74 F. Supp. 242, 249 (W.D. Ark. 1947); *United States v. Columbia Gas & Elec. Corp.*, 27 F. Supp. 116, 120 (D. Del.), appeal dismissed sub nom. *Mo.-Kan. Pipe Line Co. v. United States*, 108 F.2d 614 (3d Cir. 1939).

<sup>216</sup> Fed. R. Civ. P. 24(a)(3), 329 U.S. 853 (1946) (emphasis added).

<sup>217</sup> 275 F.2d 52 (9th Cir. 1960).

<sup>218</sup> *Id.* at 53 & n.1.

<sup>219</sup> *Id.* at 53–54.

<sup>220</sup> See *id.* at 54, 56–57.

<sup>221</sup> *Id.* at 56.

permissive intervention than about eligibility to intervene at all. If Formulabs and Hartley had not been citizens of the same state, Formulabs would have been an obvious candidate for permissive intervention even if the then-existing version of Rule 24(a)(3) did not confer a *right* to intervene. After all, Formulabs was claiming that the threatened disclosure of its trade secrets would violate its proprietary and contractual rights (not just its practical interests), and Formulabs was intervening for the sake of asserting a claim for injunctive relief against Hartley. Even with respect to intervention of right, moreover, the Ninth Circuit's application of Rule 24(a)(3) might have seemed less remarkable if Formulabs had been asserting an interest in *tangible* property. If a district court was threatening to order one of the parties to a lawsuit to destroy an item of property, Rule 24(a)(3) might well have been understood to give the purported owner of that item a right to intervene.

*c. Permissive Intervention Under Rule 24(b)*

As for permissive intervention, the Supreme Court's 1940 opinion in *SEC v. U.S. Realty & Improvement Co.*<sup>222</sup> is sometimes thought to have interpreted Rule 24(b) expansively. In 1938, Congress had revised the Federal Bankruptcy Act, creating several new chapters.<sup>223</sup> The new Chapter X was "principally the work of the Securities and Exchange Commission,"<sup>224</sup> and it contained an elaborate set of procedures suited for the reorganization of large corporations with publicly traded stock.<sup>225</sup> The statute explicitly provided that with the district court's permission, the SEC could enter an appearance and "be deemed to be a party in interest" in any proceeding under Chapter X, "with the right to be heard on all matters arising in such proceeding" at the district-court level.<sup>226</sup> On the other hand, Chapter XI contained a separate set of procedures by which

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<sup>222</sup> 310 U.S. 434 (1940).

<sup>223</sup> Chandler Act, ch. 575, 52 Stat. 840 (1938).

<sup>224</sup> Eugene V. Rostow & Lloyd N. Cutler, *Competing Systems of Corporate Reorganization: Chapters X and XI of the Bankruptcy Act*, 48 *Yale L.J.* 1334, 1335 (1939). For background, see David A. Skeel, Jr., *Debt's Dominion: A History of Bankruptcy Law in America* 109–27 (2001).

<sup>225</sup> 52 Stat. at 883–905; see also *U.S. Realty*, 310 U.S. at 447 (agreeing that Chapter X was "adapted to the reorganization of corporations with complicated debt structures and many stockholders").

<sup>226</sup> 52 Stat. at 894; see also Rostow & Cutler, *supra* note 224, at 1336 ("Public officers and agencies—the judge, the trustee and the Securities and Exchange Commission—are to dominate the proceedings [under Chapter X] . . .").

insolvent debtors could petition federal district courts for an “arrangement” of their unsecured debts, and Chapter XI did not contemplate any role for the SEC.<sup>227</sup> According to commentators, Chapter XI was mostly intended “for the relief of small debtors, incorporated and unincorporated,” but the statute did not explicitly address “which corporate debtors should be rehabilitated under Chapter X and which under Chapter XI.”<sup>228</sup>

In *U.S. Realty*, a large corporation that was listed on the New York Stock Exchange initiated proceedings under Chapter XI. Counsel for the SEC (appearing as amicus curiae) argued that such corporations could not use Chapter XI; according to the SEC, the statute implicitly restricted publicly held corporations to proceedings under Chapter X, in which the SEC could seek to participate as warranted for the protection of stockholders and the public. Ultimately, however, the district court rejected the SEC’s position and allowed the proceedings under Chapter XI to continue. Still, the district court permitted the SEC to intervene so that it could move to vacate the district court’s order and then could pursue an appeal.<sup>229</sup>

The SEC did indeed appeal, but the Second Circuit agreed with the district court that the corporation could proceed under Chapter XI.<sup>230</sup> Because the statute gave the SEC no role in proceedings under Chapter XI, moreover, the Second Circuit held that the SEC had not actually been eligible to intervene.<sup>231</sup> The Second Circuit therefore dismissed the appeal.

The Supreme Court reversed. At least under the circumstances of this particular case, the Supreme Court agreed with the SEC that the corporation needed to proceed under Chapter X, not Chapter XI. According to the Court, moreover, Rule 24 allowed the SEC to protect its role in Chapter X proceedings by intervening in a case where a corporation was trying to circumvent that role. In the Court’s words, “the Commission has a sufficient interest in the maintenance of its statutory authority and the performance of its public duties to entitle it through

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<sup>227</sup> 52 Stat. at 905–16.

<sup>228</sup> Rostow & Cutler, *supra* note 224, at 1334.

<sup>229</sup> See *In re U.S. Realty & Improvement Co.*, 108 F.2d 794, 796 (2d Cir. 1940) (recounting proceedings below); *id.* at 799 (Clark, J., dissenting) (describing the corporation’s size and nature).

<sup>230</sup> *Id.* at 796–97 (majority opinion).

<sup>231</sup> *Id.* at 797–98.

intervention to prevent reorganizations, which should rightly be subjected to its scrutiny, from proceeding without it.”<sup>232</sup>

The Second Circuit had asserted that “[t]he Commission has no special interest to protect by intervention in the proceeding at bar.”<sup>233</sup> Given the Supreme Court’s view of the merits, that assertion seems false.<sup>234</sup> But in any event, the Supreme Court seemed to doubt the relevance of the Second Circuit’s point. As the Supreme Court noted, the main criterion for permissive intervention under Rule 24(b)(2) was simply that “[the] applicant’s claim or defense and the main action have a question of law or fact in common.”<sup>235</sup> In the Supreme Court’s words, “This provision plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation.”<sup>236</sup>

Some modern courts and commentators have read this statement to suggest that outsiders seeking permissive intervention do not need any legally protected interest at all.<sup>237</sup> Given the relevant historical context, though, the Supreme Court may well have meant something else. Before the Federal Rules of Civil Procedure, “practically all definitions of intervention include[d] a requirement that the intervenor have an ‘interest’ in the main case.”<sup>238</sup> Under Rule 24(b), that was no longer necessary for permissive intervention; with the district court’s permission, intervenors could join their claims or defenses to those in the original action if the new claims or defenses shared a question of law or fact with the original action, even if the intervenors had no “interest” in

<sup>232</sup> SEC v. U.S. Realty & Improvement Co., 310 U.S. 434, 460 (1940).

<sup>233</sup> *In re U.S. Realty*, 108 F.2d at 798.

<sup>234</sup> See, e.g., *U.S. Realty*, 310 U.S. at 458–59 (“The Commission is . . . charged with the performance of important public duties in every case brought under Chapter X, which will be thwarted, to the public injury, if a debtor may secure adjustment of his debts in a Chapter XI proceeding when . . . he should be required to proceed, if at all, under Chapter X.”).

<sup>235</sup> *Id.* at 459 (quoting Fed. R. Civ. P. 24(b), 308 U.S. 691 (1938)); see also *id.* at 458 (noting that because the district court had granted the SEC’s motion to intervene, the Supreme Court did not have to decide whether Rule 24(a) gave the SEC a *right* to intervene).

<sup>236</sup> *Id.* at 459.

<sup>237</sup> See, e.g., *Shaw v. Hunt*, 154 F.3d 161, 165 (4th Cir. 1998) (taking *U.S. Realty* to hold that “a party who lacks standing can nonetheless take part in a case as a permissive intervenor”); *Emp. Staffing Servs., Inc. v. Aubry*, 20 F.3d 1038, 1042 (9th Cir. 1994) (citing *U.S. Realty* for the proposition that “the requirement of a legally protectable interest applies only to intervention as of right under Rule 24(a), not permissive intervention under Rule 24(b)”; see also 7C Wright et al., *supra* note 9, § 1912 (asserting, erroneously, that in *U.S. Realty*, “[the SEC’s] sole interest was to settle important questions of public law”).

<sup>238</sup> Commentary, *Nature of Permissive Intervention Under Rule 24b*, 3 Fed. R. Serv. (Callaghan & Co.) 704, 706 (1940).

any of the original claims. Still, while intervenors did not need an interest in the subject of the (original) litigation, they presumably did need an interest in the claims or defenses that they themselves were trying to assert. According to the Supreme Court, the SEC had such an interest in *U.S. Realty*,<sup>239</sup> and “[t]he ‘claim or defense’ of the Commission founded upon this interest has a question of law in common with the main proceeding.”<sup>240</sup>

To be sure, the idea that the SEC had a “claim or defense” requires some explanation. As one early commentator observed, “it seems doubtful that [the SEC] had a ‘cause of action’ which it could have asserted against anyone in an independent action.”<sup>241</sup> But even if the SEC lacked a stand-alone “claim,” the SEC was a natural party to oppose the corporation’s petition for relief under Chapter XI. As the Supreme Court understood the statutory scheme, allowing the corporation to proceed under Chapter XI “would defeat the public interests which the Commission was designated to represent”; Congress had given the SEC a role to play in any effort to reorganize the corporation, and the corporation was improperly trying to circumvent that role by proceeding under Chapter XI rather than Chapter X.<sup>242</sup> Under the circumstances, the Court thought that precedents supported letting the SEC protect its statutory role by seeking dismissal of the corporation’s petition.<sup>243</sup> To the

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<sup>239</sup> See, e.g., *U.S. Realty*, 310 U.S. at 459 (“The Commission’s duty and its interest extend not only to the performance of its prescribed functions where a petition is filed under Chapter X, but to the prevention, so far as the rules of procedure permit, of interferences with their performance through improper resort to a Chapter XI proceeding . . .”).

<sup>240</sup> *Id.* at 460.

<sup>241</sup> Commentary, *supra* note 238, at 704; see also Note, Federal Intervention in Private Actions Involving the Public Interest, 65 Harv. L. Rev. 319, 324 (1951) (“The *United States Realty* decision apparently expanded the meaning of ‘claim or defense,’ which elsewhere in the Federal Rules seems to have the meaning of ‘cause of action’ or defense to a particular claim already asserted in the action.” (footnote omitted)).

<sup>242</sup> *U.S. Realty*, 310 U.S. at 459–60.

<sup>243</sup> For instance, precedents indicated that when a state was asserting authority to liquidate a bank pursuant to state law, the liquidator “may, in a proper case, intervene in an equity receivership in a federal court to ask the court to relinquish its jurisdiction in favor of the state proceeding.” *Id.* at 460 (citing *Pennsylvania v. Williams*, 294 U.S. 176 (1935)). Likewise, when a debtor filed a voluntary petition in bankruptcy, “it has long been the practice of bankruptcy courts to permit creditors . . . to move for . . . dismissal of [the] petition” on the ground that the petition had been filed in the wrong court or that the proceedings were otherwise improper—even though creditors were not entitled to oppose a *proper* petition. *Id.* at 457–58, 458 n.9 (citing cases); cf. *In re Stevenson*, 45 F. Supp. 709, 710 (E.D. La. 1942) (“A creditor, *ordinarily*, may neither oppose a voluntary petition nor move to have a voluntary adjudication set aside.”).

extent that the SEC had a legally recognized interest in obtaining the dismissal of the corporation's petition, moreover, the SEC's position can readily be characterized as a "defense."<sup>244</sup>

In any event, even if one thinks that the Supreme Court's opinion in *U.S. Realty* relaxed the requirements for permissive intervention, it arguably did so only in favor of governmental entities like the SEC. Perhaps *U.S. Realty* simply recognized the ability of regulatory agencies to intervene in lawsuits that threatened to circumvent their statutory role. More broadly, Professor Shapiro used *U.S. Realty* as an example of "cases in which an agency of government, although it has no claim or defense that could be asserted in a separate action, seeks to intervene to represent the public interest in a particular controversy."<sup>245</sup> Understood in either of these ways, *U.S. Realty* is of a piece with various rules and statutes—some enacted in the same era—that provide special authorization for intervention by public authorities.<sup>246</sup>

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<sup>244</sup> See Fed. R. Civ. P. 12(b) (using the word "defenses" to encompass arguments about lack of jurisdiction and failure to state a claim upon which relief can be granted, and allowing parties to assert those "defenses" by a motion to dismiss); Brief for the Petitioner at 49, *U.S. Realty*, 310 U.S. 434 (No. 796) (arguing that "a motion to dismiss an action constitutes a 'defense' to that action within the meaning of [Rule 24(b)(2)]," and citing Rule 12(b)); cf. Raoul Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts*, 50 *Yale L.J.* 65, 76 (1940) (agreeing that the SEC's position could be characterized as a "defense," but noting that "the Supreme Court described the SEC's interest as a 'claim or defense'").

<sup>245</sup> See Shapiro, *supra* note 84, at 734–36; cf. Berger, *supra* note 244, at 69 (similarly casting *U.S. Realty* as a case about "intervention by governmental bodies"). On the very day of the opinion in *U.S. Realty*, the Supreme Court itself cited that opinion in another case where the district court had permitted the Administrator of the Wage and Hour Division of the Department of Labor to intervene in defense of his regulatory authority. See *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 541 n.14 (1940); Berger, *supra* note 244, at 77 (describing this case). Thus, there is some evidence that the Court too saw *U.S. Realty* as a case about intervention by the government.

<sup>246</sup> Congress enacted the most prominent such statute in the summer of 1937, just a few years before *U.S. Realty*. At the time, members of Congress were concerned that the constitutionality of New Deal legislation was sometimes attacked in lawsuits between private parties, where the task of persuading the court to apply the legislation might fall to "a private lawyer hired by a private person to try his case." 81 *Cong. Rec.* 3255 (1937) (statement of Rep. Hatton Summers). To ensure that the public was adequately represented in these cases, Congress gave the government a special statutory right to intervene. Specifically, the Act of August 24, 1937, provided that "whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question in any court of the United States" in a case to which neither the federal government nor one of its agencies, officers, or employees was already a party, "the court shall permit the United States to intervene and become a party for presentation of evidence (if evidence is otherwise receivable in such suit or proceeding) and argument upon the question of the constitutionality of such Act." Act of Aug. 24, 1937, ch.

A few years after *U.S. Realty*, federal district judge Alfred Barksdale cast the Supreme Court's holding in precisely these terms. In his view, *U.S. Realty* indicated that "in its discretion, the court might permit an

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754, § 1, 50 Stat. 751, 751; see also 28 U.S.C. § 2403(a) (2018) (setting out the current version of this provision, which still gives the United States a right "to intervene for presentation of evidence . . . and for argument" but now describes the United States not as becoming a party but rather as "hav[ing] all the rights of a party . . . to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality"); cf. Act of Aug. 12, 1976, Pub. L. No. 94-381, § 5, 90 Stat. 1119, 1120 (enacting 28 U.S.C. § 2403(b), which gives each *state* a similar right to intervene in cases in federal court "wherein the constitutionality of any statute of that State affecting the public interest is drawn in question"); *Maine v. Taylor*, 477 U.S. 131, 136–37 (1986) (interpreting the phrase "all the rights of a party" in § 2403(b) to include the right to appeal even when the original parties do not).

The 1937 Act obviously did not cover the SEC's motion to intervene in *U.S. Realty*. But the fact that Congress had recently highlighted the need for special rules about intervention by public authorities dovetails with the Supreme Court's emphasis in *U.S. Realty* on the SEC's "statutory authority and . . . public duties." 310 U.S. at 460. A few years later, indeed, the Court amended Rule 24(b) so that it explicitly made governmental officers or agencies eligible to intervene in cases involving the statutes they administered. See Fed. R. Civ. P. 24(b), 329 U.S. 853–54 (1946) (adding the following sentence: "When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action"). By its terms, this amendment gave district courts discretion to permit intervention by governmental actors even when the government was not itself asserting a claim or defense.

For detailed discussion of intervention by the government, see Arthur F. Greenbaum, *Government Participation in Private Litigation*, 21 *Ariz. St. L.J.* 853, 900–70 (1989). Among other things, Professor Greenbaum discusses various statutes that specifically authorize the United States or a federal agency to intervene in certain kinds of cases. See *id.* at 900, 925–30. Relatedly, Congress arguably has also given the Senate a right to intervene in any lawsuit in state or federal court "in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue," but "only if standing to intervene exists under section 2 of article III of the Constitution of the United States." *Ethics in Government Act of 1978*, Pub. L. 95-521, § 706(a), 92 Stat. 1824, 1880 (codified at 2 U.S.C. § 288e(a) (2018)); cf. Michele Estrin Gilman, *Litigating Presidential Signing Statements*, 16 *Wm. & Mary Bill Rts. J.* 131, 149 (2007) (noting that under current doctrine, the Senate will rarely satisfy the standing requirement). Congress has never enacted a similar provision in favor of the House of Representatives, but a separate statute now requires the Attorney General to notify both Houses of Congress if the Justice Department decides not to defend a federal statute's constitutionality in a judicial proceeding, and this notice must be provided "within such time as will reasonably enable the House of Representatives and the Senate to take action, separately or jointly, to intervene in timely fashion in the proceeding." 28 U.S.C. § 530D(a)(1)(B), (b)(2) (2018). In several recent cases, the House has argued that this provision implicitly gives both the House and the Senate a statutory right to intervene (apparently without regard to the requirement of Article III standing spelled out in 2 U.S.C. § 288e(a)). See, e.g., *Motion of the U.S. House of Representatives to Intervene at 6, United States v. Nagarwala*, No. 19-1015 (6th Cir. Apr. 30, 2019).



applicant to intervene if such applicant were charged with a public duty which reasonably required him to intervene.”<sup>247</sup> But according to Judge Barksdale, *U.S. Realty* did nothing to weaken the normal “claim or defense” requirement for applicants who were “charged with no public duty.”<sup>248</sup> Thus, when a mining company sued the union representing its workers for a declaratory judgment about the requirements of the Fair Labor Standards Act, Judge Barksdale held that an association of other mining companies was not eligible to intervene. Although the issues that were being debated in the case affected how much the association’s members had to pay their own employees, the association did not qualify for permissive intervention because it “has no claim which it could assert in a legal action against any defendant here, nor could any defendant here assert any claim against it in a legal action which would require any defense on the part of the [association].”<sup>249</sup>

In the ensuing years, a succession of jurists agreed that the words “claim or defense” in Rule 24(b) should be understood to mean what they normally mean.<sup>250</sup> Writing in 1986, indeed, Justice O’Connor indicated that there was no room for doubt on this point: “The words ‘claim or defense’ [in Rule 24(b)] 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 . . . .”<sup>251</sup> A decade later, Justice Ginsburg’s majority opinion in *Amchem Products, Inc. v. Windsor* echoed this view (albeit in dictum).<sup>252</sup>

<sup>247</sup> *Jewell Ridge Coal Corp. v. Local No. 6167 United Mine Workers*, 3 F.R.D. 251, 254 (W.D. Va. 1943).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> See, e.g., *Liberty Mut. Ins. Co. v. Pac. Indem. Co.*, 76 F.R.D. 656, 660 (W.D. Pa. 1977) (“To intervene under Rule 24(b), the movant must have a ‘claim or defense’ against the defendants with questions of fact or law in common with the main action—not just a general interest in its subject matter or outcome . . . .”); *Reynolds v. Marlene Indus. Corp.*, 250 F. Supp. 722, 724 (S.D.N.Y. 1966) (“[P]ermissive intervention under rule 24(b)(2) may not be granted since that portion of the rule is expressly predicated on an applicant being possessed of a claim.”); *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 76 F. Supp. 335, 348–49 (S.D.N.Y. 1948) (holding that an applicant was ineligible for permissive intervention because the applicant had “no claim” to assert), *aff’d in part and modified in part*, 173 F.2d 71 (2d Cir. 1949), *mandate amended*, 210 F.2d 375 (2d Cir. 1954); cf. *Shapiro*, *supra* note 84, at 759 (criticizing the claim-or-defense requirement in Rule 24(b), but proposing that the rule be rewritten rather than “stretch[ing] the language of the rule . . . to give the words a meaning quite different from that given them in other contexts”).

<sup>251</sup> *Diamond v. Charles*, 476 U.S. 54, 76 (1986) (O’Connor, J., concurring in part and concurring in the judgment).

<sup>252</sup> 521 U.S. 591, 623 n.18 (1997).

This interpretation dovetails with the longstanding idea that Rule 24(b) is a joinder mechanism designed to promote efficiency by avoiding a multiplicity of suits.<sup>253</sup>

Still, one can readily find cases that read Rule 24(b) more leniently. As early as 1950, Professor Moore's treatise on federal practice contrasted cases taking Judge Barksdale's position with cases permitting intervention even though "the existence of any nominate 'claim' or 'defense' is difficult to find."<sup>254</sup> At the time, cases of the latter sort were few and far between. Indeed, Professor Moore's "principal example"<sup>255</sup> was a one-page opinion from the D.C. Circuit that may not actually have been interpreting Rule 24(b).<sup>256</sup> But in 1955, Judge David Bazelon used this example to suggest that Rule 24(b) had not been understood to require a claim or defense "in the technical sense."<sup>257</sup> By the 1970s, that idea had

<sup>253</sup> See *supra* text accompanying notes 194–96.

<sup>254</sup> 4 James Wm. Moore, *Moore's Federal Practice* 60 (2d ed. 1950), *as quoted in* *Textile Workers Union v. Allendale Co.*, 226 F.2d 765, 769 (D.C. Cir. 1955). Because Professor Moore's treatise was a loose-leaf service, libraries discarded the old pages of the treatise when they received new ones, so I have not found the relevant page as it stood in the 1950s. But I have no reason to believe that *Allendale* misquoted it.

<sup>255</sup> *Allendale*, 226 F.2d at 769.

<sup>256</sup> See *Champ v. Atkins*, 128 F.2d 601 (D.C. Cir. 1942). Ms. Champ had been injured by a taxi that was owned by its driver but that "bore the name and colors of Harlem Taxicab Association," an unincorporated association of cabdrivers operating in the District of Columbia. *Id.* at 602. Rather than suing only the driver who had caused the accident, Ms. Champ sued the other members of the association too, and she won judgment "on the theory that they were engaged in a joint enterprise." *Id.* When this judgment went unpaid, the clerk of court certified it to the District's Director of Traffic pursuant to the Automobile Financial Responsibility Act, which required authorities in the District to suspend the drivers' licenses and vehicle registrations of people who failed to pay certain judgments arising from car accidents. See Act of May 3, 1935, ch. 89, § 3, 49 Stat. 166, 167. Faced with the threat of losing their drivers' licenses, members of the association sued the Director of Traffic for a declaratory judgment to the effect that "they are not such judgment debtors as are described in the Financial Responsibility Act." *Champ*, 128 F.2d at 602. The district court agreed with the cabdrivers, but it allowed Ms. Champ to intervene and she appealed. In the course of reversing the district court on the merits, the United States Court of Appeals for the District of Columbia held that intervention had been proper. The court's terse opinion explained that Ms. Champ had an "interest" in the suit (because the cabdrivers were more likely to pay her judgment if they otherwise would lose their licenses), and "one of the purposes of [the Financial Responsibility Act]" was to protect that interest. *Id.* For the court, that apparently was enough to justify intervention: "We think her interest entitled her, under Rule 24 of the Federal Rules of Civil Procedure, . . . to intervene in this suit." *Id.* The court did not specify whether it was referring to Rule 24(a) or to Rule 24(b).

<sup>257</sup> *Allendale*, 226 F.2d at 769; accord *Nuesse v. Camp*, 385 F.2d 694, 704 (D.C. Cir. 1967) ("Although the rule speaks in terms of a 'claim or defense' this is not interpreted strictly so as to preclude permissive intervention. In Professor Moore's phrase, quoted with approval in

spread to other lower federal courts.<sup>258</sup> Despite contrary signals from the Supreme Court,<sup>259</sup> moreover, some lower courts continue to downplay the “claim or defense” language in Rule 24(b).<sup>260</sup>

### *C. The 1966 Amendment*

Aside from one sentence that was added in the 1940s and that specifically addresses intervention by governmental officers and agencies,<sup>261</sup> Rule 24(b) has remained essentially unchanged since its debut in 1938.<sup>262</sup> By contrast, the criteria for intervention of right under Rule 24(a) were significantly reworded in 1966. Because some federal judges would soon portray the new language as dramatically expanding opportunities to intervene, this Section considers the 1966 amendment in detail.

#### *1. Sam Fox and the Need to Reword Rule 24(a)*

To understand the motivation for the 1966 amendment, we must start with the original version of Rule 24(a). Ever since 1938, Rule 24(a)(2) had authorized intervention of right “when the representation of the applicant’s interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action.”<sup>263</sup> Even on the conventional view that the phrase “bound by a judgment” referred to the judgment’s formal preclusive effect,<sup>264</sup> Rule 24(a)(2) could operate in a range of different cases; for instance, it might give the beneficiary of a

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*Allendale*, intervention has been allowed in situations where “the existence of any nominate “claim” or “defense” is difficult to find.” (citation omitted)).

<sup>258</sup> See, e.g., *In re Estelle*, 516 F.2d 480, 485 (5th Cir. 1975) (separate opinion of Tuttle, J.) (“The ‘claim or defense’ portion of the rule has been construed liberally . . . .”); *Brooks v. Flagg Bros.*, 63 F.R.D. 409, 415 (S.D.N.Y. 1974) (“[T]he words ‘claim or defense’ have not been read in a technical sense . . . .”).

<sup>259</sup> See *supra* notes 251–52 and accompanying text.

<sup>260</sup> See, e.g., *United States v. N.Y.C. Hous. Auth.*, 326 F.R.D. 411, 418 (S.D.N.Y. 2018); *Commack Self-Serv. Kosher Meats, Inc. v. Rubin*, 170 F.R.D. 93, 106 (E.D.N.Y. 1996); see also *EEOC v. Nat’l Children’s Ctr.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998) (observing that in past cases “we have eschewed strict readings of the phrase ‘claim or defense,’” and concluding that circuit precedent “compels a flexible reading of Rule 24(b)”).

<sup>261</sup> See *supra* note 246.

<sup>262</sup> Cosmetic changes were made in 2007 as part of the general restyling of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 24(b), 550 U.S. 1053–54 (2007).

<sup>263</sup> See *supra* text accompanying note 197.

<sup>264</sup> See *supra* note 203 and accompanying text.

trust the right to intervene in a case brought by or against the trustee,<sup>265</sup> and it might give an indemnitor the right to intervene in a case brought against the indemnitee.<sup>266</sup> But class actions were among the main examples of cases in which Rule 24(a)(2) had been expected to apply.<sup>267</sup> Specifically, Rule 24(a)(2) was thought to let individual members of the class intervene if the party purporting to represent them could not be counted on to protect their interests.<sup>268</sup>

On one view, that idea dovetailed with what Rule 23 said about the requirements for class actions in federal court. Subject to some restrictions relating to “the character of the right sought to be enforced for or against the class,” Rule 23 provided that “[i]f persons constituting a class are so numerous as to make it impracticable to bring them all before the court,” then “such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.”<sup>269</sup> The drafters of the Rules may have thought that if one member of a class purported to bring such a suit, but was not an adequate representative for one or more other members of the class, those members would have a right to intervene under Rule 24(a)(2), and the suit could then proceed on behalf of the entire class under Rule 23.

<sup>265</sup> See, e.g., Note, Federal Jurisdiction Over Ancillary Intervention, 55 Harv. L. Rev. 264, 267 & n.27 (1941) (identifying “suits by trustees or executors” as cases in which the “narrow terms” of Rule 24(a)(2) could apply).

<sup>266</sup> See, e.g., Lawrence Koenigsberger, An Introduction to the Federal Rules of Civil Procedure 16–17 (1938) (noting that if the indemnitee was held liable to the plaintiff and then sued the indemnitor for reimbursement, there were some situations in which the indemnitor could not relitigate the indemnitee’s liability, and indicating that in those situations Rule 24(a)(2) would sometimes give the indemnitor a right to intervene in the original action).

<sup>267</sup> See 2 Moore & Friedman, *supra* note 182, § 24.07 n.1; Note, *supra* note 265, at 267 n.27; see also Am. Bar Ass’n, Cleveland Proceedings, *supra* note 198, at 266 (printing remarks from a 1938 road show about the Federal Rules of Civil Procedure, where Dean Clark quoted Rule 24(a)(2) and immediately added that “a case of that kind is of course the class action I have been referring to”); cf. Yale Note, *supra* note 203, at 414 n.36 (criticizing *Clark v. Sandusky*, 205 F.2d 915 (7th Cir. 1953), for “extend[ing] 24(a)(2) far beyond the class action typical of its intended application”).

<sup>268</sup> See, e.g., Note, The Problem of Capacity in Union Suits: A Potpourri of Erie, Diversity and the Federal Rules of Civil Procedure, 68 Yale L.J. 1182, 1192 n.50 (1959) (“Fed. R. Civ. P. 24(a) . . . gives any member of a true class who may be inadequately represented a right to intervene.”); see also 2 Moore & Friedman, *supra* note 182, § 23.04 (defining “true,” “hybrid,” and “spurious” classes); *id.* § 24.07 n.1 (observing that “the spurious class action provided for in [then-existing] Rule 23(a)(3) is only a joinder device” and the judgment in such a suit “binds only parties and privies,” and concluding that “the absolute right to intervene based on inadequate representation refers to the true and hybrid class actions provided for in [then-existing] Rule 23(a)(1), (2)”).

<sup>269</sup> Fed. R. Civ. P. 23(a), 308 U.S. 689 (1938) (amended 1966).

Unfortunately, the provision that became Rule 24(a)(2) had been drafted before Rule 23,<sup>270</sup> and its language did not quite mesh with this idea. For Rule 24(a)(2) to give someone a right to intervene in a suit, the would-be intervenor needed to be at risk of being bound by the judgment. In many circumstances, however, the Constitution would prevent the judgment in a class action from binding absent class members whose interests had not been adequately represented.<sup>271</sup> As applied to class actions, then, the requirements of Rule 24(a)(2) arguably were at odds with each other: when an individual class member tried to establish a right to intervene under Rule 24(a)(2), arguments establishing that “the representation of the applicant’s interest by existing parties is or may be inadequate” would undermine the idea that “the applicant is or may be bound by a judgment in the action.”<sup>272</sup>

In 1961, the Supreme Court said as much. Writing for the Court in *Sam Fox Publishing Co. v. United States*,<sup>273</sup> Justice Harlan indicated that a class member who would not be adequately represented in a class action was not at risk of being bound by the judgment and therefore was not eligible for intervention of right under Rule 24(a)(2).<sup>274</sup> This holding gave Rule 24(a)(2) a narrower scope than its drafters may have intended, and people immediately started to talk about amending Rule 24.<sup>275</sup>

## 2. *The Advisory Committee’s Response*

Ultimately, changes to Rule 24 became part of a broader package of amendments that the Advisory Committee proposed in 1965 and that took

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<sup>270</sup> See Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia 49–50 (1936) (setting forth an initial version of the rule about intervention, then found at Rule 29, but not including any separate rule about class actions); James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 *Geo. L.J.* 551, 571–72 (1937) (proposing a version of what became Rule 23).

<sup>271</sup> See *Hansberry v. Lee*, 311 U.S. 32, 40–45 (1940).

<sup>272</sup> Cf. *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 *Harv. L. Rev.* 874, 941 (1958) (“[I]t is difficult to see how a member of a class can intervene under rule 24(a)(2) since, if it is a proper class action under rule 23, he is by definition adequately represented. Moreover, in a nonbinding class action the rights and liabilities of the absentees are not affected.”).

<sup>273</sup> 366 U.S. 683 (1961).

<sup>274</sup> See *id.* at 691.

<sup>275</sup> See, e.g., Milton D. Green, *Federal Jurisdiction and Practice*, 1961 *Ann. Surv. Am. L.* 481, 492; see also Tobias, *supra* note 10, at 429 (observing that *Sam Fox* was “the major reason for the amendment of Rule 24 in 1966”).

effect in 1966. With respect to Rule 24, those amendments collapsed what had been Rules 24(a)(2) and 24(a)(3) into a single criterion for intervention of right. The new version of Rule 24(a) read as follows:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.<sup>276</sup>

This language unquestionably broadened the right to intervene. By dropping the phrase “bound by [the] judgment” from the old version of Rule 24(a)(2), the amendment moved beyond the doctrines of *res judicata* that had driven Justice Harlan's analysis in *Sam Fox*; even if the judgment in a case would formally bind only the existing parties, an outsider who claimed a relevant “interest” could now assert a right to intervene if his ability to protect that interest might be at stake in a practical sense. The amendment also expanded upon the old version of Rule 24(a)(3). Before 1966, even when a case in federal court involved property in which an outsider claimed an “interest,” and even when a judgment in the case might jeopardize that interest, Rule 24(a)(3) had imposed a seemingly artificial restriction on the outsider's right to intervene: intervention of right had been available only if the property was “in the custody or subject to the control or disposition of the court or an officer thereof.” Cases like *Formulabs* had read this language broadly so as to minimize the restriction that it imposed,<sup>277</sup> but the amendment eliminated the restriction altogether.

Among the set of people who were eligible for some form of intervention under Rule 24, these changes enabled more applicants to qualify for “intervention of right” under Rule 24(a) rather than simply “permissive intervention” under Rule 24(b). That is consistent with pre-1966 trends; as noted above, the favorable treatment of “intervention of right” for purposes of both subject-matter jurisdiction and appellate review had led some judges to expand the prior version of Rule 24(a) at the expense of Rule 24(b).<sup>278</sup> But there is little reason to read the 1966

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<sup>276</sup> Fed. R. Civ. P. 24(a), 383 U.S. 1051 (1966).

<sup>277</sup> See supra notes 217–21 and accompanying text.

<sup>278</sup> See supra notes 199–202, 207 and accompanying text.

amendment as conferring a right to intervene upon people who had not previously been eligible even for permissive intervention. Not only was that not the Advisory Committee's concern,<sup>279</sup> but Rule 24(c) continued to assume that *all* would-be intervenors (including those invoking the new version of Rule 24(a)) would be asserting a "claim or defense" of the sort that could form the basis for a "pleading."<sup>280</sup>

Consistent with that idea, the revised version of Rule 24(a) still required would-be intervenors to "claim[] an interest relating to the property or transaction which is the subject of the action." According to the Reporter for the Advisory Committee, moreover, the word "interest" in the new version of Rule 24(a)(2) was limited by "the historic continuity of the subject of intervention" (that is, the types of interests that had supported intervention in the past) and by "the concepts of new rule 19, to which intervention looks for analogy."<sup>281</sup>

The latter point refers to the fact that the same package of amendments that revamped Rule 24(a) also overhauled Rule 19's provisions about necessary parties—outsiders who must be brought into a lawsuit if

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<sup>279</sup> Both the Note that the Advisory Committee issued to explain the 1966 amendment and a law-review article published by the Committee's Reporter, Professor Benjamin Kaplan, indicate that two issues animated the changes to Rule 24(a): (1) the Committee wanted to provide a stronger textual basis for the result in cases like *Formulabs*, which had taken "a loose view of [the then-existing version of] rule 24(a)(3)," and (2) given the problem highlighted by *Sam Fox*, "the 'binding' language had to be excised from subdivision (a)(2)." Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pt. 1), 81 Harv. L. Rev. 356, 400–03 & n.169 (1967); see also *Amendments to Rules of Civil Procedure*, 39 F.R.D. 69, 109–10 (1966) (Advisory Committee's Note) (discussing the same two issues). In Professor Kaplan's words, "The Advisory Committee undertook only these reforms." Kaplan, *supra*, at 403.

<sup>280</sup> See *supra* text accompanying note 197 (quoting Rule 24(c), which required all motions to intervene to "be accompanied by a pleading setting forth the claim or defense for which intervention is sought"); *supra* note 82. Admittedly, it is not clear how Rule 24(c) was supposed to interact with the specialized provisions authorizing intervention by the government under circumstances where intervention would not normally be possible. See *supra* note 246. For example, imagine that A sues B in federal court, B invokes a federal statute that allegedly defeats A's legal theory, and A responds that the statute does not supply a rule of decision for the case because the statute is unconstitutional. If the statute "affect[s] the public interest," 28 U.S.C. § 2403 gives the United States a right to intervene for the purpose of defending the statute's constitutionality even though the United States has no obvious "claim or defense" against either A or B. (While the United States and A do disagree about their legal relations—specifically, about whether Congress has the power to change A's legal position in the manner attempted by the statute—it is not clear that this dispute would support a claim for declaratory relief by the United States against A or vice versa.)

<sup>281</sup> Kaplan, *supra* note 279, at 405.

feasible. The new version of Rule 19(a) included the following description of people who are required to be joined:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.<sup>282</sup>

The language of Rule 19(a)(2)(i) was virtually identical to the new criterion for intervention of right under Rule 24(a)(2), and the Advisory Committee's Notes confirmed that the rules should be understood in tandem; the Committee apparently expected that someone would have a right to intervene under Rule 24(a)(2) only if he would also have been required to be joined if feasible under Rule 19(a)(2)(i).<sup>283</sup> Both before and after the 1966 amendments, moreover, most courts have understood the word "interest" in Rule 19 to refer to legally protected interests of the sort that might form the basis for a lawsuit, not simply practical interests that might make someone care about the outcome of the suit.<sup>284</sup>

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<sup>282</sup> Fed. R. Civ. P. 19(a), 383 U.S. 1045 (1966).

<sup>283</sup> See Amendments to Rules of Civil Procedure, *supra* note 279, 39 F.R.D. at 109–10 (linking these two rules); see also *id.* at 110 ("The amendment [to Rule 24(a)] provides that an applicant is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i), as amended, unless his interest is already adequately represented in the action by existing parties.").

<sup>284</sup> From 1938 until 1966, Rule 19 had provided that "persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants." Fed. R. Civ. P. 19(a), 308 U.S. 687 (1938). In this context, the phrase "joint interest" plainly referred to a type of *legal* interest, and courts so interpreted it. See, e.g., *Samuel Goldwyn, Inc. v. United Artists Corp.*, 113 F.2d 703, 707 (3d Cir. 1940). Even after 1966, most courts have understood the word "interest" in Rule 19 to retain a legal cast; although there has been some disagreement on this point, many cases suggest that the 1966 version of Rule 19(a)(2) and its current incarnation (now found at Rule 19(a)(1)(B)) contemplate "a legally protected interest," with the result that outsiders are not necessary parties simply because the outcome of a case will affect them in a practical sense. See *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 971 (9th Cir. 2008) ("The mere fact that the outcome of Colusa's litigation may have some financial consequences for the non-party tribes is not sufficient to make those tribes required parties . . . . The absent tribes must have a legally protected interest . . . ."); accord, e.g., *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 230 (3d Cir. 2005); see also 4 James Wm. Moore, *Moore's Federal Practice* § 19.03[3][b] (3d



The connection between Rule 19 and Rule 24 provides crucial context for understanding a sentence in the Advisory Committee's Notes that has misled subsequent courts and commentators. To explain the need for the 1966 amendments to Rule 24(a), the Advisory Committee's Notes began by observing that some judicial opinions (such as the Ninth Circuit's opinion in *Formulabs*) had "virtually disregarded the language" of the existing version of Rule 24(a)(3).<sup>285</sup> The Notes continued as follows:

This development was quite natural, for Rule 24(a)(3) was unduly restricted. If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of. Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion.<sup>286</sup>

Seizing upon the second of the three sentences in this passage, some courts and commentators have asserted that "the purpose of Rule 24(a)(2)" was to open up intervention to every absentee who "would be substantially affected in a practical sense by the determination made in an action."<sup>287</sup> As the very next sentence of the passage makes clear,

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ed. 2019) ("This interest must be legally protected, not merely a financial interest or interest of convenience." (internal quotation marks omitted)); Katherine Florey, *Making Sovereigns Indispensable: Pimentel and the Evolution of Rule 19*, 58 *UCLA L. Rev.* 667, 693 n.177 (2011) (calling this "[t]he general rule"). But see *Aguilar v. Los Angeles County*, 751 F.2d 1089, 1093 (9th Cir. 1985) (concluding that "the Rule 19(a)(2) 'interest' requirement [is] not limited to a 'legal' interest," and calling this conclusion "the prevailing view"); cf. *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 852 (9th Cir. 2019) (acknowledging that "[t]o satisfy Rule 19, an interest must be legally protected and must be 'more than a financial stake,'" but finding this requirement satisfied (quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990))).

<sup>285</sup> Amendments to Rules of Civil Procedure, *supra* note 279, 39 F.R.D. at 109.

<sup>286</sup> *Id.* at 109–10.

<sup>287</sup> See, e.g., *San Juan County v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007) (en banc) (quoting Amendments to Rules of Civil Procedure, *supra* note 279, 39 F.R.D. at 109). In support of the same assertion, the Tenth Circuit also invoked a statement prepared by Professor Kaplan and his associate reporter, Professor Albert Sacks. The statement explained the proposed amendment to Rule 24 as follows:

however, the Advisory Committee was thinking about absentees who had a relevant “interest” to assert—the sort of interest that would make the absentee a necessary party under Rule 19.

Contemporaneous changes to Rule 23 reinforce this view. In addition to revising what Rule 19 said about necessary parties in ordinary lawsuits, the 1966 amendments also revised what Rule 23 said about the use of class actions when individual members of the class would be necessary parties in each other’s lawsuits.<sup>288</sup> Specifically, if some other conditions were also satisfied, the new version of Rule 23(b)(1)(B) said that a suit could proceed as a class action if

the prosecution of separate actions by or against individual members of the class would create a risk of . . . adjudications with respect to

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The main purpose of this amendment is to correct a paradoxical situation created by reading “is or may be bound” appearing in present Rule 24(a)(2) as referring to *res judicata* in the strict sense. On this reading, if a member of the class demanded intervention in a class action on the ground of inadequacy of representation, he might be met with the argument that if the representation was in fact inadequate, he would not be technically “bound” by the class judgment, whereas, if the representation was adequate, there was no basis at all for intervention. But if the class member could establish inadequacy of representation with sufficient probability, he should not be put to the risk of a judgment which included him by its terms, and be obliged to test the judgment by collateral attack. The effect of the amendment is to provide that if a person who would be affected *in a practical sense* by the disposition of an action is not joined as a party, he has a right to intervene unless he is adequately represented by an existing party.

Statement on Behalf of the Advisory Committee on Civil Rules 11 (June 10, 1965), *in* Report of the Committee on Rules of Practice and Procedure (1965), Exhibit B, [www.uscourts.gov/sites/default/files/fr\\_import/ST09-1965-1.pdf](http://www.uscourts.gov/sites/default/files/fr_import/ST09-1965-1.pdf) [<https://perma.cc/G3GM-3KZW>].

The Tenth Circuit quoted only the last sentence of this passage. *San Juan County*, 503 F.3d at 1195. Taken out of context, that sentence might seem to bear on the type of “interest” required for intervention of right. In context, though, that interpretation is less plausible. The overall passage focused primarily on members of a plaintiff class (each of whom would have legal claims to assert), and the passage explicitly said that “[t]he main purpose of this amendment” was simply to fix the *Sam Fox* problem. When Professors Kaplan and Sacks wrote the last sentence, they presumably had in mind a person who satisfied the “interest” requirement; they were trying to clarify the separate requirement that he be “so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest.” Fed. R. Civ. P. 24(a)(2), 383 U.S. 1051 (1966). The Tenth Circuit has improperly conflated those two inquiries. Cf. *San Juan County*, 503 F.3d at 1190 (combining the “interest” and “impairment” requirements into a single inquiry called “the impaired-interest requirement”).

<sup>288</sup> Cf. 2 Moore & Friedman, *supra* note 182, § 23.04(1) (“The ‘true class suit’ is one wherein, but for the class action device, the joinder of all interested persons would be essential.”).

individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.<sup>289</sup>

Again, this language seems to have been referring to *legal* interests of the sort that might be asserted in lawsuits by or against individual members of the class.

### III. WHEN AND WHY DID LOWER COURTS BROADEN THE RIGHT TO INTERVENE?

Given the history canvassed in Part II, one might wonder how we got to the modern cases described in Part I. When and why did courts broaden the right to intervene?

As commentators have already observed, the Supreme Court neither drove this expansion nor even ratified it after the fact. In the words of Professor Carl Tobias, “The Supreme Court has rarely addressed Rule 24(a)(2), and when it has, the opinions have been peculiarly fact-bound, affording minimal guidance, especially as to the meaning of interest.”<sup>290</sup> To be sure, the Court heard three cases about intervention in the first five years after the 1966 amendment. But as Section III.A explains, none of those cases clarified the “interest” required for intervention of right, and the Supreme Court has not addressed that topic since. Thus, “the lower federal courts have assumed primary responsibility for articulating the interest requirement . . . .”<sup>291</sup>

Among the lower courts, expansive readings of Rule 24(a)(2) can be traced to the 1960s and 1970s.<sup>292</sup> Section III.B suggests that those readings were a product of their time. Scholars have long linked expansion of the right to intervene to the rise of so-called “public law litigation,”<sup>293</sup> and Section III.B highlights a key aspect of that connection: to borrow a phrase from Professor Richard Stewart (who discussed analogous developments in the field of administrative procedure), the expansion of the right to intervene reflected an “interest representation” model of litigation. For instance, that model nicely fits two influential

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<sup>289</sup> Fed. R. Civ. P. 23(b)(1)(B), 383 U.S. 1047 (1966).

<sup>290</sup> Tobias, *supra* note 10, at 432.

<sup>291</sup> *Id.* at 434.

<sup>292</sup> See *id.* at 417 n.4.

<sup>293</sup> See Chayes, *supra* note 16, at 1284, 1290; see also sources cited *infra* note 396.

opinions that a trio of judges on the D.C. Circuit issued in the late 1960s and that encouraged a broad understanding of the right to intervene. Even in the 1970s, however, the Supreme Court seemed more inclined to accept the traditional model, and that remains true today. Thus, if and when the Supreme Court takes a case that requires it to interpret Rule 24, the Court might well question the premises behind the lower courts' expansive readings.

Section III.C considers another idea that crops up in some lower-court opinions about intervention. Some lower courts have suggested that even if a statute does not create a private right of action, it confers legal "interests" upon the people whom it was intended to protect, and Rule 24(a)(2) entitles those people to intervene in suits where their protected interests are threatened. That idea suggests an intermediate reading of Rule 24(a)(2)—a reading that does not require would-be intervenors to have a full-fledged right of action, but also does not invite intervention by everyone who might suffer a practical "injury in fact" because of the outcome of a lawsuit. One of the leading opinions to embrace this reading, however, did so by analogy to doctrines of "prudential standing," which the Supreme Court has since criticized. And while the intermediate reading of Rule 24(a)(2) resonates with earlier doctrines about the kinds of "legal interests" that would support suits for relief against allegedly unlawful actions by federal administrative agencies, those doctrines too later moved in a different direction. Thus, one should not expect the Supreme Court to gravitate toward this intermediate reading either.

What might the Supreme Court say instead? Section III.D suggests an interpretation of Rule 24 that fits the history detailed in Part II and that is oriented around legal claims rather than practical interests.

#### *A. The Lack of Guidance from the Supreme Court*

This Section describes the three main cases from the Supreme Court—all more than 45 years old—that might be thought to bear on the "interest"

required by Rule 24(a)(2).<sup>294</sup> As commentators have already concluded, though, those cases lack significant precedential force.<sup>295</sup>

*I. Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*

When the 1966 amendment took effect, the Supreme Court already had a pending case about Rule 24.<sup>296</sup> As a result, the Supreme Court addressed the meaning of the 1966 amendment “before scarcely a district court had been able to look at it.”<sup>297</sup>

The pending case had already been at the Supreme Court once. In the 1950s, the El Paso Natural Gas Company had acquired substantially all the stock (and later the assets) of the Pacific Northwest Pipeline Corporation. Alleging that these acquisitions were likely to have anticompetitive effects in several western states and therefore violated Section 7 of the Clayton Act,<sup>298</sup> the federal government sued for divestiture. The district court ruled against the government, but the Supreme Court disagreed; based on the potential for anticompetitive effects in California, the Court held that the Clayton Act prohibited the

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<sup>294</sup> A fourth case—*Bryant v. Yellen*, 447 U.S. 352 (1980)—is also sometimes said to have addressed this topic. See Appel, *supra* note 117, at 263–64 (glossing *Bryant* as having “discussed the interest required by Rule 24(a)(2)”). As I read *Bryant*, though, the Supreme Court’s opinion said nothing about Rule 24. The parties’ briefs focused instead on whether the would-be intervenors had enjoyed “Article III standing” (a requirement for being allowed to appeal the district court’s judgment on their own), and that is the issue that the Supreme Court addressed. See Brief of Landowner Petitioners at 64–68, *Bryant*, 447 U.S. 352 (No. 79-421) (arguing that the respondent-intervenors lacked “Article III standing”); Brief for the United States at 76–86, *Bryant*, 447 U.S. 352 (Nos. 79-421, 79-425, & 79-435) (arguing that the respondent-intervenors “had standing under Article III to appeal from the district court’s adverse decision”); see also Respondents’ Brief at 166, *Bryant*, 447 U.S. 352 (Nos. 79-421, 79-425, & 79-435) (“The court of appeals concluded that respondents met the requirements of standing so as to have an appealable interest in pursuing the judgment. Petitioners . . . challenge respondents’ appealable interest alone. They raise no question about the other aspects of Rule 24 . . .”).

<sup>295</sup> Cf. 7C Wright et al., *supra* note 9, § 1908.1 (“The Supreme Court has spoken to the question twice since the rule was amended in 1966, but those cases generally have been limited to their somewhat unique facts.”).

<sup>296</sup> See *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 382 U.S. 970 (1966) (noting probable jurisdiction over three consolidated appeals).

<sup>297</sup> Shapiro, *supra* note 84, at 722.

<sup>298</sup> As amended in 1950, Section 7 forbade El Paso to “acquire, directly or indirectly, the whole or any part of the stock or . . . assets of another corporation engaged . . . in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition.” Act of Dec. 29, 1950, ch. 1184, 64 Stat. 1125, 1125–26 (amending Clayton Act, ch. 323, § 7, 38 Stat. 730, 731–32 (1914)) (codified as amended at 15 U.S.C. § 18 (2018)).

acquisitions.<sup>299</sup> In a strongly worded majority opinion, Justice Douglas declared that “we not only reverse the judgment below but direct the District Court to order divestiture without delay.”<sup>300</sup>

On remand, El Paso proposed a plan for spinning off assets that it had acquired from Pacific Northwest into a separate corporation called “the New Company,” whose stock would be distributed to El Paso’s shareholders and which would owe contractual obligations to El Paso.<sup>301</sup> Various outside entities moved to intervene, but the district court eventually denied all these motions.<sup>302</sup> Three of the would-be intervenors—the State of California (which feared that El Paso’s plan would not restore the competitive conditions that had previously existed in California),<sup>303</sup> the Southern California Edison Company (which likewise wanted to ensure adequate competition in California because it bought a lot of natural gas there),<sup>304</sup> and the Cascade Natural Gas Corporation (which had contracts making the New Company the sole supplier for the natural gas that Cascade distributed in Oregon and Washington, and which feared that the divestiture plan allocated too many gas reserves to El Paso and not enough to the New Company)<sup>305</sup>—appealed the denial of their motions to intervene.

Meanwhile, the federal government came to terms with El Paso on a version of the spin-off plan, and the district court entered a decree consistent with that agreement. Having acquiesced in this decree, the federal government did not appeal. But the three would-be intervenors remained dissatisfied, and they pursued their appeals of the district court’s refusal to let them intervene.

In the course of addressing these appeals, the Supreme Court sharply criticized both the federal government (which allegedly had “knuckled under to El Paso”) and the district judge (who allegedly had flouted the

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<sup>299</sup> United States v. El Paso Nat. Gas Co., 376 U.S. 651, 657–62 (1964).

<sup>300</sup> Id. at 662.

<sup>301</sup> See Brief for the United States at 6–7, *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129 (1967) (Nos. 4, 5, & 24) (describing El Paso’s initial proposal).

<sup>302</sup> Id. at 12–16.

<sup>303</sup> See, e.g., Statement of the State of California in Support of Application for Leave to Intervene (Nov. 20, 1964), in 2 Transcript of Record 458, 459, *Cascade*, 386 U.S. 129 (Nos. 4, 5, & 24) (“California . . . is concerned that this divestiture proceeding will, contrary to the mandate of the United States Supreme Court, permit acquisition by individual shareholders of El Paso so that, in fact, the El Paso Natural Gas Company will continue to control and to dominate the Pacific Northwest Pipeline Corporation.”).

<sup>304</sup> See *Cascade*, 386 U.S. at 132–33.

<sup>305</sup> See id. at 133.

Court's previous mandate, and whom the Court ordered to be removed from the case).<sup>306</sup> Again writing for the majority, Justice Douglas charged that the district court's decree "does the opposite of what our prior opinion and mandate commanded",<sup>307</sup> the mandate "plainly meant that Pacific Northwest or a new company be at once restored to a position where it could compete with El Paso in the California market,"<sup>308</sup> and the district court's decree did nothing of the sort.<sup>309</sup>

Given the posture in which the case had returned to the Supreme Court, however, the "threshold question" confronting the Court was simply about intervention: Were any of the appellants correct that they had been entitled to intervene?<sup>310</sup> If the answer was "no," then their appeals would fail, and the Court might lack a vehicle for correcting the alleged disregard of its mandate. Perhaps to avert that prospect, the majority concluded that the answer was "yes." The 1966 amendment had not been in effect at the time of the proceedings in the district court, but Justice Douglas concluded that even the pre-1966 version of Rule 24(a)(3) had given the State of California and the Southern California Edison Company a right to intervene.<sup>311</sup> Further proceedings therefore would be necessary. In those proceedings, moreover, Cascade too would have a right to intervene; as Justice Douglas understood the 1966 amendment, the new version of Rule 24(a) "is broad enough to include Cascade."<sup>312</sup>

Both of these conclusions were questionable. Start with whether the pre-1966 version of Rule 24(a)(3) really gave the State of California and the Southern California Edison Company a right to intervene at the remedial stage of the government's antitrust suit. To be sure, these would-be intervenors did have relevant claims of their own;<sup>313</sup> Section 16 of the Clayton Act specifically confers a private cause of action for "injunctive

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<sup>306</sup> See *id.* at 141–43. While not unprecedented, the Court's decision to reassign the case was certainly unusual. See Toby J. Heytens, *Reassignment*, 66 *Stan. L. Rev.* 1, 43–44 (2014).

<sup>307</sup> *Cascade*, 386 U.S. at 142.

<sup>308</sup> *Id.* at 136.

<sup>309</sup> See *id.* at 131 (concluding that "no divestiture in any meaningful sense has been directed").

<sup>310</sup> See *id.* at 132.

<sup>311</sup> *Id.* at 135.

<sup>312</sup> *Id.* at 135–36.

<sup>313</sup> The United States conceded this point. See Brief for the United States at 57, *Cascade*, 386 U.S. 129 (Nos. 4, 5, & 24) ("We grant that California and Edison have an interest in the proceeding which—were it not adequately represented by the United States—would support a claim of intervention of right. That interest is a right of action against El Paso for violation of Section 7.").

relief . . . against threatened loss or damage by a violation of the antitrust laws, including section[] . . . seven . . . of this Act,”<sup>314</sup> and the Supreme Court has subsequently confirmed that private litigants can seek divestiture as a remedy for violations of Section 7.<sup>315</sup> As buyers of natural gas in California, moreover, both the Southern California Edison Company and the California citizenry were among the people whom the Supreme Court’s prior mandate “was designed to protect,” and Justice Douglas seemed to think that they were therefore appropriate parties to seek enforcement of the mandate.<sup>316</sup> Still, it is far from clear that the pre-1966 version of Rule 24(a)(3) entitled them to force their way into the government’s suit for this purpose. While the assets that El Paso had illegally acquired might well be “property . . . subject to the disposition of the court” within the meaning of Rule 24(a)(3), neither the people of California nor Southern California Edison had anything approaching a lien or even a specific claim on that property. In the past, moreover, courts

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<sup>314</sup> Clayton Act, ch. 323, § 16, 38 Stat. 730, 737 (1914) (codified as amended at 15 U.S.C. § 26 (2018)). Just as § 16 of the Clayton Act created a private cause of action for injunctive relief, so too § 4 created a private cause of action for treble damages. See § 4, 38 Stat. at 731; cf. Richard E. Day, *Private Actions Under Section 7 of the Clayton Act*, 29 A.B.A. Antitrust Sec. 155, 155–58 (1965) (discussing splits of opinion about whether and under what circumstances treble damages were an appropriate remedy for violations of § 7). Eventually, the Supreme Court held that “for plaintiffs to recover treble damages on account of § 7 violations,” they needed to establish what the Court called “*antitrust injury*”—“injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); see also *id.* (“The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.”). Later, the Court recognized a similar limitation on the cause of action for injunctive relief created by § 16; plaintiffs are eligible for such relief only if they are threatened with “*antitrust injury*.” *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 109–13 (1986). Even if these opinions had been in place at the time of the *El Paso* case, however, they probably would not have posed a problem either for Southern California Edison or for the California citizens whom the state purported to be representing; as buyers of natural gas in the state where El Paso’s merger with Pacific Northwest was suppressing competition, they were in a position to allege “*antitrust injury*.”

<sup>315</sup> See *California v. Am. Stores Co.*, 495 U.S. 271, 278–85 (1990). This conclusion was not clear at the time of *Cascade*, but it was certainly arguable. See ABA Section of Antitrust Law, *Mergers and the Private Antitrust Suit: The Private Enforcement of Section 7 of the Clayton Act 4–7* (1977) (discussing a split of authority in the 1970s); P. Dexter Peacock, *Private Divestiture Suits Under Section 16 of the Clayton Act*, 48 *Tex. L. Rev.* 54, 55–57 (1969) (advocating the conclusion that the Supreme Court ultimately reached).

<sup>316</sup> *Cascade*, 386 U.S. at 135.



had been particularly reluctant to let private litigants intervene in antitrust suits brought by the government.<sup>317</sup>

As for the Cascade Natural Gas Corporation's right to intervene in the proceedings that would be occurring on remand, Justice Douglas apparently believed that Cascade was claiming "'an interest' in the 'transaction which is the subject of the action'" within the meaning of the 1966 amendment to Rule 24(a).<sup>318</sup> But Justice Douglas offered no explanation of this conclusion, and he said nothing about how he was interpreting the word "interest." Did he think that Cascade had a cause of action of its own—perhaps for injunctive relief under Section 16 of the Clayton Act,<sup>319</sup> or perhaps to vindicate Cascade's statutory rights under the Natural Gas Act,<sup>320</sup> or perhaps simply to "safeguard[] its contract rights" as against El Paso and the New Company?<sup>321</sup> Or did Justice Douglas think that the term "interest," as used in the 1966 amendment, extended to purely practical concerns—so that intervention of right was

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<sup>317</sup> See *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 693 (1961) (referring to "the unquestionably sound policy of not permitting private antitrust plaintiffs to press their claims against alleged violators in the same suit as the Government"); see also *Cascade*, 386 U.S. at 151–52 (Stewart, J., dissenting) (citing many cases in which "we . . . refused to recognize the right to intervene in government antitrust suits," and one in which "we . . . upheld denial of intervention to a private party who claimed that a decree negotiated between the Government and an antitrust defendant failed to carry out the mandate of this Court"); Kaplan, *supra* note 279, at 405–06 (noting that "[t]he majority of the Court omitted to deal with the weight of negative authority on interventions of this kind" and adding that "[i]f the *El Paso* case is taken at face value, it would radically change the present pattern of antitrust administration").

<sup>318</sup> *Cascade*, 386 U.S. at 135–36.

<sup>319</sup> While Cascade could certainly argue that it was being harmed by El Paso's violation of § 7 of the Clayton Act, the type of harm alleged by Cascade might not be "antitrust injury" of the sort that is now seen as an element of the cause of action for injunctive relief under § 16. But the Supreme Court did not explicitly articulate this limitation on § 16 until the 1980s. See *supra* note 314. At the time of *Cascade*, Justice Douglas might have assumed that § 16 also created a cause of action in favor of plaintiffs who were threatened with other sorts of "loss or damage" as a result of violations of the antitrust laws. See Clayton Act § 16, 38 Stat. at 737.

<sup>320</sup> See Brief for the United States, *supra* note 313, at 63–64 (acknowledging that "under Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), El Paso is forbidden to terminate its service to Cascade without the authority of the Federal Power Commission," but arguing that Cascade's statutory "right . . . to adequate, uninterrupted service" should be vindicated "in proceedings before the Federal Power Commission—the agency charged with the duty to enforce the Act"); cf. *Farmland Indus., Inc. v. Kan.-Neb. Nat. Gas Co.*, 349 F. Supp. 670, 677–81 (D. Neb. 1972) (analyzing whether to recognize private causes of action to enforce Section 7(b) of the Natural Gas Act), *aff'd*, 486 F.2d 315 (8th Cir. 1973).

<sup>321</sup> See Brief for the United States, *supra* note 313, at 58 (acknowledging Cascade's contract rights but arguing that they did not give Cascade a right to intervene in the government's antitrust suit).

now available to people who cared about the outcome of a case but who had no relevant legal claims or defenses to assert?

In early commentary on *Cascade*, Professor Shapiro expressed uncertainty about both the basis of Justice Douglas's decision and its implications for other cases.<sup>322</sup> Perhaps the decision signaled a broad reading of the 1966 amendment; in Professor Shapiro's words, the Court "may have expanded the right to intervene beyond the dreams, or nightmares, of the draftsmen of that amendment."<sup>323</sup> In keeping with that point, Professor Kaplan (the reporter to the Advisory Committee that prepared the 1966 amendment) expressed "grave doubt" that the new version of Rule 24(a) really covered any of the intervenors in *Cascade*.<sup>324</sup> Still, both Shapiro and Kaplan suggested that the Court's decision might be an isolated event, driven by the majority's desire to correct the district judge's perceived failure to follow the Court's previous mandate.<sup>325</sup>

Some lower courts shared that view. In the words of one federal district judge, "[t]he unusual facts of *Cascade* make it sui generis," and the Supreme Court's opinion did not establish a precedent for intervention in other situations.<sup>326</sup> Judges who took this position often noted that after *Cascade*, the Supreme Court had issued several memorandum decisions rejecting appeals by would-be intervenors in other situations.<sup>327</sup>

A different set of federal judges read *Cascade* more expansively. For instance, a few judges took *Cascade* to mean that "an individual claiming to speak for the public interest may intervene as a matter of right in suits . . . where he asserts that the Government may have used bad

<sup>322</sup> See Shapiro, *supra* note 84, at 730.

<sup>323</sup> *Id.* at 722.

<sup>324</sup> Kaplan, *supra* note 279, at 405; see also *id.* at 404–07 (criticizing Justice Douglas's opinion).

<sup>325</sup> See *id.* at 406; Shapiro, *supra* note 84, at 730.

<sup>326</sup> *United States v. Paramount Pictures, Inc.*, 333 F. Supp. 1100, 1102 (S.D.N.Y. 1971) (explaining the Supreme Court's decision as "a convenient device for preventing any further disregard of its order"); see also *United States v. Nat'l Bank & Tr. Co. of Cent. Pa.*, 319 F. Supp. 930, 932–33 (E.D. Pa. 1970) (distinguishing *Cascade* on similar grounds); *United States v. Auto. Mfrs. Ass'n*, 307 F. Supp. 617, 619 n.3 (C.D. Cal. 1969) (agreeing that the majority opinion in *Cascade* "must be limited to the facts of that case"), *aff'd sub nom. City of New York v. United States*, 397 U.S. 248 (1970); *The Supreme Court, 1966 Term—Leading Cases*, 81 Harv. L. Rev. 110, 223 (1967) (noting that the head of the Justice Department's Antitrust Division "has interpreted *El Paso* to apply only when such a mandate has not been honored and intervention is sought to enforce it").

<sup>327</sup> See *United States v. Ciba Corp.*, 50 F.R.D. 507, 512 (S.D.N.Y. 1970); *Auto. Mfrs. Ass'n*, 307 F. Supp. at 619 n.3.

judgment in conducting the litigation.”<sup>328</sup> Some other judges cited *Cascade* for the proposition that intervention sometimes can be predicated on an “economic interest” rather than a legal claim or defense.<sup>329</sup> But these readings of Justice Douglas’s opinion assume that *Cascade* lacked a cause of action of its own, and it is hard to know what Justice Douglas would have said on that topic. Indeed, it is difficult to reduce Justice Douglas’s opinion to a definitive statement of any sort. Thus, “[w]ith an occasional rare exception, both the commentators and the lower courts have refused to regard *Cascade* as a significant precedent.”<sup>330</sup>

## 2. *Donaldson v. United States*

A few years after *Cascade*, the Supreme Court issued an equally murky opinion that arguably pointed in the opposite direction. Kevin Donaldson had worked for a circus. To investigate his income-tax returns, the IRS served summonses upon his former employer and the employer’s accountant, seeking to obtain records of payments they had made to Mr. Donaldson, the social-security number he had given them, and other information.<sup>331</sup> Ultimately, the United States filed petitions in federal district court against the employer and the accountant to enforce these summonses. Mr. Donaldson moved to intervene in these proceedings, but the district court denied his motion, and the Fifth Circuit affirmed. So did the Supreme Court.<sup>332</sup>

Justice Blackmun’s majority opinion began by observing that although the Federal Rules of Civil Procedure apply to proceedings to enforce a summons, the rules “are not inflexible in this application.”<sup>333</sup> Yet even if

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<sup>328</sup> *City of Cleveland v. Cities Serv. Oil Co.*, 47 F.R.D. 543, 546 (N.D. Ohio 1969); accord *United States v. First Nat’l Bank & Tr. Co. of Lexington, Ky.*, 280 F. Supp. 260, 263 (E.D. Ky. 1967), *aff’d sub nom. Cent. Bank & Tr. Co. v. United States*, 391 U.S. 469 (1968) (mem.); cf. *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 149, 155 (1967) (Stewart, J., dissenting) (accusing the majority of embracing something like this idea).

<sup>329</sup> *Brooks v. Flagg Bros.*, 63 F.R.D. 409, 415 (S.D.N.Y. 1974); accord *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm’n*, 834 F.3d 562, 567–68 (5th Cir. 2016); *United States v. Simmonds Precision Prods., Inc.*, 319 F. Supp. 620, 621 (S.D.N.Y. 1970); see also *infra* text accompanying note 383.

<sup>330</sup> 7C Wright et al., *supra* note 9, § 1908.1 (italics added) (footnote omitted).

<sup>331</sup> See *Donaldson v. United States*, 400 U.S. 517, 518–19 (1971).

<sup>332</sup> *Id.* at 520–22, 527–31.

<sup>333</sup> *Id.* at 528; see also *id.* at 528–29 (explaining that Rule 81 “specifically . . . recognize[s] that a district court, by local rule or by order, may limit the application of the rules in a summons proceeding”).

Rule 24(a) applied with full force, the Court held that Mr. Donaldson did not meet its requirements; despite the fact that disclosure of the records might be bad for him, he lacked an “interest” of the sort required for intervention of right.<sup>334</sup> Justice Blackmun did not fully explain this conclusion, but he observed that the law did not entitle Mr. Donaldson to suppression of the records in question.<sup>335</sup> Justice Blackmun added that when Rule 24(a)(2) referred to “an interest relating to the property or transaction which is the subject of the action,” it “obviously meant . . . a significantly protectable interest.”<sup>336</sup>

Commentators greeted this formulation with well-deserved criticism. As a leading treatise observed at the time, “‘significantly protectable interest’ has not been a term of art in the law and there is sufficient room for disagreement about what it means so that this gloss . . . is not likely to provide any more guidance than does the bare term ‘interest’ used in Rule 24 itself.”<sup>337</sup> That prediction has proved entirely accurate.<sup>338</sup>

To be sure, a few lower courts had previously used the words “protectable interest” in connection with intervention.<sup>339</sup> As used in *Donaldson*, moreover, those words presumably referred to an interest that the law actually does protect (and that therefore is “protectable” by litigants), rather than simply a real-world interest of the sort that lawmakers could decide to protect and that would support litigation if they did. (Lawmakers surely could have given Mr. Donaldson a legal right to prevent the disclosure of records about him; the reason he lacked a “protectable interest” was simply that the law did *not* give him such a

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<sup>334</sup> See *id.* at 530–31.

<sup>335</sup> See *id.* at 531.

<sup>336</sup> *Id.*

<sup>337</sup> 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1908, at 502 (1972).

<sup>338</sup> See Appel, *supra* note 117, at 263 (“The phrase ‘significantly protectable interest’ raises more questions than it answers . . .”).

<sup>339</sup> The leading example is *Hobson v. Hansen*, 44 F.R.D. 18, 24 (D.D.C. 1968) (arguing that the 1966 amendment to Rule 24(a) had not affected the type of “interest” required for intervention of right, and asserting that would-be intervenors still needed “a direct, substantial, legally protectable interest in the proceedings”); see also *Diaz v. S. Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970) (quoting this language approvingly). In the *Hobson* litigation, however, the D.C. Circuit (or at least three of its members) ultimately embraced a broader reading of Rule 24(a). See *Smuck v. Hobson*, 408 F.2d 175, 177–82 (D.C. Cir. 1969) (en banc) (plurality opinion of Bazelon, C.J.); see also *infra* notes 374–88 and accompanying text (describing the litigation).

right.<sup>340</sup>) In other contexts, lower courts sometimes had described interests as being “protectible” when the law supplied remedies for their invasion.<sup>341</sup> Likewise, a prominent book by Professor Edwin Borchard had used the phrase “protectible interest” interchangeably with the phrase “legal interest,” to describe interests that the law protected and that could be vindicated in a suit for a declaratory judgment.<sup>342</sup> But exactly how to define either of those phrases has never been clear, and Justice Blackmun offered no clarification.

Justice Blackmun’s decision to add the word “significantly” only fuzzed things up more. As far as I can tell from Westlaw’s electronic databases, no American judicial opinion had ever before used the adverb “significantly” to modify “protectable.” What it meant is anyone’s guess.

### 3. *Trbovich v. United Mine Workers*

A year after *Donaldson*, the Supreme Court confronted Rule 24 again in *Trbovich v. United Mine Workers*.<sup>343</sup> The facts of *Trbovich* were dramatic, but the legal issues concerned a contest for the presidency of a labor union.

Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) requires unions to hold periodic elections to choose their officers, and the statute imposes various requirements to protect the integrity of the electoral process.<sup>344</sup> Any union member who alleges a violation of those requirements, and who has exhausted the remedies available under the union’s constitution and by-laws, may file a complaint

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<sup>340</sup> See *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 464 (5th Cir. 1984) (“It is apparent that the Supreme Court in *Donaldson* used ‘protectable’ in the sense of legally protectable . . . . [T]he interest [must] be one which the substantive law recognizes as belonging to or being owned by the applicant.” (emphasis omitted)).

<sup>341</sup> See, e.g., *Rockaway Blvd. Wrecking & Lumber Co. v. Raylite Elec. Corp.*, 269 N.Y.S.2d 926, 928 (App. Div. 1966) (“A right to future possession of a chattel has been recognized as a protectible interest.” (citations omitted)).

<sup>342</sup> See Edwin Borchard, *Declaratory Judgments* 48–50 (2d ed. 1941). In cases about declaratory judgments, this usage has been common ever since. See *Frank Vicent Incopero Estate v. Barrett Daffin Frappier Treder & Weiss, LLP*, No. 2:17-cv-02636, 2018 WL 2725002, at \*3 (D. Nev. June 6, 2018); see also, e.g., *Aralac, Inc. v. Hat Corp. of Am.*, 166 F.2d 286, 295 (3d Cir. 1948) (“An economic interest is not enough to create justiciability. Plaintiff must have a protectible interest . . . .” (citations omitted)); *Riley v. County of Cochise*, 455 P.2d 1005, 1009 (Ariz. Ct. App. 1969) (“A plaintiff, . . . in order to be entitled to [declaratory] relief, must have a legal, protectible interest . . . .”).

<sup>343</sup> 404 U.S. 528 (1972).

<sup>344</sup> Pub. L. No. 86-257, § 401, 73 Stat. 519, 532–33 (1959) (codified at 29 U.S.C. § 481 (2018)).

with the Secretary of Labor.<sup>345</sup> The Secretary has a duty to investigate such complaints and—if the Secretary finds probable cause to believe that a violation occurred and has not been remedied—to file a civil action against the union in a federal district court.<sup>346</sup> If the election has already been held but the court finds that a violation of the statute may have affected its outcome, “the court shall declare the election . . . to be void and direct the conduct of a new election under supervision of the Secretary.”<sup>347</sup>

In 1969, the United Mine Workers of America held an election pitting its incumbent president, Tony Boyle, against a challenger named Jock Yablonski.<sup>348</sup> Boyle won, but Yablonski alleged that the election had been tainted by numerous violations of federal law, and he began to exhaust his internal remedies by filing a challenge with the union.<sup>349</sup> Two weeks later, gunmen went to Yablonski’s home and murdered him, his wife, and their daughter.<sup>350</sup> (Boyle eventually was convicted of first-degree murder for allegedly having ordered the hit.<sup>351</sup>) Unbowed, Yablonski’s campaign manager—a union member named Mike Trbovich—carried forward the electoral challenge, filing a complaint in his own name with the Secretary of Labor.<sup>352</sup> The Secretary agreed that there was probable cause to believe that the election was tainted, and the Secretary sued the union in federal district court to set aside the results.<sup>353</sup>

By the terms of the LMRDA, only the Secretary can bring suit to challenge an election that has already occurred; individual union members are not authorized to bring separate suits of their own.<sup>354</sup> But

<sup>345</sup> Id. § 402(a), 73 Stat. at 534 (codified at 29 U.S.C. § 482(a)).

<sup>346</sup> Id. § 402(b), 73 Stat. at 534 (codified at 29 U.S.C. § 482(b)).

<sup>347</sup> Id. § 402(c), 73 Stat. at 534 (codified at 29 U.S.C. § 482(c)).

<sup>348</sup> For an account of Yablonski’s decision to challenge Boyle and the ensuing campaign, see Brit Hume, *Death and the Mines: Rebellion and Murder in the United Mine Workers* 165–240 (1971).

<sup>349</sup> Brief for Petitioner at 10, *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972) (No. 71-119).

<sup>350</sup> See Hume, *supra* note 348, at 240–41.

<sup>351</sup> See *Commonwealth v. Boyle*, 447 A.2d 250 (Pa. 1982) (upholding Boyle’s conviction). For accounts of the cases that prosecutors built against Boyle and some other union officials who were also convicted, see Trevor Armbrister, *Act of Vengeance: The Yablonski Murders and Their Solution* (1975); Stuart Brown, *A Man Named Tony: The True Story of the Yablonski Murders* (1976).

<sup>352</sup> Brief for Petitioner, *supra* note 349, at 10.

<sup>353</sup> Brief for the Secretary of Labor at 4–5, *Trbovich*, 404 U.S. 528 (No. 71-119).

<sup>354</sup> See Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 403, 73 Stat. 519, 534 (1959) (“The remedy provided by this title for challenging an election

Mr. Trbovich moved to intervene in the Secretary's suit. The district court denied this motion on the theory that permitting intervention would be inconsistent with Congress's decision to give the Secretary exclusive enforcement powers.<sup>355</sup> Ultimately, though, the Supreme Court held that the district court had taken this theory too far: while Congress had not wanted individual union members to be able to challenge elections on grounds not advanced by the Secretary, and while intervention should therefore be "limited to the claims of illegality presented by the Secretary's complaint," nothing in the LMRDA prevented individual union members from intervening "to present evidence and argument in support of the Secretary's complaint" or to "assist[] the court in fashioning a suitable remedial order."<sup>356</sup>

Of course, even if the LMRDA did not implicitly prevent Mr. Trbovich from intervening in the Secretary's suit, he had a right to intervene only if Rule 24(a) gave him one. When the case reached the Supreme Court, neither the government nor the union denied that Mr. Trbovich and other union members had a relevant "interest" that was potentially at stake in the litigation. Instead, both parties simply argued that the Secretary adequately represented that interest.<sup>357</sup> The Court focused on that argument and did not address the other requirements of Rule 24(a).<sup>358</sup>

Still, the Court's analysis of the adequacy of representation arguably sheds light on the nature of Mr. Trbovich's perceived interest. According to the Court, Title IV of the LMRDA casts the Secretary in two different roles. Like other statutes that are enforced by governmental authorities,

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already conducted shall be exclusive.") (codified at 29 U.S.C. § 483 (2018)); *Calhoun v. Harvey*, 379 U.S. 134, 140 (1964) (noting that apart from one limited type of pre-election suit by candidates, "Congress . . . decided not to permit individuals to block or delay union elections by filing federal-court suits for violations of Title IV"). But cf. *Dunlop v. Bachowski*, 421 U.S. 560, 566 (1975) (holding that if a union member files a complaint with the Secretary but the Secretary decides not to bring suit, the complaining member can sue the Secretary under the Administrative Procedure Act to obtain review of whether the Secretary's decision was arbitrary and capricious).

<sup>355</sup> *Hodgson v. United Mine Workers*, 51 F.R.D. 270, 272 (D.D.C. 1970), *aff'd*, No. 662-cv-70, 1971 WL 2965 (D.C. Cir. Apr. 27, 1971) (mem.).

<sup>356</sup> *Trbovich*, 404 U.S. at 537 & n.8.

<sup>357</sup> See Brief for the Secretary of Labor, *supra* note 353, at 33–34; Brief of Respondent United Mine Workers of America at 24, *Trbovich*, 404 U.S. 528 (No. 71-119); see also *Trbovich*, 404 U.S. at 538 ("The Secretary does not contend that petitioner's interest in this litigation is insufficient; he argues, rather, that any interest petitioner has is adequately represented by the Secretary.")

<sup>358</sup> See *Trbovich*, 404 U.S. at 538–39; cf. Appel, *supra* note 117, at 263 (downplaying *Trbovich* as "a decision that essentially assumed the existence of sufficient interest").

the LMRDA defines an interest held by the public at large and gives the Secretary a duty to protect that interest.<sup>359</sup> But the Court asserted that in addition to recognizing this public interest, “the statute gives the individual union members certain rights against their union, and ‘the Secretary of Labor in effect becomes the union member’s lawyer’ for purposes of enforcing those rights.”<sup>360</sup> The Court observed that these two roles “may not always dictate exactly the same approach to the conduct of the litigation”—with the result that even if the Secretary is discharging his combined functions as well as possible, “the union member may have a valid complaint about the performance of ‘his lawyer.’”<sup>361</sup> Here, Mr. Trbovich was indeed voicing concerns about how the Secretary was representing the legal rights of the individual union members,<sup>362</sup> and the Court concluded that “in this case there is sufficient doubt about the adequacy of representation to warrant intervention.”<sup>363</sup>

In modern times, several federal courts of appeals have taken *Trbovich* to establish that would-be intervenors can have the sort of “interest” required by Rule 24(a) even though they do not have a cause of action under the applicable substantive law.<sup>364</sup> Because the Supreme Court’s opinion focused on a different issue, that is an aggressive reading. But

<sup>359</sup> See *Trbovich*, 404 U.S. at 539 (“[T]he Secretary has an obligation to protect the ‘vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.’” (quoting *Wirtz v. Local 153, Glass Bottle Blowers Ass’n*, 389 U.S. 463, 475 (1968))).

<sup>360</sup> *Id.* at 538–39 (quoting remarks made by Senator John Kennedy during debates on an earlier bill, 104 Cong. Rec. 10947 (1958)).

<sup>361</sup> *Id.* at 539.

<sup>362</sup> See, e.g., Brief for Petitioner, *supra* note 349, at 8 n.1 (noting that during the election campaign, the Secretary had repeatedly declined Mr. Yablonski’s requests to investigate alleged violations of federal law); *id.* at 19 (complaining about “[t]he inadequacy of the relief sought by the Secretary under the second cause of action”); *id.* at 42–43 (arguing that Mr. Trbovich knew more than the Secretary about “the internal operations of this particular union”); *id.* at 44 n.20 (complaining that one of the positions taken in the Secretary’s brief “indicates a lack of understanding of the reform group’s position and a total acceptance of the Union’s position”).

<sup>363</sup> *Trbovich*, 404 U.S. at 538; see also *id.* n.10 (“[T]he Rule is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.”); *id.* at 539 (deeming it relevant that the concerns were being voiced by “the member who initiated the entire enforcement proceeding”).

<sup>364</sup> See *Jones v. Prince George’s County*, 348 F.3d 1014, 1018 (D.C. Cir. 2003) (“In *Trbovich* . . . , the Supreme Court concluded that the lack of a cause of action does not, in and of itself, bar a party from intervening.”); accord *San Juan County v. United States*, 503 F.3d 1163, 1201 (10th Cir. 2007) (en banc); *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991).



even if Mr. Trbovich did indeed have the requisite “interest,” the case still stands for less than these courts suggest. As the Supreme Court understood the LMRDA, the Secretary was suing partly in a representative capacity, asserting claims on behalf of Mr. Trbovich and his fellow union members. In that respect, the Secretary was analogous to a trustee who files suit in the trustee’s own name, but who is acting on behalf of the trust’s beneficiaries. For at least a century, courts had allowed the beneficiaries of a trust to intervene in such suits when there was reason to doubt the adequacy of the representation.<sup>365</sup> The Supreme Court’s opinion in *Trbovich* need not be understood to go much further than that. In Professor Tobias’s apt words, “the opinion probably should be restricted to its facts and the peculiar statutory scheme involved.”<sup>366</sup>

*B. Lower Courts and the “Interest Representation” Model of Litigation*

Because the Supreme Court has said so little about the 1966 amendment to Rule 24, “primary responsibility for interpreting Rule 24(a)(2) has devolved upon the lower federal courts.”<sup>367</sup> In the late 1960s, a trio of judges on the D.C. Circuit—David Bazelon, Harold Leventhal, and Spottswood Robinson—issued two opinions that paved the way for a broad reading. To this day, a leading treatise features those two opinions, and modern courts continue to cite them.<sup>368</sup> After briefly describing the two opinions and their influence, this Section discusses the “interest representation” model of litigation that they reflect. As the Section proceeds to explain, however, that model is unlikely to guide the current Supreme Court’s thinking about the right to intervene.

*1. The D.C. Circuit’s Opinions in Nuesse v. Camp and Smuck v. Hobson*

Even before the 1966 amendment, Judge Bazelon had advocated broad rights to intervene in cases seeking judicial review of actions by federal administrative agencies.<sup>369</sup> In 1967, a panel that included now-Chief

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<sup>365</sup> See supra note 145 and accompanying text.

<sup>366</sup> Tobias, supra note 10, at 433.

<sup>367</sup> Id. at 415.

<sup>368</sup> See 7C Wright et al., supra note 9, § 1908.1, at 333–36; see also infra notes 390–93 and accompanying text.

<sup>369</sup> See supra notes 209–14 and accompanying text (discussing *Textile Workers Union v. Allendale Co.*, 226 F.2d 765 (D.C. Cir. 1955)).

Judge Bazelon considered that topic again in *Nuesse v. Camp*.<sup>370</sup> Writing for the panel, Judge Leventhal mentioned “the greater impetus to intervention that inheres in administrative cases.”<sup>371</sup> But Judge Leventhal also spoke more generally about how courts should approach Rule 24(a). He argued that interpretation of Rule 24(a) should “be guided by the policies behind the ‘interest’ requirement,” and he identified those policies as follows: “We know from the recent amendments to the civil rules that in the intervention area 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.”<sup>372</sup>

*Nuesse* itself did not entail an aggressive application of this idea. In concluding that the would-be intervenor had the requisite “interest,” Judge Leventhal asserted that the intervenor “has distinct legal rights of his own” and could have maintained an independent lawsuit against the same defendant.<sup>373</sup> But roughly a year later, Chief Judge Bazelon repeated Judge Leventhal’s formulation and applied it expansively in the high-profile case of *Smuck v. Hobson*.<sup>374</sup>

Julius Hobson, whose children attended public schools in the District of Columbia, had filed a class action against the Superintendent of

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<sup>370</sup> 385 F.2d 694 (D.C. Cir. 1967).

<sup>371</sup> *Id.* at 700.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 699–700. The case arose when the Kenosha National Bank (KNB) of Kenosha, Wisconsin, applied to the Comptroller of the Currency for permission to open a branch. Alleging that the Comptroller was about to grant this application and that doing so would violate the National Bank Act, a competing bank chartered by the State of Wisconsin sued the Comptroller for declaratory and injunctive relief. Under the then-existing version of the National Bank Act, the Comptroller could not grant KNB’s application unless Wisconsin state law expressly authorized “State banks” to open branches. 12 U.S.C. § 36(c) (1964). Most state banks in Wisconsin could not operate branches, but savings-and-loan associations could. See *Nuesse*, 385 F.2d at 698. On the strength of the authority that Wisconsin law gave savings-and-loan associations, the Comptroller argued that the National Bank Act enabled him to let national banks in Wisconsin operate branches, but the plaintiff disagreed. So did William Nuesse, the Commissioner of Banks for the State of Wisconsin, who sought to intervene on the plaintiff’s side. See *id.*

The district court denied this motion, but the D.C. Circuit reversed. According to Judge Leventhal, if Nuesse was correct about the limits on the Comptroller’s authority, but the Comptroller unlawfully granted KNB’s application anyway, Nuesse himself would have a cause of action against the Comptroller. See *id.* at 699–700 (holding that “a state banking commissioner does have sufficient standing to bring an action to enjoin the Comptroller from unlawfully authorizing a national bank to open a branch where state law would not permit branching by state banks”). Starting from this premise, Judge Leventhal concluded that Nuesse “has an ‘interest’ in an action brought by the state bank for similar relief.” *Id.* at 700.

<sup>374</sup> 408 F.2d 175, 179 (D.C. Cir. 1969) (en banc) (plurality opinion).

Schools and the members of the Board of Education. In addition to highlighting constitutional problems with the Board's composition, the suit alleged that African-American and poor children in the public schools were being denied educational opportunities that white and more affluent children were provided.<sup>375</sup> After a lengthy trial, the district court agreed that the school system's policies amounted to unconstitutional racial and economic discrimination, and the court ordered far-reaching injunctive relief.<sup>376</sup> The Board of Education voted not to appeal, but some parents of children in the public schools were disappointed with that decision, and they asserted a right to intervene for the purpose of taking an appeal on their own.

The district court argued that these parents had not demonstrated an "interest" of the sort contemplated by Rule 24(a).<sup>377</sup> But the court granted their motion anyway, so as to facilitate an appeal that would "give the Court of Appeals an opportunity to pass on the intervention questions raised here."<sup>378</sup> The D.C. Circuit heard the case en banc. In a part of his opinion that only Judges Leventhal and Robinson joined, but that may have been accepted by three more judges who dissented on other grounds, Chief Judge Bazelon argued that Rule 24(a) had given the parents a right to intervene.<sup>379</sup>

One might conceivably defend this conclusion on the ground that some of the intervening parents or their children were members of the class that Julius Hobson purported to represent.<sup>380</sup> In contrast to the typical situation in which individual class members seek to intervene in a class action, though, they were not trying to advance or protect any claims of their

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<sup>375</sup> See *Hobson v. Hansen*, 269 F. Supp. 401, 406 (D.D.C. 1967) (stating the question presented); see also *Hobson v. Hansen*, 252 F. Supp. 4, 5 (D.D.C. 1966) (summarizing the plaintiffs' allegations).

<sup>376</sup> See *Hobson*, 269 F. Supp. at 407 (summarizing the court's decree).

<sup>377</sup> *Hobson v. Hansen*, 44 F.R.D. 18, 25–27, 29 (D.D.C. 1968).

<sup>378</sup> *Id.* at 33. The district court purported to grant the motion under Rule 24(a), not Rule 24(b). See *id.* n.12.

<sup>379</sup> See *Smuck*, 408 F.2d at 177–82 (plurality opinion of Bazelon, C.J.); cf. *id.* at 190–91 (McGowan, J., concurring in part) (denying that the parents had a right to intervene, but implying that the other six judges who constituted the en banc court all believed that the parents were proper appellants). The three dissenters did not themselves say anything about intervention, nor did they join the relevant portion of Chief Judge Bazelon's opinion. See *id.* at 192–94 (Danaher, J., dissenting); *id.* at 196–97 (Burger, J., dissenting).

<sup>380</sup> See *Hobson*, 44 F.R.D. at 25 & n.7 (indicating that the would-be intervenors included African-Americans).

own.<sup>381</sup> To the contrary, they apparently believed that the district court should have ruled *against* the class. While they opposed the relief that the district court had awarded, moreover, they did not seem to be arguing that the district court's decree would invade any of their legal rights. For instance, they did not claim that the school board owed them a duty not to do what the decree required.<sup>382</sup>

According to Chief Judge Bazelon, however, an outsider does not need legal claims of this sort in order to have a right to intervene in a pending case under Rule 24(a). Chief Judge Bazelon saw *Cascade* as a case in point; in his telling, the only “interest” that the Cascade Natural Gas Corporation had invoked in challenging the district court's divestiture plan was the “economic harm” that Cascade allegedly would suffer because of the plan, and the Supreme Court had treated this “interest” as adequate under the new version of Rule 24(a).<sup>383</sup> According to Chief Judge Bazelon, moreover, noneconomic interests—such as parents' interests in the education of their children—can also support a right to intervene in appropriate circumstances. Here, the decree that the intervening parents wanted to challenge would constrain the school board's discretion in ways that might affect the education of the parents' children, and Chief Judge Bazelon concluded that the parents therefore had enough of a stake to intervene.<sup>384</sup> What is more, Chief Judge Bazelon indicated that the parents could appeal the district court's judgment even if the school board did not.<sup>385</sup>

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<sup>381</sup> See *id.* at 27 (“[T]he petitioners seeking to intervene . . . have not alleged a denial of any rights, constitutional or otherwise.”).

<sup>382</sup> Cf. *Smuck*, 408 F.2d at 180–81 (plurality opinion) (“[I]f the right to intervene is denied . . . , there is no apparent way for the parents to pursue their interests in a subsequent lawsuit.”).

<sup>383</sup> *Id.* at 179.

<sup>384</sup> See *id.* at 179–80; see also *Spangler v. Pasadena City Bd. of Educ.*, 427 F.2d 1352, 1353 (9th Cir. 1970) (“The protectable interest of the parents [in *Smuck*] was . . . recognized to be a narrow one. . . . [T]heir interest was in freeing the board from judicial restraint so that the board could exercise its discretion to the fullest degree constitutionally permissible in deciding educational policies.”); cf. Stephen C. Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 *UCLA L. Rev.* 244, 249 (1977) (suggesting that traditional notions of litigation can accommodate “the proposition that [remedial] decrees ought not disturb an advantageous situation enjoyed by persons not parties to the litigation unless there is a good reason for doing so, and that a non-party may intervene to argue either that good reason does not exist or that there is a way to accomplish the desired result without disadvantaging him”).

<sup>385</sup> See *Smuck*, 408 F.2d at 181–82 (plurality opinion). On the merits, Chief Judge Bazelon affirmed the portions of the district court's judgment that he thought the parents had standing

Of course, if the parents had not wanted to intervene, no one would have thought that Rule 19 required them to be joined against their will. Because the 1966 versions of Rule 24(a)(2) and Rule 19(a)(2)(i) were designed in tandem and used the same language,<sup>386</sup> the fact that the parents were not necessary parties under Rule 19(a) might seem to defeat the idea that they had a right to intervene under Rule 24(a)(2). But Chief Judge Bazelon brushed away this objection. In his view, “the fact that the two rules are entwined does not imply that an ‘interest’ for the purpose of one is precisely the same as for the other.”<sup>387</sup> More generally, Chief Judge Bazelon urged courts not “to be led . . . astray by a myopic fixation upon ‘interest,’” but instead to interpret Rule 24(a) so as to achieve “[t]he goal of ‘disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.’”<sup>388</sup>

Chief Judge Bazelon was an iconic and influential judge,<sup>389</sup> and his opinion in *Smuck* proved both iconic and influential. To this day, indeed, the casebook from which I teach Civil Procedure uses that opinion as its principal illustration of Rule 24,<sup>390</sup> and Westlaw currently lists 973 “citing references” for *Smuck* (including 219 federal judicial opinions).<sup>391</sup>

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to challenge. See *id.* at 183–85; see also *id.* at 186–90 (concluding that the parents lacked standing to challenge some aspects of the district court’s order).

<sup>386</sup> See *supra* notes 281–84 and accompanying text.

<sup>387</sup> *Smuck*, 408 F.2d at 178 (plurality opinion).

<sup>388</sup> *Id.* at 179 (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)).

<sup>389</sup> See, e.g., Fred Barbash, Judge Bazelon’s “Network”: The Salon of the Ultimate Liberal, *Wash. Post*, Mar. 1, 1981, at A2:

During the Warren Court era, . . . it was a good idea for lawyers who wanted a Bazelon opinion upheld to mention Bazelon’s name in the brief as many times as possible.

It was one of those intersections in the law where personality met lofty jurisprudence and a name—Bazelon or Frank Johnson or Skelly Wright—meant as much as 100 pages of legal research. It would remind the liberal majority that Bazelon did it—and if Bazelon did it, it must be all right.

. . . [T]he direction of the law . . . is changing now, both in style and substance. The change is slower and less explosive than the dramatic shift that has occurred in the White House and the Senate, but dramatic nonetheless.

Bazelon . . . is still one of the few lower court judges cited by name in legal briefs at the Supreme Court. But now he is cited when the lawyer wants the court to reverse a Bazelon opinion or a Bazelon-like opinion.

<sup>390</sup> See Jack H. Friedenthal, Arthur R. Miller, John E. Sexton & Helen Hershkoff, *Civil Procedure: Cases and Materials* 740–44 (12th ed. 2018).

<sup>391</sup> As of December 31, 2019.

*Nuesse* has been cited even more often.<sup>392</sup> Even when courts cite *Smuck* or a subsequent case rather than *Nuesse*, moreover, they continue to use Judge Leventhal's words about "involving as many apparently concerned persons as is compatible with efficiency and due process." That precise phrase appears in 286 federal judicial opinions on Westlaw, including more than sixty from 2016 on.<sup>393</sup>

## 2. *Abram Chayes's Analysis of Public-Law Litigation*

The spread of Judge Leventhal's words may have been aided by the publication, in 1976, of a canonical law-review article: "The Role of the Judge in Public Law Litigation" by Abram Chayes.<sup>394</sup> Admittedly, Professor Chayes's article did not mention either *Nuesse* or *Smuck*, and it contained little "traditional doctrinal analysis" of any sort.<sup>395</sup> But in the course of a broader discussion, it embraced the perspective on intervention that Judge Leventhal and Chief Judge Bazelon had adopted, and it provided an intellectual framework for understanding that perspective. That framework has been a staple of scholarship about intervention ever since.<sup>396</sup> Professor Chayes's article wove together a

<sup>392</sup> As of December 31, 2019, Westlaw reports 1546 "citing references," including 267 federal judicial opinions.

<sup>393</sup> Results of search conducted on December 31, 2019; see also Tobias, *supra* note 10, at 435 (noting the importance of Judge Leventhal's statement to courts that take a broad view of intervention).

<sup>394</sup> Chayes, *supra* note 16; see also Fred R. Shapiro & Michelle Pearse, The Most-Cited Law Review Articles of All Time, 110 Mich. L. Rev. 1483, 1489 (2012) (listing the article as the eleventh most-cited legal article of all time). For sophisticated discussion of the article's legacy, see Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. Mich. J.L. Reform 647 (1988).

In the text accompanying note 393, I reported that 286 federal judicial opinions have used Judge Leventhal's words about "involving as many apparently concerned persons as is compatible with efficiency and due process." Not counting *Smuck* and *Nuesse* themselves, however, only five of those opinions were issued before 1977—meaning that Judge Leventhal's words did not become prominent until at least a decade after he wrote them. Of course, it takes a while for quotations to spread. But the perfect fit between Judge Leventhal's words and Professor Chayes's article probably contributed to that process.

<sup>395</sup> Marcus, *supra* note 394, at 652; cf. Chayes, *supra* note 16, at 1281 n.\* ("This Article is a sketch of work in progress. It comprises a set of preliminary hypotheses, as yet unsupported by much more than impressionistic documentation . . .").

<sup>396</sup> See, e.g., Bandes, *supra* note 10, at 250–55, 288–89; Jenkins, *supra* note 21, at 274–75; Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 Cornell L. Rev. 270, 279–83, 322–29 (1989); Tobias, *supra* note 10, at 418–23; Yeazell, *supra* note 384, at 257; Justin P. Gunter, Note, *Dual Standards for Third-Party Intervenors: Distinguishing Between Public-Law and Private-Law Intervention*, 66 Vand. L. Rev. 645, 649 (2013); Brian

number of related ideas and developments, but this Section focuses on one in particular—the idea of “interest representation” as applied to litigation.

As background, we must start with processes for decisionmaking in administrative agencies. In a classic law-review article published in 1975, Professor Richard Stewart observed that federal judges had been pushing a particular model of decisionmaking onto agencies.<sup>397</sup> Specifically, Professor Stewart argued that the “traditional” model of administrative law, which “conceive[d] of the agency as a mere transmission belt for implementing legislative directives in particular cases,”<sup>398</sup> had given way to a “model of interest representation,” predicated on the twin ideas that agencies wielded policymaking power and that they should exercise this power on the basis of input from all affected interests.<sup>399</sup> In Professor Stewart’s words, courts had responded to “the seemingly intractable problem of agency discretion” by attempting to ensure that agency decisionmaking served as “a surrogate political process” in which “all interests affected by agency decisionmaking” were fairly represented and adequately considered.<sup>400</sup>

Professor Stewart himself voiced concerns about “the transformation of administrative law into a system for assuring the representation of all affected interests in agency proceedings.”<sup>401</sup> Even if one supports that development, moreover, one might think that it is more relevant to the quasi-legislative role played by some administrative agencies than to decisionmaking by federal courts. But the year after Professor Stewart published his article, Professor Chayes suggested that the idea of interest representation applied to courts too. Indeed, Professor Chayes speculated that “[w]e are witnessing the emergence of a new model of civil litigation,” which he dubbed “public law litigation.”<sup>402</sup>

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Hutchings, Note, *Waiting for Divine Intervention: The Fifth Circuit Tries to Give Meaning to Intervention Rules in Sierra Club v. City of San Antonio*, 43 *Vill. L. Rev.* 693, 693–99 (1998); Karastelev, *supra* note 48, at 455 n.1; Cindy Vreeland, Comment, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 *U. Chi. L. Rev.* 279, 279–81 (1990).

<sup>397</sup> Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667 (1975).

<sup>398</sup> *Id.* at 1675.

<sup>399</sup> See *id.* at 1711–60.

<sup>400</sup> *Id.* at 1670, 1712.

<sup>401</sup> *Id.* at 1789.

<sup>402</sup> Chayes, *supra* note 16, at 1282, 1284. Professor Chayes conceded that this label was “not wholly satisfactory.” *Id.* at 1284; see also Appel, *supra* note 117, at 221 (“The term ‘public law litigation’ defies crisp definition.”).

In Professor Chayes's telling, the traditional "common law outlook" cast lawsuits as "bipolar" contests in which a plaintiff seeks compensation from a defendant for past events and "[t]he impact of the judgment is confined to the parties."<sup>403</sup> But as Professor Chayes observed, "much current civil litigation in the federal district courts" did not fit this description.<sup>404</sup> Instead of addressing "a dispute between private individuals about private rights," the suit involved "a grievance about the operation of public policy."<sup>405</sup> Instead of awarding "compensation for past wrong," courts entered remedial decrees "establishing an ongoing affirmative regime of conduct" and "often having important consequences for many persons including absentees."<sup>406</sup> Instead of being "rigidly bilateral," the party structure was "sprawling and amorphous."<sup>407</sup>

As "avatars of this new form of litigation," Professor Chayes mentioned suits asking federal district courts to restructure and to supervise the operation of schools, prisons, police departments, mental-health facilities, and other public institutions.<sup>408</sup> But Professor Chayes

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<sup>403</sup> Chayes, *supra* note 16, at 1282–83, 1283 n.11 (emphasis omitted). Readers should not assume the historical accuracy of this suggestion. As Larry Kramer has pointed out,

It is not true . . . that traditional adjudication was limited to isolated bipolar disputes without broader implications. Then, as now, there were lawsuits with significant effects on public policy and important consequences for public institutions. Moreover, there is every reason to believe that the lawyers and judges of the time perceived the implications of these lawsuits.

Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 Mich. L. Rev. 321, 361–62 (1988) (footnotes omitted); cf. Chayes, *supra* note 16, at 1283 ("Although I do not contend that the traditional conception ever conformed fully to what judges were doing in fact, I believe it has been central to our understanding and our analysis of the legal system." (footnote omitted)).

<sup>404</sup> Chayes, *supra* note 16, at 1284.

<sup>405</sup> *Id.* at 1302; see also *id.* at 1296–97 (indicating that the factual questions in public-law litigation involve "[h]ow . . . the policies of a public law [can] best be served in a concrete case," with the result that "factfinding is principally concerned with 'legislative' rather than 'adjudicative' fact"); cf. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364, 402 (1942) ("When an agency finds facts concerning immediate parties . . . the agency is performing an adjudicative function, and the facts may conveniently be called adjudicative facts. When an agency wrestles with a question of law or policy, it is acting legislatively, . . . and the facts which inform its legislative judgment may conveniently be denominated legislative facts.").

<sup>406</sup> Chayes, *supra* note 16, at 1302.

<sup>407</sup> *Id.*

<sup>408</sup> See *id.* at 1284 (referring to "[s]chool desegregation . . . and prisoners' or inmates' rights cases"); see also *id.* at 1295 n.69 (referring to "a suit ultimately leading to the restructuring of state mental health facilities in Alabama"); *id.* at 1305 (describing *Rizzo v. Goode*, 423 U.S. 362 (1976), as "a textbook example of public law litigation," and criticizing the Burger Court's



added that cases in numerous other fields “display in varying degrees the features of public law litigation.”<sup>409</sup> He saw the growth of the class action and the expansion of standing to challenge the behavior of administrative agencies as part of his story,<sup>410</sup> and he also emphasized the use of lawsuits to vindicate the policies behind a variety of federal statutes.<sup>411</sup> In a later article, Professor Chayes explained that the key to his concept of public-law litigation was not “the form of relief” but rather “the nature of the controversy, the sources of the governing law, and the consequent extended impact of the decision.”<sup>412</sup> In his words, the courts’ decisions in the cases that he had in mind “will necessarily have far-reaching effects on myriads of persons not individually before the Court and on political, economic, and institutional structures.”<sup>413</sup>

Professor Chayes argued that trial judges needed to play (and were playing) a different role in public-law litigation than judges had played in the older model. Judges now bore “responsibility . . . for organizing and shaping the litigation to ensure a just and viable outcome.”<sup>414</sup> Likewise, when the time came to enter a remedial decree, judges had to exercise much more discretion than the traditional model suggested; the decree’s contents could not be “logically deduced from the nature of the legal harm suffered,” but instead had to be “fashioned ad hoc” to suit the situation.<sup>415</sup> To be sure, decrees often were “negotiated” among the parties rather than simply “imposed” by the judge, and the negotiation process “introduce[d]

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response to it). For a related but more systematic treatment of this type of “structural reform” litigation, see Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 *Harv. L. Rev.* 1 (1979).

<sup>409</sup> Chayes, *supra* note 16, at 1284.

<sup>410</sup> See *id.* at 1290–92.

<sup>411</sup> See *id.* at 1284 (indicating that a key characteristic of public-law litigation is that “the object . . . is the vindication of constitutional or statutory policies,” and proceeding to mention suits about employment discrimination, housing discrimination, antitrust violations, securities fraud, labor unions, and the environment); see also Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 *Harv. L. Rev.* 4, 6 (1982) (“In the late 1960’s and early 1970’s came the passage of the Civil Rights Act prohibitions of discrimination in employment, housing, and education, the Clean Air and Clean Water Acts, the Truth in Lending, Consumer Products Safety, Occupational Safety and Health, and Freedom of Information Acts, and other sweeping acts of Congress, all mandating or inviting affirmative enforcement by the courts.” (footnotes omitted)).

<sup>412</sup> Chayes, *supra* note 411, at 58.

<sup>413</sup> *Id.*

<sup>414</sup> Chayes, *supra* note 16, at 1302.

<sup>415</sup> *Id.* at 1298, 1302.

a good deal of party control over the practical outcome.”<sup>416</sup> But Professor Chayes observed that “judges have increasingly resorted to outside help—masters, amici, experts, panels, advisory committees—for information and evaluation of proposals for relief.”<sup>417</sup> In addition to contributing to the formation of the decree, moreover, judges remained involved while the decree was being implemented. Professor Chayes concluded that “in actively shaping and monitoring the decree, mediating between the parties, [and] developing his own sources of expertise and information, the trial judge has passed beyond even the role of legislator and has become a policy planner and manager.”<sup>418</sup>

Professor Chayes argued that the rise of public-law litigation had prompted changes in civil procedure. Intervention was one of his primary examples.<sup>419</sup> In his words, “Public law litigation, because of its widespread impact, seems to call for adequate representation in the proceedings of the range of interests that will be affected by them.”<sup>420</sup> Professor Chayes saw the 1966 amendment to Rule 24(a) as accommodating this goal: “[T]he tendency, supported by both the language and the rationale of the Federal Rules of Civil Procedure, is to regard anyone whose interests may be significantly affected by the litigation to be presumptively entitled to participate in the suit on demand.”<sup>421</sup>

Although Professor Chayes did not spell out exactly *why* he thought that the “widespread impact” of public-law litigation necessitated changes to the traditional criteria for intervention, his article can be understood to suggest three distinct arguments about the benefits of allowing broader participation. The first argument reflects democratic ideals. In Professor Chayes’s telling, public-law litigation is a governmental process that results in the creation of public policy, and it has some resemblance to “the traditional description of legislation.”<sup>422</sup> Indeed, Professor Chayes

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<sup>416</sup> Id. at 1299, 1302.

<sup>417</sup> Id. at 1300–01 (footnotes omitted).

<sup>418</sup> Id. at 1302.

<sup>419</sup> See id. at 1290.

<sup>420</sup> Id. at 1310.

<sup>421</sup> Id.; see also id. at 1290 (“[I]f the right to participate in litigation is no longer determined by one’s claim to relief at the hands of another party or one’s potential liability to satisfy the claim, it becomes hard to draw the line determining those who may participate so as to eliminate anyone who is or might be significantly (a weasel word) affected by the outcome—and the latest revision of the Federal Rules of Civil Procedure has more or less abandoned the attempt.”).

<sup>422</sup> Id. at 1297.

suggested that in a system where “the object of litigation is the vindication of constitutional or statutory policies” rather than the enforcement of private ordering, “[l]itigation inevitably becomes an explicitly political forum and the court a visible arm of the political process.”<sup>423</sup> When policy is being set by legislatures or administrative agencies, we are used to the idea that people who will be affected should have mechanisms for providing input. To the extent that courts too are exercising lots of policymaking discretion, one might naturally apply the idea of interest representation to their processes as well.

Of course, that is not to say that supporters of broad intervention want federal courts to be structured like legislatures (complete with elections to choose their members) or to approach legal problems in precisely the way legislators do. But the more one thinks that the functions of courts overlap with the functions of legislatures,<sup>424</sup> the more one might want litigation to have some mechanism for interest representation.

Professor Chayes also suggested a second, related argument: allowing broad intervention by interested parties might help courts learn what they need to know in order to perform their new tasks. Professor Chayes acknowledged that courts were “traditionally thought less competent than legislatures or administrative agencies in gathering and assessing information,” but he suggested that expanding intervention would address this problem. “If the party structure is sufficiently representative of the interests at stake, a considerable range of relevant information will be forthcoming.”<sup>425</sup>

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<sup>423</sup> *Id.* at 1284, 1304.

<sup>424</sup> *Cf. id.* at 1313 (expressing “a willingness to accept a good deal of disorderly, pragmatic institutional overlap”).

<sup>425</sup> *Id.* at 1308; see also Note, Institutional Reform Litigation: Representation in the Remedial Process, 91 *Yale L.J.* 1474, 1474–75 (1982) (“[T]he formulation of a remedy in a lawsuit seeking institutional reform often affects many individuals and groups who are not among the original parties to the suit and whose interests are not represented in the remedial process by one of the original parties. Those persons and groups are frequently in a position to provide the court with information critical to the formulation of an effective decree . . . . This Note proposes that Rules 19 and 24 . . . be amended to create mechanisms through which such persons can routinely be joined and allowed to intervene in the remedial phase of institutional litigation.” (footnotes omitted)).

Writing in 1991, Professor Tobias elaborated on this potential benefit of broad intervention. In his view, intervenors should not have to demonstrate “standing” in their own right. Tobias, *supra* note 10, at 415–16, 442–43. Instead, “[t]he most significant consideration” in evaluating applications for intervention should simply be whether intervention would help the court: “Is the applicant likely to provide expertise, information, or legal or policy perspectives that

A third argument was suggested only glancingly by Professor Chayes,<sup>426</sup> but was soon developed by Professor Stephen Yeazell. Writing specifically about the remedial phase of *Crawford v. Board of Education* (a lawsuit then pending in state court to desegregate the Los Angeles schools),<sup>427</sup> Professor Yeazell observed that the success of the eventual decree would depend on “a measure of cooperation from the persons affected.”<sup>428</sup> The best chance of obtaining such cooperation might be for the decree to emerge from “a process of hearing, negotiation, and compromise” among those concerned, so as “to give them all a stake in implementing the decree.”<sup>429</sup> For that to work, though, “it is essential to have widely representative views involved.”<sup>430</sup> According to Professor Yeazell, the process that the trial court was then conducting—which resembled “a town meeting” or “the hearing stage of a legislative and administrative process” more than a traditional judicial proceeding—might be explained on these grounds.<sup>431</sup>

Professor Chayes’s emphasis on interest representation fit perfectly with what judges on the D.C. Circuit had already been saying about Rule 24. Recall that Judge Leventhal’s opinion in *Nuesse* had asserted that “the ‘interest’ test [in Rule 24(a)] is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process,”<sup>432</sup> and Chief Judge Bazelon

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contribute to a court’s understanding of questions already in issue? Correspondingly, will the applicant raise, and help resolve, new questions that the judge should consider?” *Id.* at 447.

<sup>426</sup> See Chayes, *supra* note 16, at 1300 (“The interest in a decree that will be voluntarily obeyed can be promoted by enforcing a regime of good faith bargaining among the parties.”); *id.* at 1310 (“[I]f the decree is to be quasi-negotiated and party participation is to be relied upon to ensure its viability, representation at the bargaining table assumes very great importance, not only from the point of view of the affected interests but from that of the system itself.”).

<sup>427</sup> 551 P.2d 28 (Cal. 1976).

<sup>428</sup> Yeazell, *supra* note 384, at 258.

<sup>429</sup> *Id.*

<sup>430</sup> *Id.* at 259.

<sup>431</sup> *Id.* at 259–60; see also *id.* at 260 (“It may not be a bad idea in these circumstances for Los Angeles to hold a town meeting, however anomalous it is under the traditional conception of intervention. After all, if courts must sometimes act as legislatures, we should not balk at their becoming effective ones.”); cf. Note, *supra* note 425, at 1485 n.45 (proposing that Rule 24(a) be amended to give “anyone who may be affected by the implementation of a remedial decree” the right to intervene at the remedial stage, if “he is so situated that the court will require his cooperation to implement an effective decree”).

<sup>432</sup> *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

had echoed this statement in *Smuck*.<sup>433</sup> A few years later, Judge Robinson had expressed much the same idea: “The right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that . . . justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard.”<sup>434</sup> The Ninth Circuit soon was acting upon the same theory.<sup>435</sup> More recently, the Tenth Circuit has also embraced it,<sup>436</sup> and the idea shows up episodically in opinions from other circuits too.<sup>437</sup>

<sup>433</sup> See *Smuck v. Hobson*, 408 F.2d 175, 179 (D.C. Cir. 1969) (en banc) (plurality opinion) (quoting Judge Leventhal’s statement twice).

<sup>434</sup> *Hodgson v. United Mine Workers*, 473 F.2d 118, 130 (D.C. Cir. 1972).

<sup>435</sup> See, e.g., *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (quoting *Nuesse* and citing *Smuck*); *Johnson v. S.F. Unified Sch. Dist.*, 500 F.2d 349, 352–53 & n.4 (9th Cir. 1974) (quoting *Smuck*).

<sup>436</sup> See *San Juan County v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007) (en banc) (quoting a Tenth Circuit opinion that in turn had quoted Judge Leventhal’s statement in *Nuesse*, and arguing that “[t]his view best reflects the purpose of Rule 24(a)(2)”).

The Tenth Circuit may favor a bifurcated approach to Rule 24(a)(2), under which the “interest” requirement is stricter in “cases that implicate solely private rights” than in “cases that raise an issue of public interest.” *Id.* at 1201 (agreeing with Professor Moore’s treatise that “[t]he Tenth Circuit . . . follows a very broad interpretation of the interest requirement with respect to public law issues” (quoting 6 James Wm. Moore et al., *Moore’s Federal Practice* § 24.03[2][c] (3d ed. 2006))); see also *id.* (taking the Supreme Court’s result in *Cascade* to signify that “the requirements for intervention may be relaxed in cases raising significant public interests”). But see *Keith v. Daley*, 764 F.2d 1265, 1269 (7th Cir. 1985) (“[N]o special broad definition of ‘interest’ applies to suits involving ‘public law’ cases in this circuit.”).

The Tenth Circuit’s approach arguably grows out of Professor Chayes’s analysis, and some student commentators have invoked Professor Chayes in supporting it. See Gunter, *supra* note 396, at 647–50, 681 (discussing Professor Chayes’s concept of public-law litigation and arguing that “courts should create two separate standards for [intervention in] public-law and private-law cases”); Vreeland, *supra* note 396, at 279–80, 301–09 (invoking Chayes and urging courts to read Rule 24(a) as giving “public interest groups” broad rights to intervene in “public law cases”). Still, Professor Chayes did not himself suggest that Rule 24(a) should be given one meaning in “public law” cases and another meaning in “private law” cases. His point, instead, was that the 1966 amendment to Rule 24(a) had accommodated intervention by “anyone who is or might be significantly . . . affected by the outcome,” and that the rise of public-law litigation helped account for this alleged expansion of the right to intervene. See Chayes, *supra* note 16, at 1290. Professor Chayes might well have thought that if an outsider happened to have practical interests at stake in a private-law case, the new version of Rule 24(a) entitled the outsider to intervene. On its face, the rule supplies no basis for reading the word “interest” to require a legal interest in cases about “private rights” but only a practical “injury in fact” in cases about “public law.”

<sup>437</sup> See, e.g., *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994).

### 3. *The Supreme Court's Reluctance to Embrace Professor Chayes's Model*

To whatever extent the “interest representation” model of litigation has influenced the lower courts’ expansive readings of Rule 24, however, one should not expect the Supreme Court to go along. Even when Professor Chayes wrote his initial article about public-law litigation, he acknowledged that some of the Burger Court’s then-recent decisions were more compatible with the traditional model.<sup>438</sup> A few years later, he discussed that theme in detail, writing the Foreword for the *Harvard Law Review*’s Supreme Court issue on the topic of “Public Law Litigation and the Burger Court.” As compared to the Burger Court, moreover, the current Supreme Court seems even more committed to the traditional model in all three areas that Professor Chayes’s Foreword surveyed—“standing, class actions, and remedial discretion.”<sup>439</sup>

With respect to “standing,” Professor Chayes noted the Burger Court’s insistence that a plaintiff who wanted to challenge the lawfulness of governmental behavior needed to show that the behavior was causing “some individualized harm, particular to the plaintiff.”<sup>440</sup> Professor Chayes observed that in the 1960s, “[t]here had been considerable academic support for making a clean break with the traditional model by accepting the concept of a pure public or citizen’s or taxpayer’s action—that is, a suit brought by . . . a person with no interest other than seeing the law enforced according to its terms.”<sup>441</sup> In Professor Chayes’s words, the Burger Court may have “succeeded in blocking [this] evolution.”<sup>442</sup> To be sure, “in the vast majority of public law cases, it has been possible to turn up a plaintiff who has suffered the requisite injury in fact,” so “[t]he practical impact of the Court’s work . . . is marginal.”<sup>443</sup> Still, the theory of the Court’s decisions grew out of the traditional model rather than a model in which a private litigant could properly litigate on behalf of the public as a whole.

The current Supreme Court has gone further. Not only has the Court elaborated on the idea that “a plaintiff seeking relief in federal court must first demonstrate . . . that he has ‘a personal stake in the

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<sup>438</sup> See Chayes, *supra* note 16, at 1304–05.

<sup>439</sup> Chayes, *supra* note 411, at 8.

<sup>440</sup> *Id.* at 11.

<sup>441</sup> *Id.* at 10–11.

<sup>442</sup> *Id.* at 23.

<sup>443</sup> *Id.*

outcome’ . . . distinct from a ‘generally available grievance about government,’”<sup>444</sup> but the Court has attributed this principle to the Constitution itself.<sup>445</sup> The Court also has made clear that even plaintiffs who have suffered harm in the past, and who are therefore eligible to seek damages, do not automatically have “standing” to seek structural reform for the future—a holding that gives the “personal stake” requirement a bigger practical impact than was apparent when Professor Chayes wrote.<sup>446</sup>

Much the same can be said of class actions. Professor Chayes doubted “that the class action will ever be taught to behave in accordance with the precepts of the traditional model of adjudication,” and he encouraged judges to think of the rights litigated in class actions as belonging to the class as a whole rather than to discrete individuals.<sup>447</sup> Rather than adopt this innovative view, though, “the Burger Court has clung to the [traditional] conception of the class action as a congeries of individual claims loosely bundled together for purposes of judicial efficiency.”<sup>448</sup> Professor Chayes blamed this way of thinking for “limiting the effectiveness of the class action as an enforcement device.”<sup>449</sup>

Again, the current Supreme Court has continued in the vein that Professor Chayes criticized. The Court continues to say that when a class action is launched, the named plaintiff must meet the constitutional requirements for “standing”<sup>450</sup>—and if the named plaintiff’s individual claim subsequently becomes moot, the suit will be dismissed unless other identifiable members of the class have viable individual claims in their own right.<sup>451</sup> More generally, Justices continue to describe the class-action device as a species of “traditional joinder” that “merely enables a federal court to adjudicate claims of multiple parties at once, instead of in

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<sup>444</sup> Gill v. Whitford, 138 S. Ct. 1916, 1923 (2018) (first quoting Baker v. Carr, 369 U.S. 186, 204 (1962), and then quoting Lance v. Coffman, 549 U.S. 437, 439 (2007) (per curiam)).

<sup>445</sup> See Lujan v. Defs. of Wildlife, 504 U.S. 555, 571–78 (1992); cf. Sunstein, *supra* note 59, at 187 (criticizing the Court for reading “a private law model of standing” into Article III).

<sup>446</sup> See City of Los Angeles v. Lyons, 461 U.S. 95, 105–07 (1983).

<sup>447</sup> Chayes, *supra* note 16, at 1291; see also Chayes, *supra* note 411, at 27 (linking the class action to “the burgeoning of theories about groups . . . as right bearers”).

<sup>448</sup> Chayes, *supra* note 411, at 28.

<sup>449</sup> *Id.* at 29.

<sup>450</sup> See, e.g., Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 n.6 (2016).

<sup>451</sup> See United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1537–38 (2018) (summarizing mootness doctrine in class actions).

separate suits.”<sup>452</sup> That way of thinking has informed the Court’s interpretation of Rule 23. For instance, when glossing Rule 23(a)’s requirement that there be “questions of law or fact common to the class,”<sup>453</sup> the Court’s opinion in *Wal-Mart Stores, Inc. v. Dukes* started from the premise that each class member had a litigable claim and tried to identify the type of commonality that “gives . . . cause to believe that all their claims can productively be litigated at once.”<sup>454</sup>

The third and final area that Professor Chayes examined in his Foreword about the Burger Court was “remedial discretion.” As Professor Chayes noted, the traditional common-law mindset did not acknowledge much such discretion: “[I]n the traditional lawsuit, the remedy is logically derived from the nature of the defendant’s substantive obligation or liability.”<sup>455</sup> Matters might have been somewhat different in equity; even where only a “traditional prohibitory injunction” was involved, balancing the equities and deciding exactly what to prohibit involved “large discretionary elements.”<sup>456</sup> But “the discretionary component is dramatically enhanced” in modern structural-reform litigation.<sup>457</sup> When crafting relief, “the trial judge has broad discretion to elaborate remedial arrangements in response to the particular characteristics of the situation and parties before him.”<sup>458</sup>

In his article about the Burger Court, Professor Chayes asserted that “Justice Rehnquist has led an effort to confine these discretionary elements by imposing a strict right-remedy linkage,”<sup>459</sup> but the Court as a

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<sup>452</sup> *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion of Scalia, J.); see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 (1999) (“[C]lass actions as we recognize them today developed as an exception to the formal rigidity of the necessary parties rule in equity as well as from the bill of peace, an equitable device for combining multiple suits.” (citations omitted)); cf. *Devlin v. Scardelletti*, 536 U.S. 1, 6–11 (2002) (observing that nonnamed class members are treated as “parties” to the suit “for some purposes and not for others,” but concluding that a class member who objected to a proposed settlement can appeal the district court’s decision to approve the settlement without having to intervene).

<sup>453</sup> Fed. R. Civ. P. 23(a)(2).

<sup>454</sup> 564 U.S. 338, 350 (2011) (concluding that “[t]heir claims must depend upon a common contention” that “is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke”).

<sup>455</sup> Chayes, *supra* note 411, at 45.

<sup>456</sup> *Id.* at 46.

<sup>457</sup> *Id.*

<sup>458</sup> *Id.*

<sup>459</sup> *Id.* at 51.



whole had not gone along; trial judges retained a great deal of remedial discretion.<sup>460</sup> Still, Professor Chayes faulted the Burger Court for failing to develop innovative doctrines to supervise that discretion.<sup>461</sup> Under the Court's doctrine, Professor Chayes observed, "a structural injunction ordered by the trial court is subject only to the traditional standard of review for abuse of discretion"—with the result that a single judge could wield "substantially unfettered power to promulgate far-reaching directives for the operation of educational, penal, mental health, and other institutions."<sup>462</sup> Given "[t]he parallels between public law litigation and the administrative process," Professor Chayes thought that courts might find useful analogies in doctrines that they had developed to review exercises of discretion by administrative agencies.<sup>463</sup>

In the years since Professor Chayes wrote, plaintiffs have continued to bring impact litigation of various sorts, and federal district judges have continued to exercise substantial discretion in crafting remedial decrees.<sup>464</sup> The Supreme Court does not seem wildly enthusiastic about such discretion; the Court has articulated some limits on what district judges can do,<sup>465</sup> and it has also paved the way for defendants to seek the modification or termination of decrees that district judges entered in the past.<sup>466</sup> But despite apparent concerns about structural-reform litigation, the Supreme Court has not taken Professor Chayes's suggestion of analogizing such litigation to administrative proceedings and handling

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<sup>460</sup> See *id.* at 47–52.

<sup>461</sup> Cf. *id.* at 46 ("Control of remedial discretion is . . . an insistent problem in a public law system.").

<sup>462</sup> *Id.* at 55.

<sup>463</sup> See *id.* at 56.

<sup>464</sup> See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *Harv. L. Rev.* 1016, 1018–19 (2004) ("[D]espite decades of criticism and restrictive doctrines, the lower courts continue to play a crucial role in a still-growing movement of institutional reform in the core areas of public law practice Chayes identified: schools, prisons, mental health, police, and housing."); see also, e.g., *Brown v. Plata*, 563 U.S. 493, 502 (2011) (upholding an order to remedy constitutional violations associated with overcrowding in California's prisons); Court Opinions and Orders, [nypdmonitor.org/court-opinions-and-orders](https://perma.cc/2PLW-RX6R) [https://perma.cc/2PLW-RX6R] (collecting numerous remedial orders entered by the United States District Court for the Southern District of New York in connection with litigation seeking reforms of police practices in New York City) (last visited Jan. 31, 2020).

<sup>465</sup> See, e.g., *Lewis v. Casey*, 518 U.S. 343, 357–60 (1996); *Missouri v. Jenkins*, 515 U.S. 70, 86–103 (1995).

<sup>466</sup> See *Horne v. Flores*, 557 U.S. 433, 447–70 (2009); Jason Parkin, *Aging Injunctions and the Legacy of Institutional Reform Litigation*, 70 *Vand. L. Rev.* 167, 193–96 (2017).

them accordingly. When the Court has found that remedial decrees go too far, moreover, the Court has emphasized that remedies must be linked to the particular plaintiffs who are suing and the particular rights that have been violated<sup>467</sup>—the approach that Professor Chayes associated with the traditional model of litigation. Thus, the Supreme Court still does not seem to believe that structural-reform litigation requires a paradigm shift.

Overall, the Burger Court's apparent hostility to the public-law litigation model led Professor Chayes to ask whether public-law litigation itself could survive if the Supreme Court were unsympathetic to it. His own answer was yes; in his view, the rise of public-law litigation reflected "pervasive changes in . . . our ways of thinking about law and the legal system," and "even . . . sustained resistance in the Supreme Court" would not undo those changes.<sup>468</sup> For Professor Chayes, it followed that the Burger Court should be wrestling with the new issues raised by this type of litigation, including the need for "adequate representation of the interests affected by the litigation."<sup>469</sup> But rather than shifting its mindset, the Court was adhering to the premises of the traditional model. That was both Professor Chayes's description of the situation and his fundamental complaint: "The Court has responded to the procedural problems generated by the new forms of adjudication with concepts and modes of thought derived from the old."<sup>470</sup>

Professor Chayes would have exactly the same complaint today. Indeed, the persistence of this complaint suggests that Professor Chayes was overgeneralizing when he asserted that the traditional model no longer reflects "our" ways of thinking about law. His statement seems more applicable to David Bazelon than to the members of the current Supreme Court.

That may have consequences for doctrines about intervention. The broad interpretation of Rule 24(a) that Judge Leventhal and Chief Judge Bazelon embraced in the late 1960s has several strikes against it: it departs from what the Reporter for the 1966 amendment called "the historic

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<sup>467</sup> See, e.g., *Casey*, 518 U.S. at 360 ("The constitutional violation has not been shown to be systemwide, and granting a remedy beyond what was necessary to provide relief to Harris and Bartholic was therefore improper."); see also Sabel & Simon, *supra* note 464, at 1082 ("In a series of decisions, the Court has purported to derive constraints on remedial discretion from the nature of the rights in question.").

<sup>468</sup> Chayes, *supra* note 411, at 8.

<sup>469</sup> *Id.* at 60.

<sup>470</sup> *Id.* at 56.

continuity of the subject of intervention,<sup>471</sup> it reads Rule 24(a) to mean something very different than the same language in Rule 19(a),<sup>472</sup> and it fits awkwardly with the continuing requirement that all would-be intervenors must submit “a pleading” setting out their “claim or defense.”<sup>473</sup> For some law professors and judges, the perceived need for interest representation in the model of litigation that Professor Chayes heralded may be enough to overcome these objections. But the objections will loom larger for people who accept the premises of the traditional model, and who therefore are not looking for ways to facilitate “a surrogate political process” within lawsuits.<sup>474</sup> Those people may include most or even all of the Justices of the Supreme Court—and none of the Court’s own precedents will compel them to accept Chief Judge Bazelon’s broad reading of Rule 24(a). If and when the Supreme Court addresses the criteria for intervention, then, it may reject Chief Judge Bazelon’s approach.

*C. Do the Intended Beneficiaries of a Statute Have Special “Interests”?*

*1. Illustrative Cases from the Lower Courts*

Some lower-court opinions about Rule 24 take an intermediate approach. In contrast to the D.C. Circuit (which continues to say that the “interest” required for intervention of right under Rule 24(a)(2) is identical to the “injury in fact” required for Article III standing),<sup>475</sup> the Seventh Circuit has repeatedly held that Rule 24(a)(2) requires “more than the minimum Article III interest.”<sup>476</sup> In *Flying J, Inc. v. Van Hollen*, Judge Posner described what else is required by invoking what he called “the ‘prudential’ (as distinct from constitutional) limitations on standing to sue.”<sup>477</sup> In his telling, one of those limitations is that a would-be party’s injuries should not be too “remote[],” and Judge Posner suggested that the word “interest” in Rule 24(a)(2) incorporates this idea.<sup>478</sup> Likewise, “[a]nother dimension of the ‘interest’ required for intervention . . . of

<sup>471</sup> See *supra* text accompanying note 281.

<sup>472</sup> See *supra* notes 281–84 and accompanying text.

<sup>473</sup> Fed. R. Civ. P. 24(c).

<sup>474</sup> Cf. *supra* text accompanying note 400.

<sup>475</sup> See *supra* note 66 and accompanying text.

<sup>476</sup> *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 571 (7th Cir. 2009); see also cases cited *supra* note 67.

<sup>477</sup> 578 F.3d at 571.

<sup>478</sup> See *id.* at 571–72.

right, also borrowed from (though not necessarily identical to) the prudential as distinct from the Article III concept of standing, is that the suitor be someone whom the law on which his claim is founded was intended to protect.”<sup>479</sup>

The facts of *Flying J* help illustrate Judge Posner’s understanding of these requirements. A state statute called the “Unfair Sales Act” restricts price competition among gas stations in Wisconsin.<sup>480</sup> Alleging that this statute conflicted with federal antitrust laws and therefore was preempted, a company that wanted to sell gasoline at lower prices than the statute allowed sued state officials in federal district court to enjoin them from enforcing the statute. The district court ruled in the plaintiff’s favor and issued the requested injunction. When the state officials decided not to appeal, a trade association of Wisconsin gasoline retailers moved to intervene on the defendants’ side so as to pursue an appeal. The district court denied this motion, but Judge Posner held that the trade association had the sort of “interest” required for intervention of right under Rule 24(a)(2).<sup>481</sup> To begin with, the association’s members “would be directly rather than remotely harmed” by an injunction that precluded state officials from enforcing the statute; “they would lose much or even all of their business to their larger, more efficient competitors.”<sup>482</sup> What is more, the association’s members were the intended beneficiaries of the statute that the association was trying to defend. (In Judge Posner’s words, the statute “is special-interest legislation,” enacted for the benefit of “retailers who wish . . . to limit price competition.”<sup>483</sup>) For Judge Posner,

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<sup>479</sup> *Id.* at 572.

<sup>480</sup> See Wis. Stat. § 100.30 (2017–18). As originally enacted in 1939, the relevant provisions of the Unfair Sales Act had covered all products sold in the state. In 1986, however, the Wisconsin legislature limited those provisions to tobacco products, alcoholic beverages, and motor vehicle fuel. See *Flying J, Inc. v. Van Hollen*, 621 F.3d 658, 660 (7th Cir. 2010).

<sup>481</sup> See *Flying J*, 578 F.3d at 570–72.

<sup>482</sup> *Id.* at 572.

<sup>483</sup> *Id.* In support of this point, Judge Posner noted that the statute not only authorized enforcement by the state but also created a private cause of action in favor of injured retailers. See *id.*; cf. Wis. Stat. § 100.30(5m) (2017–18) (providing that “[a]ny person who is injured or threatened with injury as a result of a sale or purchase of motor vehicle fuel in violation of [the relevant provision] may bring an action against the person who violated [that provision]” for various types of relief). In Judge Posner’s mind, the fact that members of the trade association could have asserted claims for relief against *Flying J* may have strengthened the argument for allowing the association to intervene in the suit at hand.

Admittedly, Judge Posner’s analysis was too breezy to make his position completely clear. At one point, he observed that “[i]nvalidation of the statute would deprive [retailers] of the benefit not only of [the private cause of action] but also of the principal remedy provided by

it followed that the trade association “has a legally protectable interest in the statute enjoined by the district court” and was entitled to intervene for the sake of appealing the injunction.<sup>484</sup> That was true even though the injunction ran only against the state officials and not against the trade association or its members.<sup>485</sup>

The Fifth Circuit reached a similar conclusion in the high-profile case of *Texas v. United States*.<sup>486</sup> In 2014, the Obama Administration unveiled a program called “Deferred Action for Parents of Americans and Lawful Permanent Residents” (DAPA), which was designed to benefit undocumented immigrants who met certain criteria. In some respects, the program simply articulated a set of priorities for enforcing federal immigration law. But the program also purported to allow covered individuals to be “lawfully present” in the United States, and that designation had various legal consequences.<sup>487</sup> Alleging that the Administration had violated the Administrative Procedure Act and that some aspects of DAPA exceeded the President’s substantive authority, twenty-six states sued the United States and various federal officials to

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the statute—public enforcement by a variety of means no[t] requiring proof of injury.” *Flying J*, 578 F.3d at 572. Later in his opinion, though, he tacitly acknowledged that *Flying J*’s suit could not really “invalidat[e]” the statute in a way that would bind nonparties; even if state officials were enjoined from enforcing the statute (whether against *Flying J* or anyone else), retailers injured by violations of the statute would still be able to sue the violators under the statute’s private cause of action, and the parties to that suit would be able to relitigate the statute’s validity. See *id.* at 572–73. Nonetheless, Judge Posner thought that if the retailers’ trade association wanted to intervene in the current suit so as to appeal the judgment that had been entered in favor of *Flying J*, and if the appeal would present some of the same legal issues that could come up in a suit brought by an injured retailer, there was no reason to make the association or its members go through a new round of proceedings at the trial-court level. See *id.* at 573 (“[T]o make the association start over, when all it really seeks by way of intervention . . . is an opportunity to litigate an appeal, would impose substantial inconvenience on the association with no offsetting gain that we can see.”). To the extent that Judge Posner’s conclusion rested on this practical point, his analysis depended on the fact that the statute did create a private cause of action in favor of injured retailers, even if the retailers’ trade association was not asserting that cause of action in its motion to intervene.

<sup>484</sup> *Flying J*, 578 F.3d at 573. The quoted phrase comes from the portion of Judge Posner’s opinion about permissive intervention, but it is relevant to his analysis of intervention of right as well.

<sup>485</sup> In a later opinion by Judge Kanne, the same panel agreed with the trade association on the merits and vacated the injunction that the district court had entered against the state officials (who had not themselves appealed). *Flying J*, 621 F.3d at 659–60, 666.

<sup>486</sup> 805 F.3d 653 (5th Cir. 2015).

<sup>487</sup> See *Texas v. United States*, 809 F.3d 134, 147–49 (5th Cir. 2015), *aff’d* by an evenly divided Court, 136 S. Ct. 2271 (2016) (*per curiam*).

enjoin implementation of the program.<sup>488</sup> Three undocumented immigrants who believed that they met DAPA's criteria sought to intervene as additional defendants. The existing parties objected, and the district court denied these motions to intervene. On appeal, however, the Fifth Circuit held that Rule 24(a) gave these three individuals a right to become parties to the states' suit against the federal government. The panel appeared to acknowledge that the word "interest" in Rule 24(a) had a legal as well as a practical aspect: to trigger a right to intervene, "an asserted interest must be 'legally protectable.'"<sup>489</sup> According to the panel, though, that does not mean that would-be intervenors need to assert remedial rights of their own, or even that they need a "legal entitlement" that can be enforced by someone else.<sup>490</sup> Instead, "an interest is sufficient if it is of the type that the law deems worthy of protection."<sup>491</sup> In the case at hand, the panel concluded that the intervenors' "interest in avoiding deportation" met this test, both because the Due Process Clause gives this interest some legal protection and because the intervenors were "the intended beneficiaries of the challenged federal policy."<sup>492</sup>

On several occasions, the Ninth Circuit has offered a similar analysis of the "interest" required by Rule 24(a). Consider *California ex rel. Lockyer v. United States*.<sup>493</sup> Starting in 2004, Congress has included the following provision (known as the Weldon Amendment) in annual Consolidated Appropriations Acts: "None of the funds made available in this Act may be made available . . . to a State or local government[] if such . . . government subjects any . . . health care entity to discrimination on the basis that the health care entity does not provide . . . abortions."<sup>494</sup> As described by the Ninth Circuit, the Weldon Amendment was intended "to dissuade states from forcing health care providers to offer abortion

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<sup>488</sup> See id. at 146, 149 (summarizing the states' claims).

<sup>489</sup> *Texas*, 805 F.3d at 659.

<sup>490</sup> See id. (asserting that "legally protectable" does not mean "legally enforceable").

<sup>491</sup> Id.

<sup>492</sup> Id. at 660; see also *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 564–65, 569 (5th Cir. 2016) (holding that a trade association for stores that were licensed to sell liquor in Texas had a right to intervene in a suit brought by a would-be competitor to challenge the constitutionality of Texas's restrictions on liquor sales, and explaining that "the Association has a legally protectable interest as the intended beneficiary" of the state's restrictions).

<sup>493</sup> 450 F.3d 436 (9th Cir. 2006).

<sup>494</sup> E.g., Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d)(1), 118 Stat. 2809, 3163 (2004). The Weldon Amendment defines "health care entity" to include individual health-care workers as well as hospitals and other organizations. See id. § 508(d)(2).

services.”<sup>495</sup> California state law, however, gives emergency rooms a general duty to provide appropriate emergency care to people who are “in danger of loss of life, or serious injury or illness.”<sup>496</sup> California officials understood this law as requiring hospitals with emergency rooms to perform abortions when necessary to protect the life or health of the mother, but the officials feared that enforcing this requirement might jeopardize federal funds covered by the Weldon Amendment. California therefore sued the United States in a federal district court for a declaration that federal law would not cut off funds on this basis, either because the Weldon Amendment was unconstitutional or because enforcing the state law would not trigger it.<sup>497</sup> The Alliance of Catholic Health Care and some organizations of pro-life health-care workers moved to intervene. The district court denied these motions, but the Ninth Circuit reversed.<sup>498</sup>

Although the Weldon Amendment did not give the would-be intervenors either substantive or remedial rights, the Ninth Circuit insisted that “our intervention caselaw has not turned on such technical distinctions.”<sup>499</sup> At oral argument, the United States had conceded that the individuals and entities represented by the would-be intervenors were “the intended beneficiaries of this law,” and the panel agreed: “Congress passed the Weldon Amendment precisely to keep doctors who have moral qualms about performing abortions from being put to the hard choice of acting in conformity with their beliefs, or risking imprisonment or loss of professional livelihood.”<sup>500</sup> The panel concluded that the intervenors therefore had a relevant “interest” within the meaning of Rule 24(a).<sup>501</sup>

## *2. The Current Supreme Court’s Likely Skepticism*

The idea that the intended beneficiaries of a statute have legally protected “interests,” of the sort that might entitle them to intervene in a lawsuit under Rule 24(a)(2), resonates with some other doctrines that were familiar in the 1960s and 1970s. To the extent that those doctrines were in vogue in 1966, they might be thought to bear on the meaning of

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<sup>495</sup> *Lockyer*, 450 F.3d at 439.

<sup>496</sup> Cal. Health & Safety Code § 1317(a) (Deering 2010).

<sup>497</sup> See Complaint at 6, 13–15, 21–22, *California ex rel. Lockyer v. United States*, No. 3:05-cv-00328, 2005 WL 452106 (N.D. Cal. Jan. 25, 2005).

<sup>498</sup> See *Lockyer*, 450 F.3d at 440, 445.

<sup>499</sup> *Id.* at 441.

<sup>500</sup> *Id.*

<sup>501</sup> See *id.* at 441–42, 445.

the 1966 amendment to Rule 24(a)(2). Still, those doctrines have faded in other areas, and the current Supreme Court might not be inclined to revive them.

*a. Intended Beneficiaries and “Standing” in Administrative Law*

We can begin with the historical development of doctrines about “standing” to seek relief in court against allegedly unlawful actions by federal administrative agencies.<sup>502</sup> In the first half of the twentieth century, people discussing judicial review of administrative action distinguished between what they called “statutory” review proceedings (brought under statutory provisions that specifically authorized suits challenging a particular agency’s decisions) and “nonstatutory” review proceedings (brought under rights of action that existed as a matter of unwritten law).<sup>503</sup>

A leading example of a statutory review provision was Section 402(b) of the Communications Act of 1934, which created a mechanism for challenging the Federal Communications Commission’s decisions about applications for broadcasting licenses and permits to construct radio stations. Section 402(b) specified that “any . . . person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application” could “appeal” the decision to what is now the D.C. Circuit.<sup>504</sup> In 1940, the Supreme Court’s opinion in *FCC v. Sanders Bros. Radio Station* interpreted this provision broadly, so as to authorize judicial review at the behest of people who would not otherwise have had claims for relief.<sup>505</sup>

In the absence of a relevant statutory review provision, plaintiffs who wanted to challenge the legality of an administrative agency’s behavior were relegated to “nonstatutory” review. In the early twentieth century, one of the main ways to obtain judicial review of allegedly unlawful administrative action was to bring a suit in equity against the responsible administrative officials.<sup>506</sup> But under the applicable principles of equity

<sup>502</sup> For a more elaborate account of the history covered in the next few paragraphs, see Nelson, *supra* note 71.

<sup>503</sup> See, e.g., Albert, *supra* note 74, at 428–29 (noting that this distinction was “[c]entral to the development of legal interest standing”—that is, the idea that “[a] litigant must have a legally protected interest”).

<sup>504</sup> Communications Act of 1934, ch. 652, § 402(b)(2), 48 Stat. 1064, 1093 (codified as amended at 47 U.S.C. § 402(b)(6) (2012)).

<sup>505</sup> 309 U.S. 470, 476–77 (1940).

<sup>506</sup> See, e.g., Ernst Freund, *Administrative Powers Over Persons and Property* 248 (1928).



jurisprudence, a plaintiff had “standing” to maintain such a suit only if the administrative action under review invaded the plaintiff’s own “legal rights.”<sup>507</sup> In a leading case, the Supreme Court defined the category of “legal rights” largely in terms of rights recognized at common law.<sup>508</sup> Still, “[w]hen . . . definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law,” plaintiffs sometimes could bring suits in equity to protect those rights too against invasion by administrative officials.<sup>509</sup>

In 1946, the Administrative Procedure Act (APA) included a cross-cutting provision about judicial review. Subject to a few exceptions, Section 10(a) of the APA declared that “[a]ny person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”<sup>510</sup> Most scholars agree that the two prongs of this provision were simply designed to codify existing doctrine.<sup>511</sup> The phrase “legal wrong” was understood to mean “the invasion of a legally protected right,”<sup>512</sup> of the sort that would have supported a suit in equity under pre-existing doctrines about nonstatutory review. Likewise, the prong about people who were “adversely affected or aggrieved by [agency] action within the meaning of any relevant statute” was designed to accommodate specialized statutory review provisions like Section 402(b) of the Communications Act—provisions that went beyond the “legal right” doctrine by authorizing review of particular types of administrative decisions at the behest of anyone who was “aggrieved” or “adversely affected” by those decisions.<sup>513</sup>

<sup>507</sup> *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940).

<sup>508</sup> See *Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 137–38 (1939).

<sup>509</sup> *Stark v. Wickard*, 321 U.S. 288, 309 (1944); see also *Tenn. Elec. Power*, 306 U.S. at 137–38 (defining a “legal right” in this context to mean “one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege”).

<sup>510</sup> Ch. 324, § 10(a), 60 Stat. 237, 243 (1946) (current version at 5 U.S.C. § 702 (2018)).

<sup>511</sup> See Magill, *supra* note 72, at 1150 (“The widely accepted view of the history is that [Section 10(a)] was a declaration of existing law.”).

<sup>512</sup> *Braude v. Wirtz*, 350 F.2d 702, 707 (9th Cir. 1965).

<sup>513</sup> See Sunstein, *supra* note 59, at 182 (explaining that this part of Section 10(a) referred to “people expressly authorized to bring suit under statutes other than the APA”). In a student note published in 1949, Charles C. Hileman III cited roughly fifteen statutes that authorized review of particular administrative actions at the behest of persons or parties “aggrieved” or “adversely affected” by those actions. See Note, *Statutory Standing to Review Administrative Action*, 98 U. Pa. L. Rev. 70, 71 n.13a (1949). According to Mr. Hileman, though, “there can be no general definition laid down as to who is an ‘aggrieved person’” for purposes of these

In the 1950s, however, Professor Kenneth Culp Davis started arguing that rather than having codified existing doctrine, Section 10(a) established a general rule that everyone “who is in fact adversely affected” by the final action of any federal administrative agency can go to court to challenge the lawfulness of that action.<sup>514</sup> On this reading, the second prong of Section 10(a) did not simply accommodate whatever statutory review provisions might exist in other statutes. Instead, Section 10(a) *was* a statutory review provision, analogous to Section 402(b) of the Communications Act but applicable to all federal agencies.

Courts did not immediately embrace this view. For the rest of the 1950s and the 1960s, prevailing doctrine continued to reflect the basic framework that had existed before the APA and that Section 10(a) had been understood to preserve. In the absence of a “special statutory review provision” (supplied by a statute other than the APA), a plaintiff’s “standing” to seek judicial review of allegedly unlawful administrative action depended on whether the action invaded a “legal right” belonging to the plaintiff.<sup>515</sup>

Professor Louis L. Jaffe, the leading administrative-law scholar of his era,<sup>516</sup> was one of the people who continued to operate largely within this framework.<sup>517</sup> Still, Professor Jaffe supported broad doctrines of standing,<sup>518</sup> and he encouraged an expansive view of the concept of “legal rights.” Writing in 1961, Professor Jaffe offered a synthesis of pre-APA cases involving “legal rights” created by statute. According to Professor Jaffe, “the clue to standing in these cases is to look . . . to the statutory purposes”: if a statutory or constitutional provision “was directed to the protection of the plaintiff’s interest” (in the sense that the provision had been enacted at least partly for the purpose of protecting that interest), then the plaintiff had “standing” to seek judicial review of agency actions

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provisions. *Id.* at 72. By referring to people “adversely affected or aggrieved by [agency] action *within the meaning of any relevant statute*,” the APA accommodated this variation in the scope of statutory review provisions. § 10(a), 60 Stat. at 243 (emphasis added).

<sup>514</sup> Davis, *supra* note 76, at 355–56. This article became the chapter on “Standing” in 3 Kenneth Culp Davis, *Administrative Law Treatise* 208 (1958).

<sup>515</sup> See Magill, *supra* note 72, at 1150.

<sup>516</sup> See *In Memoriam: Louis L. Jaffe*, 110 Harv. L. Rev. 1203 (1997) (printing tributes).

<sup>517</sup> See, e.g., Peter L. Strauss, *Changing Times: The APA at Fifty*, 63 U. Chi. L. Rev. 1389, 1402–03 (1996) (summarizing the debate between Professors Davis and Jaffe).

<sup>518</sup> Cf. Louis L. Jaffe, *Standing Again*, 84 Harv. L. Rev. 633, 633 (1971) (referring to “the current zeal—which I for the most part share—to relax the technical requirements for standing”).

that violated the provision to the plaintiff's detriment.<sup>519</sup> By the same token, Congress sometimes required regulatory agencies to take specified interests into account when making decisions—and “[w]here the legislature has recognized a certain ‘interest’ as one which must be heeded, it is such a ‘legally protected interest’ as warrants standing to complain of its disregard.”<sup>520</sup>

In 1968, the Supreme Court's opinion in *Hardin v. Kentucky Utilities Co.* agreed that when a statutory provision restricts what an agency can do, the intended beneficiaries of that restriction normally have “standing” to seek judicial review of agency actions that violate the restriction.<sup>521</sup> By statute, Congress had restricted the geographic area within which the Tennessee Valley Authority (TVA) could supply power.<sup>522</sup> The legislative history of this statute indicated that “the primary objective of the limitation” was to protect private utility companies against competition from the TVA.<sup>523</sup> In *Hardin*, one such company accused the TVA of violating the geographic restriction and thereby harming the company's sales.<sup>524</sup> Consistent with Professor Jaffe's ideas, the Supreme Court upheld the company's standing to seek injunctive relief against the TVA: “Since [the plaintiff] is . . . in the class which [the statutory limitation] is designed to protect, [the plaintiff] has standing under familiar judicial principles to bring this suit, and no explicit statutory provision is necessary to confer standing.”<sup>525</sup> Although the Court did not explicitly invoke the APA, the distinguished circuit judge Henry Friendly took *Hardin* to indicate that if a statutory provision was enacted for the purpose of protecting a certain interest, “it follows that this interest is legally protected . . . and that disregard of it is a ‘legal wrong’ within the meaning of § 10(a) of the Administrative Procedure Act.”<sup>526</sup>

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<sup>519</sup> Louis L. Jaffe, Standing to Secure Judicial Review: Private Actions, 75 Harv. L. Rev. 255, 266 (1961).

<sup>520</sup> *Id.* at 264.

<sup>521</sup> 390 U.S. 1, 6–7 (1968).

<sup>522</sup> See Act of Aug. 6, 1959, Pub. L. No. 86-137, 73 Stat. 280, 280–81 (codified at 16 U.S.C. § 831n-4(a) (2018)).

<sup>523</sup> *Hardin*, 390 U.S. at 7.

<sup>524</sup> See *id.* at 4–5.

<sup>525</sup> *Id.* at 7 (citations omitted); see also *id.* at 6 (“[I]t has been the rule, at least since the *Chicago Junction Case*, 264 U.S. 258 (1924), that when the particular statutory provision invoked . . . reflect[s] a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision.”); cf. Jaffe, *supra* note 519, at 262–67 (emphasizing *Chicago Junction*).

<sup>526</sup> *Safir v. Gibson*, 417 F.2d 972, 978 (2d Cir. 1969).

In 1970, however, the Supreme Court fuzzed up this analysis in *Association of Data Processing Service Organizations v. Camp*.<sup>527</sup> According to Justice Douglas's opinion for the Court, a plaintiff did not need to establish a "legal interest" in order to have "standing" to seek judicial review of administrative action.<sup>528</sup> Instead, courts normally should entertain the plaintiff's suit if (1) "the plaintiff alleges that the challenged action has caused him injury in fact" (a requirement that Justice Douglas associated with Article III of the Constitution) and (2) "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."<sup>529</sup>

Even by Justice Douglas's standards, *Data Processing* was "a remarkably sloppy opinion";<sup>530</sup> it said little either to justify its new approach to "standing" or to explain the distinction that it drew between "standing" and "the merits."<sup>531</sup> Still, it did refer to the provision about judicial review previously found in Section 10(a) of the APA and now found at 5 U.S.C. § 702.<sup>532</sup> Rather than emphasizing the "legal wrong" prong of that provision, moreover, it focused on the other prong. In Justice Douglas's words, "the Administrative Procedure Act grants standing to a person 'aggrieved by agency action within the meaning of a relevant statute.'"<sup>533</sup> Justice Douglas added that in *Data Processing* itself, the statutes that allegedly limited the agency's power "are clearly 'relevant' statutes within the meaning of § 702," and the plaintiffs "are within that class of 'aggrieved' persons who, under § 702, are entitled to judicial review of 'agency action.'"<sup>534</sup>

By the 1980s, if not before, the Supreme Court understood *Data Processing* to have moved in the direction that Professor Davis had been

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<sup>527</sup> 397 U.S. 150 (1970).

<sup>528</sup> See *id.* at 153 ("The 'legal interest' test goes to the merits. The question of standing is different.").

<sup>529</sup> *Id.* at 151–53.

<sup>530</sup> Sunstein, *supra* note 59, at 185.

<sup>531</sup> For my take on the latter question, see Nelson, *supra* note 71.

<sup>532</sup> See *Data Processing*, 397 U.S. at 153, 157. By the time of *Data Processing*, Congress had replaced the 1946 version of the APA with Title 5 of the United States Code. See Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378 (enacting Title 5 as such); see also Office of the Law Revision Counsel, Positive Law Codification, [uscode.house.gov/codification/-legislation.shtml](https://www.uscode.house.gov/codification/-legislation.shtml) [<https://perma.cc/HW6B-KSP6>] (explaining the difference between the titles in the United States Code that Congress has enacted as such and the other titles).

<sup>533</sup> *Data Processing*, 397 U.S. at 153 (quoting 5 U.S.C. § 702 (1964 ed., Supp. II)).

<sup>534</sup> *Id.* at 157.

advocating since the 1950s. Under current doctrine, the APA's provisions about judicial review are no longer thought simply to codify the pre-existing framework. Instead, the APA is said to have created an entirely new "cause of action for [judicial] review" in favor of everyone who meets *Data Processing's* test for "standing."<sup>535</sup> Specifically, whenever an agency takes a final action of the sort that is subject to judicial review under the APA,<sup>536</sup> and whenever that action allegedly violates a statutory or constitutional limitation on the agency's powers, the APA is said to authorize suit by anyone who is suffering "injury in fact" and whose interests are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," unless Congress affirmatively intended to preclude review at the behest of some or all of these plaintiffs.<sup>537</sup>

Professor Davis himself argued that the Supreme Court should go even further, and should normally allow everyone who enjoys what is now called "Article III standing" to bring suits challenging unauthorized action by administrative agencies. In his view, "The basic law of standing should be a simple proposition cutting both ways: *One who is adversely affected by governmental action has standing to challenge it, and one who is not adversely affected lacks standing.*"<sup>538</sup> Thus, he praised *Data Processing's* emphasis on "injury in fact," but he argued that the additional "zone of interests" limitation should be discarded.<sup>539</sup>

The Court has declined this invitation. For purposes of the APA, however, the Court has said that "[t]he 'zone of interest' test . . . is not meant to be especially demanding."<sup>540</sup> In the 1980s, the Court indicated that plaintiffs can satisfy the test even if they are not among the intended

<sup>535</sup> See *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 231 n.4 (1986); see also *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (describing *Data Processing* as a precedent about the scope of "the cause of action for judicial review conferred by the Administrative Procedure Act").

<sup>536</sup> See 5 U.S.C. § 704 (2018).

<sup>537</sup> See *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 394–96, 395 n.9 (1987) (quoting *Data Processing*, 397 U.S. at 153).

<sup>538</sup> Kenneth Culp Davis, *Standing*, 1976, 72 Nw. U. L. Rev. 69, 80–81 (1977).

<sup>539</sup> See *id.* at 81 (arguing that the zone-of-interests prong "has become extinct, as it should"); cf. Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 472 (1970) (suggesting that the zone-of-interests test be altered so that it would preclude standing only if Congress affirmatively intended *not* to protect the interest that the plaintiff is asserting).

<sup>540</sup> *Clarke*, 479 U.S. at 399; accord *Lexmark*, 572 U.S. at 130; *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

beneficiaries of the statute in question.<sup>541</sup> More recently, the Court has suggested that whether the plaintiffs are intended beneficiaries is not even relevant: “Although our prior cases have not stated a clear rule for determining whether a plaintiff’s interest is ‘arguably within the zone of interests’ to be protected by a statute, they nonetheless establish that we should not inquire whether there has been a congressional intent to benefit the would-be plaintiff.”<sup>542</sup> Admittedly, the Court has also appeared to say the opposite.<sup>543</sup> But at least as the D.C. Circuit understands the Court’s cases, “the zone of interests test serves to exclude only those ‘parties whose interests are not consistent with the purposes of the statute in question’”—so that instead of asking whether Congress intended to protect the plaintiff’s interests, the key question is simply whether those interests are incompatible with the statute’s purposes.<sup>544</sup>

*b. Intended Beneficiaries and Implied Rights of Action*

As compared to doctrine about the express right of action allegedly created by the APA, doctrine about “implied” rights of action under federal statutes has moved in the opposite direction; when a federal statute does not explicitly create a private right of action, courts have become much less likely to infer one. Here again, though, courts trying to determine whether to recognize a private right of action under a federal statute no longer focus on whether the would-be plaintiff is among the statute’s intended beneficiaries.

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<sup>541</sup> See *Clarke*, 479 U.S. at 399–400 (“[T]here need be no indication of congressional purpose to benefit the would-be plaintiff.”); *id.* at 400 n.15 (“Insofar as lower court decisions suggest otherwise, they are inconsistent with our understanding of the ‘zone of interest’ test, as now formulated.” (citation omitted)).

<sup>542</sup> *Nat’l Credit Union Admin. v. First Nat’l Bank & Tr. Co.*, 522 U.S. 479, 488–89 (1998).

<sup>543</sup> See *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 525–26 (1991) (holding that postal workers lacked standing to challenge a regulation as being inconsistent with the statutes that prohibit private carriage of letters, and explaining that postal workers failed the zone-of-interest test because “the congressional concern was not with opportunities for postal workers but with the receipt of necessary revenues for the Postal Service”); Jonathan R. Siegel, *Zone of Interests*, 92 *Geo. L.J.* 317, 328–35 (2004) (discussing the conflict between *Air Courier Conference* and *National Credit Union Administration*).

<sup>544</sup> *Amgen, Inc. v. Smith*, 357 F.3d 103, 109 (D.C. Cir. 2004) (quoting *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1148 (D.C. Cir. 2002)); see also, e.g., *Sherley v. Sebelius*, 610 F.3d 69, 75 (D.C. Cir. 2010) (“[T]he Doctors’ interest in preventing the NIH from funding [research involving human embryos] is not inconsistent with the purposes of the Amendment. Under the standard of *Amgen*, . . . that is all that matters.”).

For a time, that question played a central role in doctrine about implied rights of action. In the 1964 case of *J.I. Case Co. v. Borak*, the Supreme Court held that although § 14(a) of the Securities Exchange Act “makes no specific reference to a private right of action,” the Act nonetheless “authorizes a federal cause of action for rescission or damages [in favor of] a corporate stockholder with respect to a consummated merger which was authorized pursuant to the use of a proxy statement alleged to contain false and misleading statements violative of § 14(a).”<sup>545</sup> To explain this conclusion, the Court emphasized that § 14(a) had been enacted to protect stockholders.<sup>546</sup> A decade later, in *Cort v. Ash*, Justice Brennan featured the same idea in his list of factors that judges should consider “[i]n determining whether a private remedy is implicit in a statute not expressly providing one.”<sup>547</sup> The first factor was whether “the plaintiff [is] ‘one of the class for whose *especial* benefit the statute was enacted.’”<sup>548</sup>

In 1979, however, Justice Powell condemned this approach. Rather than asking whether Congress had intended to protect the plaintiff’s substantive interests, Justice Powell argued that the Court should simply focus on whether Congress had intended to create a right of action. In his words, “we should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist.”<sup>549</sup> A majority of the Court soon moved sharply in this direction.<sup>550</sup> Under current doctrine, “[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.”<sup>551</sup>

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<sup>545</sup> 377 U.S. 426, 428, 432 (1964).

<sup>546</sup> See *id.* at 432 (“[A]mong its chief purposes is ‘the protection of investors,’ which certainly implies the availability of judicial relief where necessary to achieve that result.” (quoting Securities Exchange Act of 1934, ch. 404, § 14(a), 48 Stat. 881, 895)).

<sup>547</sup> 422 U.S. 66, 78 (1975).

<sup>548</sup> *Id.* (quoting *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916) (emphasis added by Justice Brennan)).

<sup>549</sup> *Cannon v. Univ. of Chi.*, 441 U.S. 677, 749 (1979) (Powell, J., dissenting).

<sup>550</sup> See *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15–16 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979).

<sup>551</sup> *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); see also *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (“Though the rule once may have been otherwise, see *J. I. Case Co. v. Borak*, it is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one.” (citation omitted)).

The story is more complicated with respect to rights of action for violations of the Constitution (or, more precisely, for harms caused by governmental officials who purport to be acting with legal authority but who do things that the Constitution prevents the law from authorizing<sup>552</sup>). To be sure, just as the Supreme Court has cut back on “implied” rights of action for violations of federal statutes, so too the Court has curtailed the precedential effect of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*<sup>553</sup> (which held that the victim of an unreasonable search or seizure has a federal right of action for damages against the offending officers). Without overruling *Bivens*, the Court has refused to recognize similar rights of action for damages in many other areas of constitutional law, and the Court attributes this pattern to “the notable change in the Court’s approach to recognizing implied causes of action.”<sup>554</sup>

Even in the absence of any express right of action, though, plaintiffs routinely seek and obtain injunctive or declaratory relief against governmental officials who are threatening to enforce an unconstitutional law or to act in other ways that exceed their constitutional authority. In Professor Richard Fallon’s words, “The Court . . . has treated suits for injunctions against ongoing constitutional violations strikingly differently from *Bivens* actions [for damages].”<sup>555</sup>

<sup>552</sup> Cf. John Harrison, Power, Duty, and Facial Invalidity, 16 U. Pa. J. Const. L. 501, 508–13 (2013) (explaining the difference between “power” and “duty,” observing that courts and commentators “routinely mix the vocabularies of power and duty” when discussing the Constitution, and suggesting that most references to “violations of the Constitution” reflect this imprecision).

<sup>553</sup> 403 U.S. 388 (1971).

<sup>554</sup> *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017).

<sup>555</sup> Richard H. Fallon, Jr., Jurisdiction-Stripping Reconsidered, 96 Va. L. Rev. 1043, 1113 (2010); see also, e.g., Henry Paul Monaghan, A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law, 91 Notre Dame L. Rev. 1807, 1821 (2016) (“[D]espite the current Court’s hostility to implied rights of action, we have a longstanding tradition of suits against officers seeking equitable or declaratory relief for alleged wrongful conduct.”); John F. Preis, In Defense of Implied Injunctive Relief in Constitutional Cases, 22 Wm. & Mary Bill Rts. J. 1, 3 (2013) (“At present, the availability of implied actions depends, strangely enough, on whether the relief sought is monetary or injunctive.”); cf. *Abbasi*, 137 S. Ct. at 1862 (refusing to recognize a *Bivens* action, but appearing to assume that injunctive relief would be available in appropriate circumstances).

Modern doctrine about injunctive relief against government officials who are threatening to behave unconstitutionally traces back to *Ex parte Young*, 209 U.S. 123 (1908). According to Professor Harrison, though, modern courts and commentators have overread *Young*; the plaintiffs’ right of action in the underlying litigation came from general principles of equity,



Still, doctrine about suits for injunctive or declaratory relief has also changed since the late 1960s. In 1968, Chief Justice Warren's majority opinion in *Flast v. Cohen* arguably suggested that when federal officials are behaving unconstitutionally, courts can recognize a right of action for injunctive or declaratory relief in favor of anyone who meets the constitutional requirements for standing.<sup>556</sup> But after joining the Court in 1972, Justice Powell sharply criticized *Flast*.<sup>557</sup> Justice Powell insisted that "[t]he doctrine of standing has always reflected prudential as well as constitutional limitations," and he urged his colleagues to "reaffirm pre-*Flast* prudential limitations on federal and citizen taxpayer standing."<sup>558</sup> Significantly, he also sought to put *Data Processing*'s zone-of-interests

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and it was not as broad as lawyers now assume. See John Harrison, *Ex Parte Young*, 60 *Stan. L. Rev.* 989, 1014, 1022 (2008).

<sup>556</sup> See 392 U.S. 83, 94–106 (1968). To be sure, Chief Justice Warren seemed to think that those requirements went beyond mere "injury in fact." He argued that when a plaintiff was suing to challenge the constitutionality of a federal spending program, and when the plaintiff's "standing" depended on the plaintiff's status as a taxpayer, Article III required the plaintiff to "establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.* at 102. In *Flast*, where the plaintiff was alleging that federal spending for instruction in religious schools violated the Establishment Clause, Chief Justice Warren held that this requirement was satisfied because "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general." *Id.* at 103; cf. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 509 (1982) (Brennan, J., dissenting) (explaining *Flast* on the ground that taxpayers were "intended beneficiaries" of the Establishment Clause). On one view, this "nexus" test effectively bundles something like a "legal interest" requirement into the Article III analysis.

Even if a plaintiff satisfied the requirements of Article III, moreover, Chief Justice Warren may have thought that the federal courts had considerable discretion about whether to recognize a right of action for equitable relief. At the start of his opinion in *Flast*, he noted that the parties were proposing different interpretations of *Frothingham v. Mellon*, 262 U.S. 447 (1923); the defendants saw *Frothingham* as having "announced a constitutional rule, compelled by the Article III limitations on federal court jurisdiction and grounded in considerations of the doctrine of separation of powers," while the plaintiffs saw *Frothingham* as having "expressed no more than a policy of judicial self-restraint which can be disregarded when compelling reasons for assuming jurisdiction over a taxpayer's suit exist." *Flast*, 392 U.S. at 92–93. Chief Justice Warren himself thought that "[t]he opinion delivered in *Frothingham* can be read to support either position," and he decided to "undertake a fresh examination" of the topic of taxpayer standing. *Id.* at 93–94. Like the plaintiffs, though, he may have believed that courts have leeway about the circumstances in which to recognize claims for equitable relief.

<sup>557</sup> See *United States v. Richardson*, 418 U.S. 166, 180–81 (1974) (Powell, J., concurring).

<sup>558</sup> *Id.* at 184, 196 n.18.

test into this framework: because that test was not required by Article III, he asserted that it too was a “prudential limit” on standing.<sup>559</sup>

Although Justice Powell initially articulated these ideas in a solo opinion published in 1974, he used the same framework in a majority opinion the following year.<sup>560</sup> In the ensuing decades, this framework became “numbingly familiar”;<sup>561</sup> opinion after opinion recited the “constitutional” requirements for standing (such as “injury in fact”), followed by “prudential” limitations that Congress had the power to override by statute but that courts otherwise were supposed to apply.<sup>562</sup> Often the Court’s examples of “prudential” limitations included the zone-of-interests idea.<sup>563</sup>

In 2014, however, Justice Scalia—writing for a unanimous Court—asserted that “prudential standing” was not an apt label for the zone-of-interests test (or, perhaps, for anything else).<sup>564</sup> According to Justice Scalia, the zone-of-interests test supplies a gloss for interpreting statutes that create rights of action: “[W]e presume that a statutory cause of action extends only to plaintiffs whose interests ‘fall within the zone of interests protected by the law invoked.’”<sup>565</sup> But once a court has used “traditional tools of statutory interpretation” (including the zone-of-interests idea) to figure out “whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim,”<sup>566</sup> the court has no discretion about what to do: “Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because ‘prudence’

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<sup>559</sup> Id. at 196 n.18.

<sup>560</sup> See *Warth v. Seldin*, 422 U.S. 490, 498–500 (1975) (asserting that “[t]he question of standing . . . involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise,” and proceeding to discuss both sets of limitations).

<sup>561</sup> *Fletcher*, supra note 59, at 222.

<sup>562</sup> See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11–12 (2004); *Bennett v. Spear*, 520 U.S. 154, 162–63 (1997); *Allen v. Wright*, 468 U.S. 737, 750–52 (1984); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471–76 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99–100 (1979).

<sup>563</sup> See, e.g., *Elk Grove*, 542 U.S. at 12; *Bennett*, 520 U.S. at 162; *Allen*, 468 U.S. at 751; *Valley Forge*, 454 U.S. at 475.

<sup>564</sup> See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014) (“Although we admittedly have placed that test under the ‘prudential’ rubric in the past, it does not belong there . . .” (citation omitted)); id. at 125 (saying, perhaps more generally, that the label “prudential standing” is “misleading”).

<sup>565</sup> Id. at 129 (quoting *Allen*, 468 U.S. at 751).

<sup>566</sup> Id. at 127.

dictates.”<sup>567</sup> As portrayed by Justice Scalia, then, the analysis that courts had previously conducted under the rubric of “prudential standing” was simply about whether the applicable law gave the plaintiff a right of action.<sup>568</sup>

Admittedly, whether the Court interprets a law to give the plaintiff a right of action may still sometimes depend on whether the law was intended to protect people like the plaintiff against harms of the sort that the plaintiff is alleging. But the number of contexts in which the Court will ask whether someone is an intended beneficiary of a statute has dwindled over time. It seems unlikely that the current Supreme Court will gravitate toward that question when interpreting Rule 24(a). Nor is the Court likely to revive Judge Posner’s references to “prudential standing” in this context.<sup>569</sup>

More generally, one sign of the shakiness of modern doctrine about intervention is that lower federal courts continue to read Rule 24(a) to incorporate ideas that the Supreme Court has explicitly rejected in other contexts. Whatever Chief Justice Warren might have meant in *Flast*, no one currently thinks that plaintiffs who meet the minimum requirements for “Article III standing” can automatically get into court, without any further inquiry into whether the applicable law gives them a right of action. One should not expect the current Supreme Court to reach a sharply different conclusion with respect to intervention. Likewise, whatever the Court may once have said about “implied” rights of action under federal statutes, the current Court will no longer infer a right of action simply because a would-be litigant is among a statute’s intended beneficiaries. Having banished this analysis in the right-of-action context, the Court might not want to preserve it under the rubric of Rule 24.

#### *D. Rule 24 as a Rule about Joinder or Consolidation*

Suppose that in light of the history of intervention, the Supreme Court concludes that the word “interest” in Rule 24(a) refers to some type of *legal* interest (not just a practical “injury in fact”). Suppose, too, that the current Court is not inclined to say that all of the intended beneficiaries

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<sup>567</sup> Id. at 128 (citation omitted).

<sup>568</sup> Academics had reached this conclusion decades earlier. See Fletcher, *supra* note 59, at 252 (“‘Prudential standing,’ in the current usage, . . . determines whether a plaintiff has a federal cause of action.”).

<sup>569</sup> See *supra* text accompanying notes 477–79.

of a statutory or constitutional provision automatically have such an “interest.” What might the Court say instead?

The most natural alternative would read Rule 24(a) as referring to the sort of “interest” that the law recognizes as the basis for a claim or defense. Subject to some nuances discussed below, the Court could hold that someone must be a proper party to a claim for relief in order to become a party to a case as a whole.

Where *permissive* intervention is concerned, Rule 24(b) leaves little room for doubt about this requirement. In the absence of special statutory provisions, permissive intervention is available only to someone who “has a claim or defense that shares with the main action a common question of law or fact.”<sup>570</sup> Although some lower courts have downplayed this requirement, the modern Supreme Court has said that the words “claim or defense” in Rule 24(b) “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.”<sup>571</sup> On this view, Rule 24(b) is a mechanism for consolidating in a single action claims or defenses that might otherwise be litigated separately.<sup>572</sup>

Admittedly, the phrase “claim or defense” appears only in Rule 24(b), not in Rule 24(a). That contrast might seem to support a negative inference: perhaps would-be intervenors can invoke Rule 24(a) without asserting any “claim or defense.” But Rule 24(c) cuts against this inference: Rule 24(c) requires *all* would-be intervenors (including those who invoke Rule 24(a)) to submit “a pleading that sets out the claim or defense for which intervention is sought.”<sup>573</sup> The requirement that all would-be intervenors must submit a “pleading” (such as a complaint or an answer), and that this pleading must “set[] out” a claim or defense, appears to assume that everyone who qualifies for intervention either will be asserting a claim for relief or will be a proper target of a claim for relief asserted by another party. That assumption sheds light on what Rule 24(a)

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<sup>570</sup> Fed. R. Civ. P. 24(b)(1)(B); see also *supra* text accompanying note 197 (quoting similar language in the original version of Rule 24(b)(2)).

<sup>571</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997) (quoting *Diamond v. Charles*, 476 U.S. 54, 76–77 (1986) (O’Connor, J., concurring in part and concurring in judgment)).

<sup>572</sup> Thus, intervention offers a streamlined mechanism for an outside party to join pending litigation rather than filing a separate lawsuit and then seeking consolidation. Cf. Fed. R. Civ. P. 42(a)(2) (“If actions before the court involve a common question of law or fact, the court may . . . consolidate the actions . . .”).

<sup>573</sup> Fed. R. Civ. P. 24(c).

means when it requires would-be intervenors to “claim[] an interest relating to the property or transaction that is the subject of the action.”<sup>574</sup> To judge from Rule 24(c), this language must refer to the type of legal interest that gives rise to a claim or defense.<sup>575</sup>

On this view, the difference between Rule 24(a) and Rule 24(b) does not concern whether the would-be intervenor is a proper party to a claim for relief. Instead, the difference between Rule 24(a) and Rule 24(b) concerns the justifications for litigating the claim to which the intervenor is a party together with the claims that the existing parties have already asserted against each other. Rule 24(a) applies if forcing the would-be intervenor to litigate separately “may as a practical matter impair or impede the [would-be intervenor’s] ability to protect its interest.” Rule 24(b) applies if separate litigation would merely be inefficient (or undesirable for some other reason).

The historical development of the distinction between Rule 24(a) and Rule 24(b) points in the same direction. At least as originally conceived, intervention of right was thought to lie along the same spectrum as permissive intervention, but to involve situations in which the arguments for intervention were so strong that the district court did not really have a choice; denying permission to intervene would be an abuse of discretion.<sup>576</sup> When James William Moore and Edward Levi highlighted this distinction in the 1930s, they never broached the strange idea that outsiders who lacked a relevant “claim or defense,” and who therefore failed to satisfy a threshold requirement for *permissive* intervention, might nonetheless have a *right* to intervene. To the contrary, the requirement of a “claim or defense” was built into Moore and Levi’s very concept of intervention. Here are the opening two sentences of their seminal article:

Intervention may be defined as the procedural device whereby a stranger can present a claim or defense in a pending action or in a proceeding incidental thereto, and become a party for the purpose of the claim or defense presented. The right to resort to this device under

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<sup>574</sup> Fed. R. Civ. P. 24(a)(2).

<sup>575</sup> By “claim,” I mean to include not only claims *in personam* but also the sort of claim that might be asserted in an action *in rem*.

<sup>576</sup> See *supra* text accompanying notes 189–90.

certain circumstances is absolute, while at other times it is dependent upon the discretion of the court.<sup>577</sup>

Of course, even if Rule 24 requires all would-be intervenors to be proper parties to a claim for relief, the relief in question could be purely declaratory. Ever since 1934, litigants have been able to ask federal courts for declaratory judgments “whether or not further relief is or could be sought.”<sup>578</sup> Partly because declaratory judgments can be sought by people who would be defendants in suits for other remedies, and partly because declaratory judgments can be sought before either party has acted in a manner inconsistent with the other party’s asserted legal interests, the Declaratory Judgment Act expands the universe of people who can assert claims for relief, and hence the universe of potential intervenors.

Still, that universe remains limited. By the terms of the Declaratory Judgment Act, a claim for declaratory relief must involve the claimant’s “legal relations,”<sup>579</sup> and the Supreme Court has consistently spoken of the need for “parties having adverse legal interests.”<sup>580</sup> For instance, suppose that A owes a legal duty to B. Even if A’s breach of that duty would inflict economic harm on C, it does not follow that C has a claim for declaratory relief against A.<sup>581</sup> More generally, people can have myriad practical interests in the outcome of litigation without being eligible for declaratory relief, and hence without satisfying the “claim or defense” requirement for intervention.

History does support at least two qualifications of the idea that would-be intervenors must be proper parties to a claim for relief. First, the claims to which they are party do not always have to be ripe at the moment that intervention is sought. Especially if the claims would *become* ripe were the court to grant the relief that an existing party is seeking, those claims might justify intervention even if they would not currently support a stand-alone lawsuit.

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<sup>577</sup> Moore & Levi, *supra* note 118, at 565 (footnotes omitted).

<sup>578</sup> 28 U.S.C. § 2201(a) (2018).

<sup>579</sup> *Id.*

<sup>580</sup> See, e.g., *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

<sup>581</sup> See, e.g., *Edgewood Manor Apartment Homes, LLC v. RSUI Indem. Co.*, 733 F.3d 761, 772 n.2 (7th Cir. 2013) (“The Declaratory Judgment Act provides a cause of action only to those seeking a declaration of their own legal rights.”); *Microchip Tech. Inc. v. Chamberlain Grp., Inc.*, 441 F.3d 936, 943 (Fed. Cir. 2006) (addressing a case in which the plaintiff “had only an economic interest in clarifying its customers’ rights under [the defendant’s] patents,” and concluding that the plaintiff therefore was not eligible for declaratory relief).

For instance, imagine a case in which a federal court is being asked to decree a transfer of property from A to B. If C claims to have a lien on the property, Rule 24(a) may well give C a right to intervene so as to ensure that the court's decree respects and perpetuates C's lien. That is true even if C would not currently be able to maintain a stand-alone suit against either A or B (because, say, A does not deny the existence of the lien and the property has not yet been transferred to B).

By the same token, imagine that A is suing B for an injunction that would require B to behave in a particular way, but C believes that this behavior would violate C's rights in such a way as to give C a claim for relief against B. Even if that claim is not currently ripe (because B does not want to behave in the way that allegedly would violate C's rights), C's *potential* claim against B might still support intervention; if the court were to enter the injunction that A is seeking and if B were to comply with it, C would have a ripe claim for relief against B at that point, and the "interest" underlying that claim might be enough to support intervention now.

As noted above,<sup>582</sup> similar issues can arise with respect to judicial review of agency action. Suppose that a federal agency conducts a rulemaking process, during which A and B disagree about the content of the rule that the agency should promulgate; A supports Option #1 and B supports Option #2. Ultimately, the agency selects Option #1, and B sues the United States under the cause of action for judicial review that the Administrative Procedure Act has been understood to supply. To decide whether Rule 24(a) entitles A to intervene, courts could ask whether A would have a cause of action for judicial review if the agency were to do what B is seeking. To be sure, A does not *currently* have such a cause of action; the agency did what A wanted, and A wants the court to uphold the agency's rule. But if the court were to set aside the rule and force the agency to select Option #2 instead, the Administrative Procedure Act might then enable A to sue the United States for judicial review of the agency's revised rule. Rather than making these suits proceed sequentially, courts could conclude that A is eligible to intervene in the current litigation.

Still, none of these examples contradicts the idea that people seeking to become parties to a lawsuit under Rule 24(a)(2) must be proper parties to a claim for relief. These examples simply suggest that *potential* claims

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<sup>582</sup> See *supra* notes 213–14 and accompanying text.

for relief can sometimes be good enough, if those potential claims would become ripe upon compliance with one of the possible judgments in the lawsuit.

History also supports a second qualification of the idea that all would-be intervenors must be proper parties to a claim for relief. Often, the individual beneficiaries of a trust cannot sue or be sued in their own names; instead, the trustee is the proper party to litigate on their behalf. For centuries, though, individual beneficiaries have been allowed to intervene in cases where there are reasons to believe that the trustee is not adequately representing their interests.<sup>583</sup> The same is true in other cases where a party is litigating in a representative capacity.<sup>584</sup>

Again, though, this history does not contradict the idea that would-be intervenors need the sort of “interest” that would support a claim or defense under the applicable law. In suits brought by or against a trustee, the interests that the trustee is representing can be thought of as belonging to the beneficiaries of the trust; the trustee is simply the litigating agent who advances claims or defenses for the beneficiaries. Indeed, Federal Rule of Civil Procedure 17(a) treats the fact that trustees “may sue in their own names without joining the person for whose benefit the action is brought” as an exception to the ordinary principle that “[a]n action must be prosecuted in the name of the real party in interest.”<sup>585</sup> Although the fact that a trust’s beneficiaries sometimes can intervene in suits brought by or against the trustee complicates efforts to *describe* the requirement that would-be intervenors need a “claim or defense,” this fact is not really an *exception* to that requirement. The beneficiaries do indeed have the kind of interest that supports a claim or defense, even though the trustee normally is the proper person to advance that claim or defense on their behalf.

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<sup>583</sup> See *supra* note 145 and accompanying text.

<sup>584</sup> Cf. *supra* text accompanying note 365 (discussing *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972)).

<sup>585</sup> Fed. R. Civ. P. 17(a)(1). Admittedly, whether one describes an individual beneficiary as a “real party in interest” might depend on what flows from this label. Cf. *Saks v. Damon Raike & Co.*, 7 Cal. App. 4th 419, 427 (1992) (“At common law, where a cause of action is prosecuted on behalf of an express trust, the trustee is the real party in interest because the trustee has legal title to the cause. The corollary to this rule is that the beneficiary of a trust generally is not the real party in interest and may not sue in the name of the trust.” (citations omitted)).



## CONCLUSION

For decades, lower federal courts have read Rule 24 expansively. In some respects, though, the courts' broad interpretations of Rule 24 may have outlived their rationales.

In the late 1960s, when the D.C. Circuit started holding that people can be entitled to intervene in a case even if they are not proper parties to any claim for relief, some members of the court were trying to allow broader participation in suits seeking judicial review of agency action.<sup>586</sup> Reading Rule 24 broadly was one way to accomplish this result. But in the 1970s and 1980s, the Supreme Court took a more direct approach: the Court reinterpreted the APA to expand the universe of plaintiffs who have claims for relief when federal agencies act unlawfully.<sup>587</sup> Given current doctrine on that topic, requiring intervenors to be proper parties to a claim for relief would no longer restrict intervention in administrative-law cases as much as it once did—meaning that the D.C. Circuit's broad interpretation of Rule 24 is no longer necessary to achieve what may have been its original purpose.<sup>588</sup>

Even outside the domain of administrative law, of course, one might think that courts will reach better decisions if they hear from a broad range of concerned groups, or that it is only fair to let people intervene in cases that might affect them. While the current Supreme Court does not share Professor Chayes's vision of litigation, one need not be fully committed to the "interest representation" model to think that a liberal approach to intervention has benefits. But experienced litigators note that many of those benefits could be achieved simply by allowing outsiders to present their views as amici.<sup>589</sup> And whatever benefits might flow from the current approach to intervention, allowing a broad swath of people who care about the outcome of a case to conduct discovery, file motions,

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<sup>586</sup> See *supra* text accompanying notes 208–12, 371.

<sup>587</sup> See *supra* text accompanying notes 527–37.

<sup>588</sup> Something similar might be said about the lower courts' decision to expand intervention of right under Rule 24(a) at the expense of permissive intervention under Rule 24(b). Before 1990, federal district courts could exercise ancillary jurisdiction over claims by or against people who were intervening of right, but not over claims by or against people whose intervention was discretionary. See *supra* notes 199–200 and accompanying text. To the extent that intervention seemed desirable, this constraint on ancillary jurisdiction created pressure for courts to read Rule 24(a) broadly and to downplay Rule 24(b). See, e.g., *supra* note 207. With the enactment of 28 U.S.C. § 1367 in 1990, that pressure has faded. See *supra* note 199. Still, courts have not rethought the balance between Rule 24(a) and Rule 24(b).

<sup>589</sup> See Appel, *supra* note 117, at 307–09; Goldberg, *supra* note 47, at 5.

participate in hearings, and take appeals surely has costs.<sup>590</sup> One way to strike the necessary balance would be to limit intervention to people who are proper parties to a claim for relief, while letting other concerned people participate as amici.

In my view, standard techniques of interpretation cut strongly against the expansive reading that lower courts gave Rule 24(a) in the late 1960s and that they continue to apply. For instance, notwithstanding Chief Judge Bazelon's opinion in *Smuck v. Hobson*, I see no legal basis for the conclusion that people can have a right to intervene under Rule 24(a)(2) even though they would not be necessary parties under Rule 19(a)(1)(B)(i); the two rules use essentially the same language, which was adopted at the same time and apparently was intended to refer to the same people. The link between intervention of right and required joinder, moreover, is consistent with historical understandings of the type of "interest" that might entitle an outsider to intervene—and the Reporter for the Advisory Committee that proposed the key language expected courts to interpret it in light of both "the historic continuity of the subject of intervention" and "the concepts of new rule 19."<sup>591</sup>

The idea that intervenors must normally be proper parties to a claim for relief finds support not only in Rule 24(b) (which explicitly requires applicants for permissive intervention to "ha[ve] a claim or defense that shares with the main action a common question of law or fact"), but also in Rule 24(c) (which requires *all* intervenors to submit "a pleading that sets out the claim or defense for which intervention is sought"). To the extent that modern courts read Rule 24 to allow intervention by people who are not themselves proper parties to a claim for relief, modern courts apparently think that Rule 24(c) simply requires intervenors to identify the claim or defense that they care about. But one would not adopt that interpretation unless one were already committed to reading Rule 24 expansively. The fact that intervenors must submit "a pleading" of their own strongly suggests that the "claim or defense" set out in that pleading must also be their own.

Even if courts have misinterpreted Rule 24, one might doubt that their error implicates broader issues. On closer inspection, though, the lower courts' doctrines about intervention raise deep questions about the structure of lawsuits and the functions of courts. It is no accident that a

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<sup>590</sup> See Appel, *supra* note 117, at 301–04.

<sup>591</sup> Kaplan, *supra* note 279, at 405.

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broad reading of Rule 24 played an important role in Professor Chayes's seminal discussion of the interest-representation model of litigation. To the extent that the Supreme Court is skeptical of that model, it would also be no accident if the Court were to revert to more traditional notions about the requirements for becoming a party.