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# INTERVENTION IN PUBLIC LAW LITIGATION: THE ENVIRONMENTAL PARADIGM

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Since the time that the late Abram Chayes coined the term “public law litigation” in his landmark *Harvard Law Review* article, commentators have analyzed federal court cases aimed at reforming public institutions under Chayes’s theoretical description<sup>1</sup> rather than the more traditional view of civil litigation.<sup>2</sup> Although Chayes first coined the descriptive phrase in 1976, the phenomenon of lawsuits aimed at institutional reform and the remedial devices used to effect that reform had existed for many years, as Chayes himself recognized.<sup>3</sup> Moreover, the phenomenon that Chayes dubbed “public law litigation” and the general subject of public interest litigation had numerous intellectual antecedents in description and analysis before Chayes wrote his article.<sup>4</sup> Nevertheless, Chayes’s term has stuck, and analysts of public law litigation use his work as their usual starting point.<sup>5</sup>

Litigation which Chayes labeled “public law litigation” grew especially quickly in the decade immediately before Chayes wrote his article. This growth was due, in no small part, to the 1966 amendments to the Federal Rules of Civil Procedure.<sup>6</sup> These amendments introduced a more

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\* Assistant Professor, University of Georgia School of Law. B.A., J.D. Yale University. I formerly served as an attorney in the Appellate Section of the Environment and Natural Resources Division, United States Department of Justice, and the ideas in this article stem from ideas that occurred to me in the course of cases I litigated. For whatever interest it may have for the reader, I have identified those cases in which I served as the primary counsel for the federal government on appeal. I would like to thank the following people for their generous help and suggestions: Robert D. Brussack, Dan Coenen, C. Ronald Ellington, Charles R.T. O’Kelley, Margaret V. Sachs, James Smith, Jay Tidmarsh, Carl Tobias, Alan Watson, Camilla Watson, Rebecca White, and, of course, Christine Albright. All errors that remain are, of course, my own. I dedicate this article to my parents.

1. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

2. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). Fuller’s article was a posthumous publication of an essay first written in 1957. See *id.* at 353.

3. See Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 481-86 (1980); see also Chayes, *supra* note 1, at 1288 (dating origins of public law litigation to approximately 1875).

4. See, e.g., Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

5. For a thoughtful consideration of Chayes’s article and its impact, see Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647 (1988). The most impressive, albeit most crude, measure of the article’s impact is that in 1996 it was the sixth most-frequently-cited law review article in other law review articles. See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 766 (1996).

6. See Amendments to Rules of Civil Procedure for the United States District Courts, 383 U.S. 1029 (1966).

transactional approach to litigation and made the rules concerning party structure more flexible. In particular, the amendments modified Rule 19, which governs joinder of nonparties by the parties to the suit;<sup>7</sup> Rule 23, which governs class action lawsuits;<sup>8</sup> and Rule 24, which governs intervention by nonparties into ongoing litigation.<sup>9</sup> According to the major proponents of public law litigation, making party structure more flexible should encourage public law litigation to flourish. The 1966 amendments would have had this effect, proponents assert, were it not for resistance of the bench to public law litigation. In particular, the proponents of public law litigation contend that judges have excluded parties that should be included in the litigation by denying intervention to outsiders. According to the standard argument, the absence of these intervening parties has had two negative effects. First, it has limited the ability of the court to receive the useful information supplied by outsiders and to structure appropriate remedies. Second, it has injured the absentees.<sup>10</sup>

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7. FED. R. CIV. P. 19.

8. FED. R. CIV. P. 23.

9. FED. R. CIV. P. 24.

10. For the standard account that courts have been unduly and unwisely unresponsive to proposed intervenors, see, for example, Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH. J. RACE & L. 263 (1999); Emma Coleman Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 31 (1979) [hereinafter Jones, *Litigation Without Representation*]; Emma Coleman Jones, *Problems and Prospects of Participation in Affirmative Action Litigation: A Role for Intervenor*, 13 U.C. DAVIS L. REV. 221 (1980) [hereinafter Jones, *Problems and Prospects*]; Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 322-28 (1989) [hereinafter Tobias, *Public Law Litigation*]; Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415 [hereinafter Tobias, *Standing to Intervene*]; Ellyn J. Bullock, Note, *Acid Rain Falls on the Just and the Unjust: Why Standing's Criteria Should Not Be Incorporated into Intervention of Right*, 1990 U. ILL. L. REV. 605; Joshua C. Dickinson, Casenote, *Standing Requirements for Intervention and the Doctrine of Legislative Standing: Will the Eighth Circuit "Stand" by its Mistakes in Planned Parenthood of Mid-Missouri & Eastern Kansas, Inc. v. Ehlmann*, 32 CREIGHTON L. REV. 983 (1999); Brian 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 (1998); Cindy Vreeland, Comment, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279 (1990); see also Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 288 (1990).

Academic commentary questioning this argument is rare, but it exists. See, e.g., Jack H. Friedenthal, *Increased Participation by Non-Parties: The Need for Limitations and Conditions*, 13 U.C. DAVIS L. REV. 259 (1980); Rodrick J. Coffey, Note, *Giving a Hoot About an Owl Does Not Satisfy the Interest Requirement for Intervention: The Misapplication of Intervention as of Right in Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of the Interior*, 1998 B.Y.U. L. REV. 811 (1998). For commentary taking an intermediate position, see Stephen C. Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 UCLA L. REV. 244, 244 (1977) ("It is my thesis that such an expansion of intervention doctrines can be useful if the courts recognize that the participation of additional parties under these circumstances is serving special functions."); Ernest E. Shaver, Note, *Intervention in the Public Interest Under Rule 24(a)(2) of the Federal Rules of Civil Procedure*, 45 WASH. & LEE L. REV. 1549,

Using the jurisprudence that has developed concerning intervention as of right under Rule 24(a),<sup>11</sup> this article questions these two assertions. First, courts have been receptive to amorphous party structure in public law cases, allowing intervention in many instances where it would not have been allowed before the 1966 amendments to the Federal Rules of Civil Procedure. Even with more recent limitations on intervention as of right by some courts of appeals—in particular, requiring applicants for intervention to demonstrate that they possess constitutional standing to sue—most federal courts permit the flexible party structure called for by public law litigation advocates. Second, it is far from clear in many instances how allowing intervention assists the litigation, particularly when the outsider has intervened as a defendant. Rather, in many instances the parties and the judge can realize the advantages of involving an outsider to the litigation without formal intervention as of right. Thus, contrary to the arguments of most scholars in this area, I believe that the courts have, for the most part, decided the cases correctly, and have certainly allowed intervention in more cases than they would have prior to the 1966 amendments.

These conclusions stem in part from analysis of a form of public law litigation frequently overlooked or inadequately analyzed in the standard literature, namely environmental and natural resources litigation. The underanalyzed characteristics of this litigation undermine the general arguments about the value of intervention in all public law litigation. Environmental cases are just as sprawling and complex as the civil rights cases often associated with public law litigation. Nevertheless, environmental cases are frequently different from civil rights cases because of the types of rights involved (statutory as opposed to constitutional), the administrative setting, and the consequent standard of review and evidentiary limitations

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1573-74 (“Although applicants seeking to represent the public’s interests in an action may often perform a useful service to society, courts must carefully regulate intervention under Rule 24(a)(2) to protect the rights of the original parties to the action and to insure that applicants do not abuse the judicial process by intervening unnecessarily.”). One of the articles by Emma Coleman Jones and the article by Jack Friedenthal appear in *Problems of Intervention in Public Law Litigation: A Symposium*, 13 U.C. DAVIS L. REV. 211 (1980) [hereinafter *Symposium: Problems of Intervention*].

For analyses of intervention under Rule 24 from primarily a private law perspective, see Edward J. Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701 (1978); John E. Kennedy, *Let’s All Join In: Intervention Under Rule 24*, 57 KY. L.J. 329 (1969); David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721 (1968); Gene R. Shreve, *Questioning Intervention of Right—Toward a New Methodology of Decisionmaking*, 74 NW. U. L. REV. 894 (1980); Jeffery L. Rensberger, Note, *Ancillary Jurisdiction and Intervention Under Federal Rule 24: Analysis and Proposals*, 58 IND. L.J. 111 (1982); Comment, *The Litigant and the Absentee in Federal Multiparty Practice*, 116 U. PA. L. REV. 531, 541-44 (1968).

11. See FED. R. CIV. P. 24(a).

that apply. A recent series of cases from the Pacific Northwest involving endangered and threatened stocks of salmon illustrate the distinction between environmental and civil rights cases. These cases show that intervention is both frequently granted and of questionable utility.

This Article consists of four parts. Part I explores the theoretical development of public law litigation, with a particular focus on the overlooked role that environmental litigation and its peculiarities should play in this thinking. Part II examines the history and development of intervention as a procedural device, and then outlines how it presently functions in public law cases. Part III then examines the interrelated claims that federal courts generally have been too stingy with potential intervenors<sup>12</sup> and that an increased role for intervenors necessarily benefits public law litigation. The best case that supporters of a broader right of intervention have to support their argument that courts are hostile to intervenors is that some courts of appeals require intervenors to show that they have standing to sue under Article III of the Constitution. Although I agree that courts should not incorporate standing as part of the interest requirement, I nevertheless conclude that this requirement does not, in the end, threaten a broad right to intervene. In addition, many of the benefits that promoters of a broad right of intervention argue exist simply do not. Part IV then suggests modest changes to intervention practice in public law litigation. Part IV suggests changing the standard of review that the courts of appeals use in weighing appeals over the denial of intervention, adding more criteria for courts to consider, and explicitly providing a rule for outsiders to participate as *amicus curiae* in trial courts. These proposals preserve the flexibility that has characterized intervention and public law litigation while making such litigation more manageable.

The fact that I suggest changes to intervention practice should not be taken to mean that I oppose intervention in public law cases. To the contrary, I believe that intervention can often benefit litigation and the courts that must decide these disputes. Throughout this piece, I will indicate cases in which I believe the court erred in denying intervention. For the most part, however, I believe that courts are quite receptive to intervention petitions.

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12. Every law review article should have its author stake out a position on a matter as important, fractious, and disputatious as spelling, and this one is no exception. There is a hot debate in the legal literature whether an intervening party should be called an “intervenor” or an “intervener.” The standard law dictionary does not list the “er” ending. BLACK’S LAW DICTIONARY 820 (6th ed. 1990). Nevertheless, Professors Shapiro and Shreve explicitly stake out the “er” claim, and others follow without comment. See Shapiro, *supra* note 10, at 725, n.18; Shreve, *supra* note 10, at 896 n.8; see also, e.g., Kennedy, *supra* note 10, at 330 (using “er” ending without comment). I have decided to use the “or” suffix.

## I. THE THEORETICAL DEVELOPMENT OF PUBLIC LAW LITIGATION

As typically portrayed in the public law litigation literature, the traditional form of civil action consists of one party suing another: *A v. B*. *A* sues *B*, either because *B* breached a legal right of *A*, causing an injury that *B* should rectify, or because *B* was for some other reason responsible for rectifying *A*'s injury (such as an injury to *A* caused by *B*'s servant). The remedy that ensues from this examination of past conduct takes a concrete form and follows directly from the right that the defendant violated. If the court finds *B* liable, it orders *B* to pay money in damages to *A* to compensate *A* for the damages that the law recognizes. Alternatively, the court can order *B* to refrain from an activity—"B shall nevermore trespass on A's land"—or to undertake a specific activity—"B shall return A's lawful property to A."<sup>13</sup>

Professor Chayes described a different form of civil action, one he labeled "public law litigation."<sup>14</sup> Chayes believed that this "new" form of civil action was an altogether different animal from the traditional model. In this form of litigation, the subject of the dispute is not merely a private controversy but a "grievance[ ] over the administration of some public or quasi-public program and to vindicate the public policies embodied in the governing statutes or constitutional provisions."<sup>15</sup> As defined by Chayes, public law litigation has several interrelated characteristics. Chayes reduced these characteristics to eight qualities, which can in turn be summarized in four points. First, the parties and the court, rather than outside principles of law, shape the lawsuit, leading to a "party structure [that] is not rigidly bilateral but sprawling and amorphous."<sup>16</sup> Second, the relevant set of facts are not simply past facts but future predictions, leading to relief that is not grounded merely in the past but "is forward looking, fashioned ad hoc on flexible and broadly remedial lines."<sup>17</sup> Third, "[t]he remedy is not imposed but negotiated," not simply among the parties but also the court, for the "administration [of the remedy] requires the continuing participation of the court."<sup>18</sup> Throughout, the judge remains "active, with responsibility . . . for organizing and shaping the

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13. Although injunctive relief is often characterized as equitable, *see, e.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), Professor Subrin describes instances in which common law courts could award nonmonetary relief. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 915 & n.30 (1987).

14. *See* Chayes, *supra* note 1, at 1284.

15. Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 4 (1982).

16. Chayes, *supra* note 1, at 1302.

17. *Id.*

18. *Id.*

litigation to ensure a just and viable outcome.”<sup>19</sup> This role for the judge reflects the fourth and final characteristic of public law litigation, that the “subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.”<sup>20</sup>

Chayes recognized<sup>21</sup> and others have elaborated,<sup>22</sup> that the supposedly new form of civil action that Chayes described has historical antecedents in other types of civil actions. In an influential article, Professors Eisenberg and Yeazell argued that the “novelty” that Chayes identified, “lies in substance and power, not in procedure and remedy.”<sup>23</sup> Looking at historical precedents, Eisenberg and Yeazell found that “old litigation frequently involves the elaborate decrees requiring continuous supervision that is quite common in institutional cases.”<sup>24</sup> These complex historical antecedents involved a number of different types of cases, including elaborate personal trusts and receiverships involving large corporations, particularly railroads.<sup>25</sup>

Chayes’s article became the most prominent example of a set of scholarship which arose at the same time. Much of this writing concerned the role of the courts, in particular, the federal courts, in shaping social policy. Many heralded the involvement of the courts in shaping social policy.<sup>26</sup> Others expressed concerns about the legitimacy of this enterprise and doubts about whether the courts possessed the institutional competence to undertake broad changes in social policy and social institutions.<sup>27</sup> What distinguished Chayes’s 1976 article, then, was not its entry into the general (and still ongoing) debate about the role of the courts in shaping issues that affect broader social policy, but its assertion that a new form of litigation had emerged—or, in the broadest version of Chayes’s argument, that litigation now more typically consisted of institutional reform or public law litigation

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19. *Id.*

20. *Id.*

21. *Id.* at 1288-89 (tracing origins of public law litigation to changes occurring “[s]ometime after 1875”).

22. *See, e.g.,* Eisenberg & Yeazell, *supra* note 3.

23. *Id.* at 467.

24. *Id.* at 481.

25. *See id.* at 481-86.

26. *See, e.g.,* Jaffe, *supra* note 4. As Richard Marcus has observed:

By 1976, the concept of public law was hardly new. Neither was the phenomenon of public law litigation wholly new. For some time, commentators had been writing about the “new wave” lawyers who brought nontraditional cases. Others had recognized that this activity raised problems that were difficult to explain in traditional terms. . . . Beyond that, concern about the legitimacy of judicial efforts to implement social policy through structural decrees was widespread.

Marcus, *supra* note 5, at 656 (footnotes omitted).

27. *See, e.g.,* DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); Gerald Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Fuller, *supra* note 2.

rather than private litigation.

The term “public law litigation” defies crisp definition. Reduced to the basic principle that public law litigation consists of lawsuits that concern “the operation of public policy,”<sup>28</sup> the term could easily consume most litigation that involves the interpretation of the Constitution or a statute of broad application. For example, the decision in *Miranda v. Arizona*<sup>29</sup> affected law enforcement nationwide, but it did not result from complex litigation. The law-generating function of courts is inherent in any system based on stare decisis. Indeed, Owen Fiss has argued that, to the extent that litigation generates law through precedent in a system that relies on stare decisis, courts should not engage in settlement efforts that compromise this law-generation function on behalf of the public.<sup>30</sup> Few, if any, other commentators have gone quite this far, but most accept that one of the hallmarks of public law litigation is that it will generate norms that govern people not parties to the litigation—that the litigation will have “important consequences for many person including absentees.”<sup>31</sup> When I use the term “public law litigation,” then, I mean the lawsuits that meet Chayes’s original eight criteria, his benchmarks for determining whether a case is public law litigation or not.<sup>32</sup>

Whatever the merits of the criticism of public law litigation, federal lawsuits aimed at reforming public institutions are now a settled part of the legal landscape.<sup>33</sup> For example, the Supreme Court has recognized that a different and more flexible set of remedial rules may come into play in

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28. Chayes, *supra* note 1, at 1302.

29. 384 U.S. 436 (1966).

30. See Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

31. Chayes, *supra* note 1, at 1302.

32. See *supra* notes 16-20 and accompanying text; see also Chayes, *supra* note 1, at 1302.

33. In a subsequent article, Chayes criticized the Burger Court for attempting to cut back on public law litigation. See Chayes, *supra* note 15. Nevertheless, he concluded that the Court could not resist public law litigation.

[E]ven a conservative Court is reduced . . . to practicing public law litigation. When, for example the Court pronounces on the constitutionality of an indemnity scheme for nuclear accidents or the existence of a statutory requirement for deinstitutionalization of retarded persons, the essential character of the litigation is the same whether the Court upholds the claim or rejects it. Whatever the outcome, the Court is not engaged in settling a dispute between private individuals, or even between an individual and a public official. It is resolving a controversy growing out of “the systemic effects” of governmental action. Such decisions will necessarily have far-reaching effects on myriads of persons not individually before the Court and on political, economic, and institutional structures. Whatever the result, the determination rests more-or-less directly on considerations of public policy. . . . It is these characteristics that define public law litigation and that account for the departures from the traditional model at the level of procedure and judicial role.

*Id.* at 57-58 (footnote omitted). Thus, Chayes believed that courts could not resist involving themselves in public law litigation, whatever tactics they might use.



institutional reform litigation.<sup>34</sup> Courts have also repeatedly dealt with cases that involve many parties and implicate legal principles of broad application. Federal courts have reorganized school systems, instituted prison reform, and changed the direction of public works projects. Thus, federal courts are now familiar, if not entirely comfortable, with the institutional reform lawsuit.<sup>35</sup>

The principal means through which most courts gained their familiarity with public law litigation was through civil rights lawsuits aimed at institutional reform based on constitutional values. These lawsuits then shaped how federal courts would cope with public law litigation generally. After briefly describing the civil rights litigation and its effect on the thinking in this era, I will show how the ideas developed in that context spilled over into other areas of public law litigation. Whether the lessons learned in the civil rights context were appropriately applied in other situations will be explored in Part III.

### A. *The Civil Rights Paradigm*

Most of the analysis of public law litigation uses as paradigmatic the civil rights dispute, specifically cases concerning school desegregation, prison reform, and mental institution reform. Indeed, a 1980 symposium on the question of intervention in public law litigation focused exclusively on public law litigation involving civil rights questions.<sup>36</sup> Mark Tushnet has argued that public law litigation arose directly from the desegregation cases following *Brown v. Board of Education*.<sup>37</sup> Tushnet claims that once federal courts

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34. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380-81 (1992). Just as the Supreme Court has recognized the institutional reform lawsuit, Congress has made efforts to take it away. In 1996, Congress limited the discretion that federal judges have in public law litigation aimed at reforming state and federal prisons. Prison Litigation Reform Act, Pub. L. No. 194-134, tit. VIII, sec. 802(a), 110 Stat. 1321-66 (1996) (codified at 18 U.S.C. § 3626 (Supp. III 1997)).

35. In this sense, I am something of a fatalist about the state of the case law in this area. Compare Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763, 1769 (1993) (book review). Schuck divides scholarly views on public law litigation into three groups: “strong-court” scholars, “court skeptics,” and “court fatalists.” *Id.* The first group “believe[s] that the courts are often effective reformers by reason of their unique institutional features.” *Id.* The second group “hold[s] that court-directed reform, although not inevitably doomed to failure, is highly problematic.” *Id.* Schuck describes “court fatalists” as those who “maintain that the effectiveness of social reform depends on factors that courts can perhaps reinforce, but to which they are otherwise either irrelevant or epiphenomenal.” *Id.* I am a court fatalist not in the sense that I believe that courts cannot achieve social reform by themselves, but because I believe they are constrained in institutional ways (both by statute and their own precedent) that makes reform through litigation cumbersome. Nevertheless, courts necessarily become fonts of reform because they are faced with cases that they must decide and that can have an impact on many people beyond those who are parties before them.

36. See *Symposium: Problems of Intervention*, *supra* note 10, at 211.

37. 347 U.S. 483 (1954); see Mark Tushnet, *Public Law Litigation and the Ambiguities of Brown*, 61 *FORDHAM L. REV.* 23 (1992).

“gain[ed] experience in supervising important bureaucratic institutions in the school setting, the lower courts began extending their supervision to other institutions similarly regulated by the Constitution.”<sup>38</sup>

Much of the scholarship surrounding public law litigation thus uses these prototypical cases as its standard example.<sup>39</sup> The reason for this heavy reliance on the civil rights cases for the concrete context in which these authors theorized is obvious. The courts in those cases met with resistance and intransigence by the officials in charge of the schools, mental hospitals, and prisons that were the subjects of the litigation. The social milieu in the two decades preceding the publication of Chayes’s article saw the great struggles for equal rights for minorities and women, attempts to modernize the care for the mentally disabled, and horror at brutal prison conditions.

The civil rights cases are thus an important underpinning of the arguments of the commentators that favor public law litigation generally. These cases also have at least three important similarities with each other. First, the rights involved emerge from the development of constitutional principles. When a court involves itself in overseeing the conditions at a prison, it does so because it has interpreted the Eighth Amendment to require the court’s involvement and supervision.<sup>40</sup> Similarly, when a court oversees the management of a mental institution or orders a school district to desegregate, it does so to vindicate constitutional values. This aspect of public law litigation led Eisenberg and Yeazell to argue that the novel aspect of public law litigation was not new procedural rules but new substantive rights.<sup>41</sup> Second, the litigation usually involves a judicial determination of the factual basis for the lawsuit, rather than the review of a record created by another governmental entity. The court must ask itself whether a school district engaged in discrimination or whether the conditions in which prisoners live constitute cruel and unusual punishment. Third, a court need not pay any special deference to any of the parties of the lawsuit. While a court can listen to the views of the prison officials or school supervisors, it determines for

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38. Tushnet, *supra* note 37, at 25.

39. See, e.g., Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 1-5 (1984) (tracing development of public law litigation); Owen M. Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 4 (1979) (finding origins of structural reform in desegregation, mental hospital, and prison cases).

40. See, e.g., *Ruiz v. Lyne*, 811 F.2d 856 (5th Cir. 1987); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (barring use of corporal punishment). For a recent consideration of the role of prison litigation in the development of public law litigation and the questions of creating new rights, see Stephen P. Garvey, *Did Making over the Prisons Require Making up the Law?*, 84 CORNELL L. REV. 1476 (1999) (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (1998)).

41. Eisenberg & Yeazell, *supra* note 3, at 467; see also text accompanying note 23.

itself the facts involved and the remedial measures to take. As I will now show, these features of civil rights litigation do not necessarily apply to other types of public law litigation, specifically environmental litigation.

### *B. Environmental Public Law Litigation*

Although they are important examples of public law litigation, the civil rights institutional reform cases do not make up the entire universe of public law litigation. Another important form of public law litigation is the environmental lawsuit. Chayes and others give a passing nod to the environmental dispute as a candidate case for being public law litigation.<sup>42</sup> But their writings, and those of others, reveal that these scholars have not considered the particular qualities of most environmental cases that involve public law litigation.<sup>43</sup>

It is not hard to see why scholars initially focused on civil rights litigation and largely ignored environmental litigation, except in passing. At the time that Chayes wrote his article, sweeping federal statutes governing environmental conduct were fairly young. The civil rights struggles, by contrast, had been in the courts and debated publicly for a much longer time. Moreover, although environmental issues were entering the social conscience, litigation had not been used as extensively as a tool of achieving environmental ends as it had in the civil rights arena. Finally, to the extent that litigation was used, it generally did not have the sweeping effects of the civil rights lawsuits. Rather, it resembled the older type of litigation, like common law nuisance suits, that Chayes believed were fading in importance. Environmental law may have simply supplied statutory criteria for behavior, as opposed to the balancing called for by common law nuisance. Environmental litigation, for the most part, did not generate new forms of procedure and new types of remedies.<sup>44</sup>

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42. See, e.g., Chayes, *supra* note 1, at 1284; Chayes, *supra* note 15, at 6 (citing Clean Water and Clean Air Acts as examples of statutes “mandating or inviting affirmative enforcement by the courts”); Fiss, *supra* note 39, at 29 (mentioning in passing reference environmental cases as part of new litigation).

43. One notable exception to this statement are the thought-provoking articles of Professor Carl Tobias. His articles frequently use case examples from the environmental area. See, e.g., Tobias, *Public Law Litigation*, *supra* note 10, at 294 n.158, 320-25. Also, some analyses of public law litigation focus on the environment as an issue. Indeed, the most recent commentary on intervention has largely focused on environmental concerns. See, e.g., Bullock, *supra* note 10; Hutchings, *supra* note 10; Vreeland, *supra* note 10. Nevertheless, these more extensive analyses of environmental public law litigation, like the passing references in the writings of Chayes, Fiss, and others, do not examine more fully the salient features of environmental litigation that I explore below.

44. An important exception to this general statement is *United States v. Reserve Mining Co.*, 56 F.R.D. 408 (D. Minn. 1972). I discuss *Reserve Mining* below. See *infra* notes 55-59 and accompanying

Cases concerning the environment fit the definition of public law litigation. As noted earlier, Eisenberg and Yeazell have identified several types of older cases (such as probate cases and large corporate reorganizations) that fit the definition of public law litigation.<sup>45</sup> One example they overlook is the general stream adjudication. A general stream adjudication is akin to a bankruptcy proceeding. It quantifies the relative rights and priorities of claimants to a single water source.<sup>46</sup> The party structure is not *A v. B*, but rather *A* against the entire world for a share of the water in the disputed water body. In some respects, the general stream adjudication resembles the old form of civil action because the end result is a decree over a limited resource. It could thus be characterized as simply a complicated interpleader action, an action by a stakeholder to determine to whom the stake belongs.

If one were to characterize the general stream adjudication as simply an interpleader action, however, one would fail to take into account other characteristics of this sort of litigation, in the same way that so characterizing a bankruptcy case would ignore other facets of certain bankruptcies.<sup>47</sup> A general stream adjudication decides numerous issues that have important ongoing consequences for the water body at issue. The court in such an adjudication decides how much each claimant can take in a year and what the relative priority of the claims is. The court must also quantify the previously unquantified rights of sovereigns such as the federal government and any Indian tribes claiming a right from the water body.<sup>48</sup> As a practical matter, such decisions can make or break economic development on an Indian reservation and can determine future uses of federal public lands.<sup>49</sup> A general stream adjudication can also enforce the principle of beneficial use, a driving force in the water law of the West.<sup>50</sup> While beneficial uses include such

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text.

45. See Eisenberg & Yeazell, *supra* note 3, at 481-86.

46. One of the most extensive uses of the bankruptcy analogy is found in *Rettkowski v. Department of Ecology*, 858 P.2d 232, 238 (Wash. 1993).

47. Cf. Eisenberg & Yeazell, *supra* note 3, at 485-86.

48. Under the reserved water rights doctrine, the courts have held that, when the federal government reserves public lands, it also reserves a sufficient quantity of water to satisfy the needs of the reservation. See *United States v. New Mexico*, 438 U.S. 696 (1978); *Cappaert v. United States*, 426 U.S. 128 (1976); *Winters v. United States*, 207 U.S. 564 (1908). If the reservation was set aside for Indians and the federal government sought to encourage agricultural development, the amount of water that the Indians will receive is the amount necessary to irrigate all practicably irrigable acreage on the reservation. *Arizona v. California*, 373 U.S. 546 (1963). For an interesting insight into the possible future of this standard, see Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States*, 68 U. COLO. L. REV. 683 (1997).

49. See, e.g., *United States v. New Mexico*, 438 U.S. at 705.

50. Under the law of most western states, a claimant from a water body must put any water

traditional uses as mining, irrigation, power production, and municipal water supply, courts now recognize that leaving water in the system—so-called instream flows—is a beneficial use as well.<sup>51</sup> These determinations can decide the fate and health of an entire water system.

Scholars of public law litigation may have overlooked the example of the general stream adjudication because these cases, for the most part, take place in state courts.<sup>52</sup> Thus, although similar to other public law litigation in complexity, the general stream adjudication provides little guidance for the workings of the Federal Rules of Civil Procedure in public law litigation.<sup>53</sup>

Two other situations from the field of environmental law provide better examples of the relevance of environmental litigation to the study of public law litigation. The first example is often cited by scholars of public law litigation: the litigation that ensues from cleaning up a hazardous waste site or controlling pollution at a site.<sup>54</sup> These cases can involve complex problems of the extent to which the pollution at the site causes harm, the propriety of allowing the polluter to continue polluting, and the economic consequences of closing the polluting firm. *United States v. Reserve Mining Co.*, involving pollution of Lake Superior by a large industrial facility, is frequently cited as an example of this type of litigation.<sup>55</sup> In that case, the district court faced

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appropriated to a “beneficial use.” See 2 WATERS AND WATER RIGHTS § 12.03(c) (Robert E. Beck ed., 1991) (“Beneficial use is required universally.”); see also *id.* § 12.03(c)(2) (explaining concept of beneficial use). The opposite of beneficial use is waste, which the law proscribes.

51. See, e.g., *Department of Ecology v. Yakima Reservation Irrigation Dist.*, 850 P.2d 1306 (Wash. 1993) (recognizing instream flow to benefit salmon in Yakima River).

52. The federal government waived its sovereign immunity to suits in state courts to establish relative rights to waterbodies in the McCarran Amendment. 43 U.S.C. § 666 (1994). The Supreme Court has held that this waiver of the federal government’s sovereign immunity also waives its sovereign immunity with respect to its role as trustee for Indian tribes, so that tribal rights may also be litigated in state courts. See *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). Thus, all relevant sovereigns may be joined in a single state court proceeding to determine the relative rights in a waterbody. A notable exception to this statement is the *Arizona v. California* litigation over rights to the Colorado River, which the Supreme Court heard in its original jurisdiction. See *Arizona v. California*, 460 U.S. 605 (1983); *Arizona v. California*, 373 U.S. 546 (1963).

53. Nevertheless, the general stream adjudication is a helpful example to add to those offered by Eisenberg and Yeazell in their article, namely the examples of probate and trusts. Eisenberg & Yeazell, *supra* note 3, at 482-85. Probate cases take place in state courts, and often in specialized courts, as do general stream adjudications.

54. See, e.g., Chayes, *supra* note 1, at 1284 (including “environmental management” cases in public law litigation; Fiss, *supra* note 39, at 29 (mentioning “environmental” cases as evidence that the standard story concerning the function of courts misleads).

55. The reported opinions in the *Reserve Mining* case include: *United States v. Reserve Mining Co.*, 543 F.2d 1210 (8th Cir. 1976); *Reserve Mining Co. v. Lord*, 529 F.2d 181 (8th Cir. 1976); *United States v. Reserve Mining Co.*, 380 F. Supp. 11 (D. Minn. 1974); *United States v. Reserve Mining Co.*, 56 F.R.D. 408 (D. Minn. 1972) (granting intervention to fifteen parties but limiting participation). For more thorough discussions of the *Reserve Mining* case, see THOMAS F. BASTOW, “THIS VAST POLLUTION...” (1986); FRANK D. SCHAUMBURG, JUDGMENT RESERVED: A LANDMARK

allegations of the pollution of the water supply of a major city (Duluth, Minnesota) and questions of the risk, if any, posed by that pollution. The case also involved a facility that employed hundreds of people in the community. For many scholars, *Reserve Mining* is noteworthy for its grappling with the judicial role in deciding the acceptable risk from pollution.<sup>56</sup> This weighing of risks to health against the value of jobs involves some of the policy-making functions that Chayes identifies as part of the role of the judge in public law litigation.<sup>57</sup> For purposes of this article, however, the importance of *Reserve Mining* lies in its approach to the party-structure issue that forms the focus of this article. In *Reserve Mining*, the district court judge, Miles Lord, allowed a number of parties to intervene both as plaintiffs and defendants. In a passage that Chayes's article would later echo, Judge Lord justified allowing the parties to intervene because of the nature of the litigation.

The role of a court in such a situation, because of the nature of the proceedings and considerations which must be reviewed and undertaken pursuant to the statute, transcends ordinary civil litigation and makes a reviewing court more of an administrative tribunal than a court in an ordinary adversary civil case.<sup>58</sup>

Thus, for purposes of intervention, "the 'interest' requirement in the context of this environmental case, should be viewed as an inclusionary rather than exclusionary device."<sup>59</sup> In the third section, I will examine this premise more critically.

The second type of environmental public law case is at least as complex as that involving hazardous waste cleanup or pollution control, if not more so. It is the struggle over the management of a multilayered resource, like a general stream adjudication. Illustrative of this sort of case are the ongoing

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ENVIRONMENTAL CASE (1976); see also DANIEL A. FARBER, ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD 15-34 (1999).

56. See, e.g., Daniel A. Farber, *The Legacy of Reserve Mining*, 83 MINN. L. REV. 299 (1998) (discussing impact of the case and cataloguing other scholars hailing the case as groundbreaking).

57. See Chayes, *supra* note 1, at 1293 n.57 (discussing *Reserve Mining*), 1297, 1302 (arguing that judicial factfinding in public law litigation is legislative, not adjudicative, in nature and that "a judicial decree establishing an ongoing affirmative regime of conduct is *pro tanto* a legislative act"); see also Fiss, *supra* note 39, at 46 (arguing that fashioning a remedy in structural reform litigation "forces the judge to abandon his position of independence and to enter the world of politics").

58. *Reserve Mining*, 56 F.R.D. at 413; see Chayes, *supra* note 1, at 1296-98.

59. *Reserve Mining*, 56 F.R.D. at 413. As Richard Marcus has noted of these words, "the basic thrust is a democratic one—before it enters a decree that will affect a large number of people, the court should allow them to be heard." Marcus, *supra* note 5, at 663. Of course, "[t]his democratic thrust was substantially eroded by the judge's simultaneous imposition of a variety of restrictions on the intervenors' freedom of action." *Id.* at 663 n.64.

disputes over the survival of wild stocks of salmon in the Pacific Northwest.<sup>60</sup> The salmon cases are not unique; similar complex litigation has arisen from the spotted owl controversy.<sup>61</sup> Nevertheless, the salmon cases provide an excellent example of the range of litigation that arises in the environmental context, and they therefore deserve more elaborate description.

Once legendarily plentiful, salmon populations in the Columbia and Snake River system have hit all-time lows. The National Marine Fisheries Service (NMFS) first listed some stocks of salmon as threatened under the Endangered Species Act in 1991, and has recently listed even more stocks.<sup>62</sup> The salmon problem has received national media coverage,<sup>63</sup> and the

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60. It would be hard to provide a complete catalog of the reported cases involving this dispute, but some of the key appellate cases include: *Aluminum Co. of Am. v. Bonneville Power Admin.*, 175 F.3d 1156 (9th Cir. 1999); *Northwest Envtl. Defense Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520 (9th Cir. 1997); *American Rivers v. National Marine Fisheries Serv.*, 109 F.3d 1484, *as amended*, 126 F.3d 1118 (9th Cir. 1997) (author served as principal government counsel on appeal); *Oregon Natural Resource Council v. Kantor*, 99 F.3d 334 (9th Cir. 1996); *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996); *Aluminum Co. of Am. v. National Marine Fisheries Serv.*, 92 F.3d 902 (9th Cir. 1996); *Idaho Conservation League v. Thomas*, 91 F.3d 1345 (9th Cir. 1996); *Swanson v. United States Forest Serv.*, 87 F.3d 339 (9th Cir. 1996); *Aluminum Co. of Am. v. Bonneville Power Admin.*, 56 F.3d 1075 (9th Cir. 1995); *Idaho Dep't of Fish & Game v. National Marine Fisheries Serv.*, 56 F.3d 1071 (9th Cir. 1995); *Northwest Resource Info. Ctr. v. National Marine Fisheries Serv.*, 56 F.3d 1060 (9th Cir. 1995) (author served as principal government counsel on appeal); *Shoshone-Bannock Tribes v. Fish & Game Comm'n*, 42 F.3d 1278 (9th Cir. 1994); *Pacific N.W. Generating Coop. v. Brown*, 38 F.3d 1058 (9th Cir. 1994); *Northwest Resource Info. Ctr. v. Northwest Power Planning Council*, 35 F.3d 1371 (9th Cir. 1994); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994); *Northwest Resource Info. Ctr. v. NMFS*, 25 F.3d 872 (9th Cir. 1994).

61. In 1987, a number of environmental plaintiffs petitioned the Fish and Wildlife Service to list the northern spotted owl as threatened or endangered under the Endangered Species Act. *See Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988) (remanding Fish and Wildlife Service's decision not to list); *see also Northern Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991) (requiring designation of critical habitat). The subsequent listing resulted in restrictions on the logging of old-growth timber in the Pacific Northwest, and cases arising from the situation were heavily litigated. *See, e.g., Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992) (holding congressional response to spotted owl problem constitutional); *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996); *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705 (9th Cir. 1993); *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699 (9th Cir. 1993); *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297 (9th Cir. 1991). For a popular account of the roots of the problem, see WILLIAM DIETRICH, *THE FINAL FOREST* (1992).

62. *See, e.g., Threatened Status for Two ESUs of Chum Salmon in Washington and Oregon*, 64 Fed. Reg. 141,508 (1999) (to be codified at 50 C.F.R. pt. 223); *Threatened Status for Snake River Spring/Summer Chinook Salmon, Threatened Status for Snake River Fall Chinook Salmon*, 57 Fed. Reg. 14,653 (1992) (codified at 50 C.F.R. pt. 227); *Endangered Status for Snake River Sockeye Salmon*, 56 Fed. Reg. 58,619 (1991) (codified at 50 C.F.R. pt. 222).

63. A crude measure of the impact of a story is whether it appears on the front page of the *New York Times*. Recent events concerning the salmon and the possible effect that its listing may have on the residents of the Pacific Northwest have made the grade. *See Sam Howe Verhovek, Agency to List Pacific Salmon as Threatened*, N.Y. TIMES, March 16, 1999, at A1; *see also Sam Howe Verhovek, An Expensive Fish*, N.Y. TIMES, March 17, 1999, at A14 [hereinafter Verhovek, *An Expensive Fish*]; *Saving a Regional Icon*, N.Y. TIMES, March 18, 1999, at A24 (unsigned editorial). In addition, the

accompanying legal problems have received considerable attention in legal academic literature.<sup>64</sup>

NMFS attributes the decline of the salmon to roughly four human-induced causes.<sup>65</sup> One court has dubbed these the four *H*s: hydropower, habitat management, harvest, and hatcheries.<sup>66</sup> The primary cause of the decline in the salmon population is the extensive hydropower system on the Columbia and Snake Rivers and other rivers in the Pacific Northwest. Indeed, the Ninth Circuit has depicted much of the salmon litigation as a struggle between these “two great natural resources of the Columbia River Basin.”<sup>67</sup> The dams along the rivers pose two obvious threats to the salmon. The salmon lead an anadromous life, that is, they are born upstream, migrate downstream to the ocean, and return to their natal spawning grounds at the end of their lifecycle. The dams block migration of the salmon in both directions. When the adult salmon return to spawn, the dams stand in their way. To overcome this obvious problem, many of the dams have fish ladders to allow upstream passage. The dams also hinder downstream migration, and the managers of the dams have four main methods to help the juvenile salmon migrate downstream: improvement of river flow (typically, making the river flow faster), spilling the juveniles over the tops of the dams, bypassing the juveniles around the dam through diverting facilities, and, using these same facilities, collecting the juveniles for barge transport around the dams.<sup>68</sup>

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salmon problem merited a colorful two-page diagram in *Time* magazine. Jeffrey Kluger, *Saving the Salmon*, *TIME*, March 29, 1999, at 60.

64. See, e.g., Michael C. Blumm, *The Amphibious Salmon: The Evolution of Ecosystem Management in the Columbia River Basin*, 24 *ECOLOGY L.Q.* 653 (1997); Colloquium, *Who Runs the River?*, 25 *ENVTL. L.* 349 (1995); Timothy Weaver, *Litigation and Negotiation: The History of Salmon in the Columbia River Basin*, 24 *ECOLOGY L.Q.* 677 (1997); John M. Volkman, *The Endangered Species Act and the Ecosystem of the Columbia River Salmon*, 4 *HASTINGS W.-N.W. J. ENVTL. L. & POL'Y* 51 (1997); see also *Symposium on Salmon Recovery*, 74 *WASH. L. REV.* 511 (1999). This is a very incomplete listing of the literature. For the most part, these articles deal with the substantive legal problems concerning the salmon litigation. They do not deal with the public law litigation lessons that the salmon cases teach. One exception is Arthur D. Smith, *Programmatic Consultation Under the Endangered Species Act: An Anatomy of the Salmon Habitat Litigation*, 11 *J. ENVTL. L. & LITIG.* 247 (1996).

65. Threatened Status for Snake River Spring/Summer Chinook Salmon, Threatened Status for Snake River Fall Chinook Salmon, *supra* note 62, at 14,660-61.

66. See *Idaho Dep't of Fish & Game v. NMFS*, 850 F. Supp. 886, 889 n.4 (D. Or. 1994), *vacated as moot*, 56 F.3d 1071 (9th Cir. 1995).

67. *Northwest Resource Info. Ctr. v. Northwest Power Planning Council*, 35 F.3d 1371, 1375 (9th Cir. 1994); see also *Aluminum Co. of Am. v. Bonneville Power Admin.*, 175 F.3d 1156, 1157 (9th Cir. 1999).

68. See *Idaho Dep't of Fish & Game*, 850 F. Supp. at 889 n.5; see also *Northwest Resource Info. Ctr. v. NMFS*, 56 F.3d 1060, 1063 (9th Cir. 1995) (referring to three methods for helping juveniles: “river flow improvement, spill control, and surface transportation”) (author served as principal



“Each of these methods has its advantages and disadvantages, both for the salmon and the hydropower interests that benefit from the inexpensive electricity generated by the dams.”<sup>69</sup> Flow improvements are designed to improve the speed of the river, which some studies suggest improves downstream migration.<sup>70</sup> Passing juveniles over the spillways prevents the juveniles from traveling through the turbines of the dam, but it can cause the fish to develop gas bubble disease if the water becomes supersaturated with nitrogen as a result of plunging over the spillway.<sup>71</sup> Both flow improvements and spill control, however, can disadvantage those who wish to maximize the generation of inexpensive electricity. Flow improvements use too much water during seasons in which it is needed for peak electrical demand, and spilling water over the spillway takes it away from the turbines.<sup>72</sup> Bypassing juveniles around dams or placing them in barges or other transportation units also presents problems. If river conditions are not sound, bypassing juveniles back into the river relieves them of the threat from dams but not from the river overall. Some studies also indicate that transportation may stress juveniles and promote the transmission of disease.<sup>73</sup> In addition, environmentalists object to long-term reliance on transportation as a solution for the problems salmon face, even if transportation were the most effective solution to the problem.<sup>74</sup>

Salmon habitat includes everything from small tributaries, in which the salmon spawn, to the Snake and Columbia Rivers and the Pacific Ocean. Numerous external threats can harm salmon in their habitat. First, land uses in upstream watersheds can damage the salmon’s habitat through sedimentation or polluted runoff.<sup>75</sup> Second, activities that the operators of the dams on the rivers take can affect river conditions in ways that can benefit or harm the salmon.<sup>76</sup> Finally, conditions in the Pacific Ocean, where the

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government counsel on appeal).

69. *Northwest Resource Info. Ctr.*, 56 F.3d at 1063.

70. *See id.*

71. *See id.* at 1064.

72. *See id.* at 1063-64.

73. *See id.* at 1064.

74. *See American Rivers v. NMFS*, 109 F.3d 1484, 1488 (9th Cir. 1997), *as amended*, 126 F.3d 1118 (9th Cir. 1997) (author served as principal government counsel on appeal).

75. *See, e.g., Idaho Conservation League v. Thomas*, 91 F.3d 1345 (9th Cir. 1996); *Swanson v. United States Forest Service*, 87 F.3d 339 (9th Cir. 1996); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994).

76. *See Northwest Resource Info. Ctr. v. NMFS*, 56 F.3d 1060, 1063 (9th Cir. 1995) (describing flow improvements from dams) (author served as principal government counsel on appeal). According to some, the dams have destroyed salmon habitat by creating a series of warm, slack-water reservoirs between the dams, when salmon are adapted to colder, fast-moving water.

salmon spend most of their lives, can obviously affect survival.<sup>77</sup>

The third factor in the decline of the salmon population is harvest. Salmon are harvested commercially in the Pacific Ocean as well as in rivers. The harvesting of salmon includes commercial harvesting, harvesting by Indians pursuant to treaty rights, and sport harvesting.<sup>78</sup> Hatcheries form the fourth and final cause of the decline of wild salmon stocks. Some studies indicate that hatcheries may have contributed to the decline of wild salmon runs by weakening stocks and promoting excessive harvesting of wild stocks.<sup>79</sup>

The players in the salmon litigation divide into roughly four interest groups. The first interest group is comprised of the federal agencies. Many different agencies within different cabinet-level departments have an interest in the salmon litigation, either as parties to the litigation or as interested agencies. The agencies that plaintiffs have named as defendants are numerous. The Army Corps of Engineers (an agency within the Department of Defense) runs several of the dams on the Columbia River.<sup>80</sup> The National Marine Fisheries Service (an agency within the Department of Commerce) has jurisdiction over the endangered and threatened salmon under the Endangered Species Act.<sup>81</sup> The Bureau of Reclamation (an agency within the Department of the Interior) runs some of the larger projects on the Columbia River and its tributaries, including the Grand Coulee Dam.<sup>82</sup> The Bonneville Power Administration (an agency within the Department of Energy) markets the hydroelectric power that the dams generate.<sup>83</sup> The United States Forest Service (an agency within the Department of Agriculture) manages forest lands which drain into the Columbia and Snake river systems.<sup>84</sup> All of these agencies have been sued.

Other federal agencies have an interest in the litigation, even if they have

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77. Some ocean conditions may not be human-induced. See *Idaho Dep't of Fish & Game v. NMFS*, 850 F. Supp. 886, 889 n.4 (D. Or. 1994) (citing "El Nino's depletion of the ocean food supply" as a potential source of salmon mortality), *vacated as moot*, 56 F.3d 1071 (9th Cir. 1995).

78. For potential conflicts that could arise in this context, see *Shoshone-Bannock Tribes v. Fish & Game Comm'n*, 42 F.3d 1278 (9th Cir. 1994).

79. See *Threatened Status for Snake River Spring/Summer Chinook Salmon*, *Threatened Status for Snake River Fall Chinook Salmon*, *supra* note 62, at 14,661 ("[H]atchery programs have contributed to the further decline of wild . . . salmon through the taking of fish for broodstock purposes, behavioral and genetic interactions, competition, predation and the spread of disease.").

80. See *Northwest Resource Info. Ctr.*, 56 F.3d at 1063.

81. See 16 U.S.C. § 1532(15) (1994) (dividing responsibility for Endangered Species Act between Secretaries of the Interior and of Commerce); 50 C.F.R. §§ 222.23(a), 227.4 (1998).

82. See *Northwest Resource Info. Ctr.*, 56 F.3d 1060, 1063 n.3.

83. See *Association of Pub. Agency Customers v. Bonneville Power Admin.*, 126 F.3d 1158, 1163-65 (9th Cir. 1997) (describing role and authority of Bonneville Power Administration).

84. See, e.g., *Idaho Conservation League v. Thomas*, 91 F.3d 1345 (9th Cir. 1996); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994).

not been named as parties. The Fish and Wildlife Service, part of the Department of the Interior, has no formal jurisdiction over the salmon but shares responsibility with the National Marine Fisheries Service for enforcing the Endangered Species Act.<sup>85</sup> The Bureau of Indian Affairs, also within the Department of the Interior, manages the federal government's trust relationship with tribal government and seeks to protect tribal interests.<sup>86</sup> The President's Council on Environmental Quality oversees the enforcement of the National Environmental Policy Act and will take an interest in any litigation challenging federal agency action under that statute.<sup>87</sup> The Department of State, which manages the international relations of the United States, will take an interest in any litigation challenging the federal government's ability to negotiate agreements with Canada concerning river management.<sup>88</sup> When involved in litigation, all of these agencies struggle to speak with one voice through the Department of Justice, which attempts to balance the concerns of all agencies and faithfully represent the federal government as a whole.<sup>89</sup> Thus, the structure of the federal defendants in this litigation alone exemplifies the amorphous party structure and sprawling, disparate interests typical of public law litigation.

The second interest group is other sovereigns. These include domestic sovereigns, i.e., the state and tribal governments, and a foreign sovereign, i.e. Canada. These groups have varying interests. The coastal state governments, such as Washington and Oregon, wish to preserve the commercial salmon industry in perpetuity. The inland states, such as Montana and Idaho, wish to preserve the salmon, but not at the expense of drawing down reservoirs in their states that provide water for irrigation and recreation. Alaska also has an interest in the salmon, but it wishes to see fewer restrictions on harvesting

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85. See 16 U.S.C. § 1532(15) (1994).

86. See 25 U.S.C. § 2 (1994) ("The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.")

87. See 42 U.S.C. § 4342 (1994) (creating Council on Environmental Quality); 40 C.F.R. § 1515.2(b) (1998) (describing Council's primary responsibilities).

88. In 1961, the United States and Canada signed a treaty governing the development of water resources on the Columbia River Basin. Treaty Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, U.S.-Can., 15 U.S.T. 1555. Environmentalists have unsuccessfully attempted to challenge actions taken pursuant to this treaty. See *Northwest Envtl. Defense Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520 (9th Cir. 1997). Recently, the United States and Canada have reached an agreement concerning allocation of the salmon that migrate across the international boundary. See Sam Howe Verhovek, *U.S. and Canada Agree on a Plan to Restrict Catches of Endangered Salmon*, N.Y. TIMES, June 4, 1999, at A24.

89. See 28 U.S.C. § 516 (1994) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or an officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

because its stocks are plentiful. Alaska's aggressive approach to harvesting recently led to the blockade of an Alaskan ferry by Canadian fishing boats because the Canadians thought the Alaskans were taking too many salmon.<sup>90</sup> The tribal governments seek to protect their treaty right to take fish equal to the non-Indian commercial harvest.<sup>91</sup>

The third interest group is the environmental community. This consists of national organizations such as the Sierra Club and American Rivers, and local organizations such as the Oregon Natural Resources Council, the Western Environmental Law Center, and the Northwest Resource Information Center.<sup>92</sup> These groups have different strategies and motivations for participating in the litigation.

The fourth and final interest group is the industrial community. This group includes the commercial fishers, who rely on a plentiful salmon harvest for their livelihood, and farmers, who rely on water from the rivers to irrigate their crops. Public and private utilities (and thus their customers) benefit from the cheap hydropower that the federal government markets, as do the direct-service industries (DSIs), which are large industrial consumers of electricity (primarily aluminum companies) that buy power directly from the federal government.<sup>93</sup> The most recent listings have created speculation that real estate developers and individual households within listed salmon habitat may see their actions curtailed to protect the fish.<sup>94</sup> These actions may include everything from limiting logging and agricultural practices to affecting how often households may wash their cars.

This amorphous dispute has led to much litigation. No party wishes to see the wild salmon stocks become extinct—or at least no party has taken that position publicly. All parties have different theories about what precisely causes the decline of the stocks, and each has its own theory about how best to restore the stocks. The environmental community wants downstream migration of juvenile salmon improved, but rejects the technological improvement that the Army Corps of Engineers has selected, namely, putting the juvenile salmon in barges and transporting them past the dams.<sup>95</sup>

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90. See Verhovek, *An Expensive Fish*, *supra* note 63, at A24.

91. There is too much to the dispute between the Indian and non-Indian harvesters to provide a comprehensive set of citations. Interested readers may wish to begin with *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

92. The cases cited at *supra* note 60, show all of these parties participating.

93. See, e.g., *Aluminum Co. of Am. v. Bonneville Power Admin.*, 175 F.3d 1156 (9th Cir. 1999); *Aluminum Co. of Am. v. Bonneville Power Admin.*, 56 F.3d 1075 (9th Cir. 1995).

94. See Verhovek, *An Expensive Fish*, *supra* note 63, at A14.

95. See *American Rivers v. NMFS*, 109 F.3d 1484 (9th Cir. 1997), *as amended*, 126 F.3d 1118 (9th Cir. 1997); *Northwest Resource Info. Ctr. v. NMFS*, 56 F.3d 1060 (9th Cir. 1995) (author served as principal government counsel on appeal in both cases).

Irrigators, utilities, and the industries relying on cheap hydropower want to see the minimum protection necessary to preserve the salmon so that water can be used for consumption or hydropower or irrigation, rather than for fish. In any event, some of these interests blame the commercial harvest and deteriorating ocean conditions, not the conditions in the river systems, for the decline of the species.<sup>96</sup>

There is no question that the lawsuits arising from the dispute over the salmon falls within the definition of public law litigation. The various lawsuits involve questions of how to protect and enhance the life of the fish at each stage of their lifecycle, from birth and downriver migration to the ocean, through their lives in the ocean and survival of the commercial, tribal, and sport harvest, and back through the return of these species to their natal spawning grounds to give birth to the next generation of fish. These questions concern how to manage forests to mitigate their effects on the salmon habitat,<sup>97</sup> how best to accommodate migration of juvenile salmon downstream,<sup>98</sup> how to limit the ocean harvest of salmon while accommodating the commercial and tribal interests in the salmon,<sup>99</sup> how to run the dams on the river to protect the salmon while generating hydropower for commercial and residential uses,<sup>100</sup> and what changes to make to individual practices in the home that might affect the survival of the species. The list is endless.

I have described the ongoing dispute over the salmon in some detail not simply to show that the litigation arising from the underlying disputes is public law litigation, but also to show that some of the assumptions of defenders of public law litigation do not necessarily apply here. The salmon cases, and cases like them,<sup>101</sup> differ from the cases in the civil rights paradigm in several salient ways. First, the legal rights involved are primarily statutory. In addition to the Endangered Species Act,<sup>102</sup> the lawsuits typically

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96. See, e.g., James L. Buchal, *Some Fallacies About Salmon Restoration*, 25 ENVTL. L. 375 (1995) (authored by attorney for DSIs).

97. See *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994).

98. See *Northwest Resource Info. Ctr. v. NMFS*, 56 F.3d 1060 (9th Cir. 1995) (holding that ongoing juvenile salmon transportation program not a "connected action" to flow improvements to river to aid downstream migration for purposes of National Environmental Policy Act) (author served as principal government counsel on appeal).

99. See *Ramsey v. Kantor*, 96 F.3d 434 (9th Cir. 1996).

100. See *Aluminum Co. of Am. v. Bonneville Power Admin.*, 175 F.3d 1156 (9th Cir. 1999); *Pacific N.W. Generating Coop. v. Brown*, 38 F.3d 1058 (9th Cir. 1994).

101. As mentioned above, another useful example is the litigation concerning the survival of the northern spotted owl and the old growth forest habitat on which it depends. See *supra* note 61. I prefer the example of the salmon cases because it is even more sprawling than the spotted owl cases and involves more parties.

102. 16 U.S.C. §§ 1531-1534 (1994).

arise in the context of the National Environmental Policy Act (NEPA),<sup>103</sup> the National Forest Management Act and other statutes governing the planning and management of the national forests,<sup>104</sup> or the Northwest Power and Planning Act.<sup>105</sup> Although most civil rights cases have their basis in a general statutory cause of action,<sup>106</sup> the environmental statutes are more dynamic. Not only are some of the key environmental statutes subject to periodic congressional reauthorization,<sup>107</sup> but Congress also has waived the applicability of these statutes in certain circumstances.<sup>108</sup> Such congressional waivers, which typically take the form of a congressional declaration that agency action satisfies certain environmental laws, have withstood constitutional challenge.<sup>109</sup> The added dimension of congressional interference in litigation—the fact that Congress could change the ground rules at any time, and the demonstrated propensity for it to do so—changes the dynamic of this form of litigation.<sup>110</sup> A party might not want to win too much in a particular case for fear of losing it all the next legislative session.

Second, because the rights at issue are primarily statutory and not constitutional, the court has less leeway to develop the substantive rules it will apply to the alleged violation. In contrast, in a case to desegregate a

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103. 42 U.S.C. §§ 4321-4370d (1994); *see, e.g.*, *Northwest Resource Info. Ctr. v. NMFS*, 56 F.3d 1060 (9th Cir. 1995).

104. 16 U.S.C. §§ 1600-1687 (1994); *see, e.g.*, *Idaho Conservation League v. Thomas*, 91 F.3d 1345 (9th Cir. 1996); *Swanson v. United States Forest Service*, 87 F.3d 339 (9th Cir. 1996).

105. *See* 16 U.S.C. § 839-839h (1994).

106. *See, e.g.*, 42 U.S.C. § 1983 (1994).

107. Most crucial in this context is the Endangered Species Act, which has expired and has existed only on continuing appropriations for several years.

108. A recent noteworthy example is the timber salvage sale rider of 1995. *See* Emergency Salvage Timber Sale Program, Pub. L. No. 104-19, § 2001, 109 Stat. 194, 240-47 (codified at 16 U.S.C. § 1611 (Supp. IV 1998)). That act expedited consideration and preparation of certain timber sales, established expedited judicial review to challenges to the sales, and provided that environmental documentation prepared for the sales “shall be deemed to satisfy the requirements” of a number of environmental laws. *Id.* § 2001(c), (f), (i), 109 Stat. at 241-46; *see also* *Sierra Club v. United States Forest Serv.*, 93 F.3d 610 (9th Cir. 1996) (interpreting reach of salvage rider); *Idaho Conservation League v. Thomas*, 91 F.3d 1345 (9th Cir. 1996) (interpreting same where sale could affect listed salmon); *Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697 (9th Cir. 1996). For a criticism of the salvage sale rider, *see* Victor M. Sher, *Surveying the Wreckage: Lessons from the 104th Congress*, 8 *FORDHAM ENVTL. L.J.* 589 (1997).

109. *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429 (1993); *see also* Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 *HARV. ENVTL. L. REV.* 457 (1997) (arguing for constitutional amendment to end practice of substantive riders).

110. To be sure, Congress has acted broadly and restricted the jurisdictional and remedial powers of district courts involved in prison reform litigation under the Prison Litigation Reform Act, 18 U.S.C. § 3626 (Supp. III 1997). This restriction on jurisdiction represents an unusual move in the civil rights context, one that came years after the first prison reform lawsuit. Congressional involvement in the environmental arena is much more common.

school system, for example, a court looks at the constitutional obligation of the state government to provide equal education to all citizens.<sup>111</sup> The remedy turns on how the school system can provide that education to students and live up to the constitutional command. Because the Constitution does not provide standards that govern, for example, how to measure whether a school is desegregated or whether the size of a prison cell violates the Constitution, the courts must derive the applicable measure for a given case from its own sense of justice and of the facts before it.<sup>112</sup> In environmental litigation, however, the statute frequently provides a substantive standard against which to measure the defendant's conduct, and often administrative regulations that the court must interpret and apply in determining whether the underlying conduct has violated a legal norm.

Third, the rights involved in the traditional civil rights litigation are primarily substantive rights, including the right to desegregated schools, the right to decent mental health care, and the right to a humane prison.<sup>113</sup> In environmental litigation, the rights involved are often procedural, especially to the extent that the rights at issue arise under NEPA. NEPA requires federal agencies to "include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . [t]he environmental impact of the proposed action. . . ."<sup>114</sup> Congress enacted NEPA to require each federal agency to take a "hard look" at the environmental impacts of its proposed actions before the agency acts.<sup>115</sup> NEPA does not, however, "mandate particular results" from the environmental review.<sup>116</sup> If a court finds that an agency has not carried out its obligations under NEPA, it has the

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111. See *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

112. Owen Fiss has justified this practice in the context of constitutional litigation:

The Constitution does not say anything about reports, showers, or isolation cells; much less does it say anything about the date reports are due, the temperature of showers, or the maximum numbers of days that can be spent in an isolation cell. But it does say something about equality and humane treatment, and a court trying to give meaning to those values may find it both necessary and appropriate—as a way of bringing the organization within the bounds of the Constitution—to issue directives on these matters. The court may also find it necessary and appropriate to be quite specific in these directives, either as a way of minimizing the risk of evasion or as a way of helping the bureaucratic officers know what is expected of them.

Fiss, *supra* note 39, at 50.

113. Of course, one important exception to this statement are the cases making up the so-called due process revolution, which reached its zenith in *Goldberg v. Kelly*, 397 U.S. 254 (1970). For a recent discussion of the rise and fall of this view, see Rebecca E. Zeitlow, *Giving Substance to Process: Countering the Due Process Counterrevolution*, 75 DENV. U. L. REV. 9 (1997).

114. 42 U.S.C. § 4332(2)(C) (1994).

115. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

116. *Id.*

authority under its general equitable powers to enjoin agency action pending further examination of the potential environmental impact of the proposed project.<sup>117</sup> But a victory for environmental plaintiffs may prove only temporary. While the plaintiffs may secure a delay of the federal project, they cannot necessarily halt it permanently.<sup>118</sup>

Fourth, the statutory basis for judicial review significantly limits the proceedings that the trial court may conduct in most environmental cases. In cases challenging federal agency action, the Administrative Procedure Act, where it applies, limits courts to reviewing of the record that the agency has assembled.<sup>119</sup> Only in rare cases may the court look beyond that record, and in those cases the court is limited to taking new evidence only to explain technical or scientific information or if the challenger makes a strong showing of agency bad faith.<sup>120</sup> Moreover, the reviewing court may reverse the agency's decision only if the agency acted arbitrarily, capriciously, or contrary to law.<sup>121</sup> The reviewing court cannot substitute its judgment for the agency's.<sup>122</sup> These limits on the reviewing court's role in the litigation distinguish the salmon cases from the civil rights paradigm.<sup>123</sup>

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117. See, e.g., *Town of Huntington v. Marsh*, 884 F.2d 648, 653 (2d Cir. 1989); *Sierra Club v. Hodel*, 848 F.2d 1068, 1097 (10th Cir. 1988). Except where the relevant statute limits the equitable discretion of the court, a statutory violation does not automatically lead to injunctive relief. Compare *Amoco Prod. v. Village of Gambell*, 480 U.S. 531, 545 (1987) (holding that court must find irreparable harm before issuing injunction halting project while agency conducts study), and *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-13 (1982) (holding that court must weigh equities for violation of Clean Water Act), with *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978) (finding limit on court's discretion under Endangered Species Act). The precise limits on a court's equitable discretion to impose injunctive relief in environmental cases exceeds the scope of this article. Whatever the bounds of that discretion, a court hearing a case involving an alleged violation of NEPA has the authority to enjoin a proposed federal action only pending completion of the necessary environmental study.

118. In one opinion, Judge Posner said that the environmental impact statement "is very costly and time-consuming to prepare and has been the kiss of death to many a federal project." *Cronin v. United States Dep't of Agric.*, 919 F.2d 439, 443 (7th Cir. 1990). While this may be true as a practical matter, a federal agency bent on completing a project can go forward once it has adequately completed only its compliance with NEPA.

119. See 5 U.S.C. § 706 (1994) ("In making the foregoing determination [concerning the validity of agency action] the court shall review the whole record or those parts of it cited by a party. . . .").

120. See *Florida Power & Light v. Lorion*, 470 U.S. 729, 743 (1985) (reviewing court should review "the administrative record already in existence, not some new record made initially in the reviewing court" (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973))); *Sierra Club v. Peterson*, 185 F.3d 349 (5th Cir. 1999) (applying exception where defendant agency did not compile record); *Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 807 (8th Cir. 1998) (holding exception not applicable); *National Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) (applying bad faith exception); *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436-37 (9th Cir. 1988) (explaining types of exceptions to general rule limiting court to administrative record).

121. See 5 U.S.C. § 706(2)(A) (1994).

122. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

123. In a recent article, Professor Frank Cross questions the legitimacy of judicial review of



Fifth, and finally, the interested parties in an environmental case often have participated in the matter before it reaches court because of the agency setting. Article III standing principles do not limit the parties who may participate in the agency's own decisionmaking process. Often, agencies will allow any party who expresses an interest in the matter to submit comments on a proposed decision or to otherwise participate in what becomes the agency's final decision. That ability of concerned parties to participate in the decision-making process, coupled with the limitations placed on a court's review of the agency's ultimate decision, minimizes in many instances the need for formal intervention as of right.

To be sure, not all environmental cases resemble the salmon cases in complexity or in the limitations on review. For example, many statutes have "citizen suit" provisions that authorize suits against the federal government (or other actors) for violations of the substantive provisions of the relevant act.<sup>124</sup> Thus, environmental plaintiffs could sue a federal agency for discharging pollutants into waters of the United States without a permit in violation of the Clean Water Act. Such lawsuits might implicate military installations or other important government institutions.<sup>125</sup> Moreover, in such cases the court would not pay deference to the actions of the agency that is violating the relevant act. Private groups can also sue federal agencies for failing to meet nondiscretionary, inflexible statutory deadlines to issue regulations.<sup>126</sup> In such litigation, a court would have to decide when the agency must issue the regulation despite the fact that it has already violated a clear congressional command. This litigation would affect the regulated community as well as the federal agency, but not as extensively as the salmon cases might.<sup>127</sup> Thus, not all environmental cases are alike.<sup>128</sup>

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agency rulemaking. See Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243 (1999). I accept for purposes of this Article that there will be judicial review of agency decisions, including rulemaking.

124. See, e.g., 16 U.S.C. § 1540(g) (1994) (Endangered Species Act); 33 U.S.C. § 1365 (1994) (Clean Water Act); 42 U.S.C. § 6972 (1994) (Resource Conservation and Recovery Act); 42 U.S.C. § 7604 (1994) (Clean Air Act). In addition, the Superfund law makes the federal government liable for cleaning up sites where hazardous substances have been disposed of the same as any private party. 42 U.S.C. § 9620 (1994).

125. For examples of such litigation, see *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

126. For examples of such litigation, see *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545 (D.C. Cir. 1999); *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692 (D.C. Cir. 1975).

127. See, e.g. *Natural Resources Defense Council v. Costle*, 561 F.2d 904 (D.C. Cir. 1977) (ordering intervention for representatives of industry in proceedings carrying out consent decree that set timetable for regulation).

128. In a series of articles, Professor Linda Mullenix has suggested that mass tort litigation does not fit into Chayes's paradigm of public law litigation. See Linda S. Mullenix, *Mass Tort Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579 (1994); Linda S. Mullenix, *Resolving Aggregate Mass*

The same conclusion holds true for public law litigation generally—not all cases are alike. Yet, as the next section will demonstrate, at least with regard to the procedural device of intervention, courts have treated the cases alike and have imported uncritically the decisions from one sort of public law litigation to another. This similarity in treatment results to some degree from the historical development of intervention as a procedural device, rather than a thoughtful approach to applying the modern device to particular cases. Thus, a consideration of the salient features of environmental public law litigation provides a new perspective on what courts do and should do in public law litigation generally and with regard to intervention specifically.

## II. THE HISTORY AND DEVELOPMENT OF INTERVENTION IN FEDERAL PRACTICE

In the standard private lawsuit, *A v. B*, the procedural device of intervention falls within the larger context of multiparty practice, that is, how and under what circumstances outsiders are added to the original litigation.<sup>129</sup> Thus, if *A* sues *B* to require *B* to repay a debt to *A*, and *C* claims an interest in the transaction—for example, *C* claims that *B* owes *C* money as well, and paying *A* will interfere with *C* collecting from *B*—various devices can be used to involve *C* in the litigation. If the original parties believe *C*'s presence necessary for a complete adjudication, they may use the device of joinder to involve *C*, even perhaps against *C*'s wishes.<sup>130</sup> If *C* believes that the two original parties have colluded or will otherwise dispose of *C*'s interest without *C*'s involvement—for example, if *A* sues *B* for repayment on the

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*Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413 (1999). Mullenix's series responds to the call of Judge Jack Weinstein and Professor David Rosenberg to see mass tort cases as fitting into Chayes' theoretical construct. See, e.g., David Rosenberg, *The Causal Connection in Mass Tort Exposure Cases: A Public Law Vision of the Tort System*, 97 HARV. L. REV. 849 (1984); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 472 (1994) ("Mass tort cases are akin to public litigations involving court-ordered restructuring of institutions to protect constitutional rights."). Unlike Mullenix, I have not singled out environmental litigation as not fitting within Chayes' original description of public law litigation. Rather, I believe that cases like the salmon cases do fit within Chayes's paradigm, but nevertheless deserve different treatment from other cases that also fit within the paradigm, at least with regard to the use of the procedural device of intervention.

129. See, e.g., FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 10.16 (4th ed. 1992); 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PROCEDURE AND PRACTICE § 1901, at 228-29 (2d ed. 1986). Earlier scholarship concurs in this portrayal of intervention. See James Wm. Moore & Edward H. Levi, *Federal Intervention: I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565, 565 (1936) ("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.").

130. See FED. R. CIV. P. 19.

debt, and *B* is in collusion with *A* and knows that *A* will not enforce the judgment—then *C* may get involved through the device of intervention to protect *C*'s interest.<sup>131</sup> If there are many *As* in the world who are similarly situated with respect to *B*—for example, *B* has breached a legal duty to *A* and many people like *A*—then *A* can sue *B* in a class action and *A* can serve as a representative for the *As* of the world.<sup>132</sup> One might add to this litany the procedure of interpleader, in which *B*, knowing that both *A* and *C* have a claim, say, in Blackacre, will sue both of them, usually disclaiming any interest in the property and sometimes putting the property claimed into the custody of the court if possible.<sup>133</sup>

Like many of the federal rules concerning party structure, the rules concerning intervention derive largely from equity and admiralty practice.<sup>134</sup> The practice of intervention was then expanded definitively to all civil actions in Rule 24 of the first Federal Rules of Civil Procedure. The Supreme Court's interpretation of the original Rule 24 was limited and inflexible, culminating in the now much-criticized decision in *Sam Fox Publishing Co. v. United States*.<sup>135</sup> Arguably, *Sam Fox* eliminated the possibility of intervention in many cases, especially class actions where the intervenor claimed that the class representative did not adequately represent the intervenor. In response to *Sam Fox*, the Supreme Court adopted a recommendation to amend Rule 24 in a way that eased the restrictions on intervention.<sup>136</sup> This amendment significantly increased the instances in which courts recognized the right of an outsider to intervene in litigation. Now, the instances in which courts will find intervention warranted greatly exceed those instances in which courts traditionally found it necessary.

Although the advisory committee originally designed the party structure rules for the business or transactional context, commentators advocating public law litigation seized on the device of intervention as a means of adding previously disallowed outsiders. The public law litigation advocates ignored the history of intervention, how that history led to confusing and unanswered problems with the procedural device, such as the status of the

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131. See FED. R. CIV. P. 24.

132. See FED. R. CIV. P. 23.

133. See FED. R. CIV. P. 22. Rule 22 does not require the plaintiff-stakeholder to disclaim an interest in the property at issue; it is merely to avoid the possibility of multiple recoveries against the same party. Deposit is required by the federal interpleader statute, 28 U.S.C. § 1335 (1994).

134. Moore & Levi, *supra* note 129, at 566. There is historical evidence that there was a statutory form of intervention available in the law courts (as opposed to equity courts) in England. See Ralph V. Rogers, *Intervention at Common Law*, 57 L.Q. REV. 400 (1941).

135. 366 U.S. 683 (1961).

136. See Amendments to Rules of Civil Procedure for the United States District Courts, 383 U.S. 1029, 1051 (1966).

intervenor, the intervenor's potential liability for fees, and the extent to which the original parties could control the prosecution, and, more importantly, settlement of the litigation despite the intervenor's desires. Public law litigation theorists put great hope into intervention, but because of the historical development of the device, these commentators may have put more hope into intervention than it could bear.

#### A. *The Development of Intervention in the Original Federal Rules of Civil Procedure*

The exact origin of intervention practice in the federal courts is somewhat unclear. Professors Moore and Levi recount what has emerged as the standard history in their 1936 *Yale Law Journal* article.<sup>137</sup> A close examination of that article reveals some faults in their account, although no scholar to date has attempted to undertake correcting them. The following section will not attempt to write the complete and correct history of the procedural device of intervention; such a complete history must await the work of other scholars and lies beyond the mission of this article.<sup>138</sup> The aim of this section is twofold. First, I wish to retell the standard history and suggest areas in which that history has flaws. In particular, Moore and Levi wanted to make the case that a broad right of intervention would assist litigation, and they tried to find support for this in the then-existing case law. Oddly enough, Moore and Levi overlooked some sources that would have strengthened their argument in favor of a broad right of intervention. My second purpose is to highlight the historical limitations on intervention and some of the problematic aspects of this procedural device.

To start their history, Moore and Levi contend that Roman civil procedure recognized the practice of intervention;<sup>139</sup> others have followed this assertion

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137. Moore & Levi, *supra* note 129, at 568-77.

138. As for completely rewriting the standard history of the procedural device of intervention, future scholars may find the task daunting and less rewarding than the effort required. The materials necessary for such an endeavor are hard to find and hard to understand in modern parlance, rendering them simultaneously inaccessible both to the modern researcher and to the modern reader. In a similar vein, Professor Hazard has observed that the practice and procedure books of the early eighteenth century "varied in approach, some being abridgements with a minimum of independent editorial content and others showing some of the narrative style of later treatises. They also varied in quality, ranging from efforts to do a fairly thorough job to little more than hornbooks for students." Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1262 (1961). This is not to say that future endeavors would inevitably be fruitless. Scholars have conducted many successful historical studies of procedural devices relating to party structure, for example, STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987), and Hazard, *supra*.

139. Moore & Levi, *supra* note 129, at 568-69. Moore and Levi make a somewhat tenuous

uncritically.<sup>140</sup> As an example, Moore and Levi suggest that “a relative of a

argument on this score, although fault may lie with Friedrich Kessler, on whom Moore and Levi relied for their information on the procedure of intervention in civil legal systems. *Id.* at 565 n.\*. This is not to say that Moore and Levi’s assertions concerning civil law systems are incorrect, but only that their account of Roman law has flaws. Moore and Levi assert that

intervention practice in Roman law was rather extensive, although intervention seems to have taken place only at the appeal stage and then on the theory that the losing party might refuse to appeal or might not be vigilant in prosecuting the appeal and the petitioner’s interest thus be inadequately protected.

*Id.* at 568. To support this argument, Moore and Levi rely on certain selections from Justinian’s *Digest*. These selections do not support the assertion that intervention “was rather extensive,” *id.*, at least as the term intervention is used today to describe outsiders to civil litigation interposing themselves in an ongoing dispute, especially at the trial level. Moore and Levi cite no evidence to support the notion that an outsider could intervene in any proceeding other than an appeal. Many of the passages deal with the instance where a person represented by a procurator loses and the procurator fails to appeal; in those instances, the jurists hold that the original party (whom we might call the real party in interest) could prosecute the appeal. *See, e.g.*, DIG. 49.1.4.2 (Macer, On Appeals, 1) (“A person who has an interest can appeal on the condemnation of someone else. One who has brought and lost [an action] by means of a procurator is such a person; but the procurator may not appeal in his own name.” (bracketed material in original translation)). These passages do not imply that Roman law had a procedural device that we would call intervention. Moreover, some evidence exists that third parties to a case were permitted to appeal in only limited instances. For example, before listing the types of appeals described by Moore and Levi, Justinian’s *Digest* quotes Marcian as saying, “It is not possible for there to be an appeal against a judgment passed between other parties. . . .” DIG. 49.1.5 (Marcian, Appeals, 1). Later, Ulpian is quoted as saying, “It is not customary for appellants to be heard except those whose interest is affected, or who have been given a mandate, or who are without authorization administering another’s business which will however shortly be ratified.” DIG. 49.5.1 (Ulpian, Edict, 29). In addition, there is some evidence that some appeals could be prosecuted by the real party in interest, not by a representative. *See* DIG. 49.9.1 (Ulpian, Appeals). Thus, the conclusion that intervention “was rather extensive” in Roman law is probably incorrect.

The final reason to doubt the quality of Moore and Levi’s treatment of Roman law is a revealing typographical error. All of their citations to the *Digest* follow a form since abandoned by scholars. In this citation form, an author would refer to “L.”, then the section and item number, followed by “D.” for *Digest*, and then the book and section number. The letter “L.” in this older citation form stood for “lex.” All of the “Ls” in Moore and Levi’s citations are rendered as the arabic numeral “1”. Of course, at that time, the lowercase letter “l” on a typewriter was frequently used as the numeral “1”. My point is only that Moore and Levi probably proofread this section of their article poorly because they did not frequently use the sources they cited as support.

It is easy to see, however, why Moore and Levi reached their conclusion on the extent of intervention in Roman Law. First, neither author, nor their colleague and consultant Kessler, was a Roman law scholar (nor am I). Second, both Moore and Levi supported expanding the role of intervention in civil practice. *See* Moore & Levi, *supra* note 129, at 577 (“The tendency towards an extensive use of the allowance of intervention seems advantageous.”). Finding support for the practice in Roman law may have, in their eyes, improved the pedigree of the device.

140. *See, e.g.*, JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 6.10, at 366 & n.2 (2d ed. 1993); JAMES, *supra* note 129, § 10.17, at 542; 6 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE, § 24 App. 101, at 24 App. 8 (3d ed. 1999) [hereinafter MOORE’S FEDERAL PRACTICE]; 7C WRIGHT ET AL., *supra* note 129, § 1901 at 228 & n.1; Hutchings, *supra* note 10, at 702 & n.31; Rensberger, *supra* note 10, at 114-15 & n.22. On the hazards of finding Roman origins for modern legal doctrine, see Alan Watson, *Trade Secrets and Roman Law: The Myth Exploded*, 11 TUL. EUR. & CIV. L.F. 19, 25-26 (1996). I am especially indebted to my colleague Alan Watson for his assistance with the materials on Roman law.

person sentenced to death might intervene to appeal.”<sup>141</sup> Moore and Levi also trace early forms of intervention to English ecclesiastical courts,<sup>142</sup> and they make the claim, found elsewhere,<sup>143</sup> that the influence of Roman law on Louisiana civil law influenced the practice of intervention in the United States and formed the first use of the practice on these shores in actions at law.<sup>144</sup>

As with their claims about Roman law, Moore and Levi may have misstated the historical record concerning the development of intervention in the United States. Sources predating the American Revolution recognized the device of intervention in at least some form. In particular, Lord Chief Baron Gilbert’s treatise on the High Court of Chancery, a book known as *Forum Romanum*, gave detailed instances where outsiders were admitted to ongoing

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141. Moore & Levi, *supra* note 129, at 569. *Cf.* *Gilmore v. Utah*, 429 U.S. 1012 (1976) (denying “next friend” standing to mother seeking to appeal on behalf of son sentenced to death.)

142. *See* Moore & Levi, *supra* note 129, at 569. They depict the right as a broad one, but again, they provide thin support for their assertion that “a third party was said to be entitled to intervention if he ‘consider[s] that his interest will be affected.’” *Id.* The quotation within the quotation is from a treatise on practice and not from the case that they cite, *Dalrymple v. Dalrymple*, 161 Eng. Rep. 602 (1811), *cited in* Moore & Levi, *supra* note 129, at 569 & n.22. *Dalrymple* in turn involved a marriage in which the proposed intervenor was the putative second wife of one of the parties. This does not support the contention that anyone who simply considered that her interest was implicated could intervene; rather, the intervenor in that case had a direct interest in the outcome of the proceeding.

143. *See, e.g.*, 2 C.L. BATES, *FEDERAL EQUITY PROCEDURE: A TREATISE IN SUITS IN EQUITY IN THE CIRCUIT COURTS OF THE UNITED STATES* § 624 (1901); CHARLES E. CLARK, *HANDBOOK ON THE LAW OF CODE PLEADING* § 65, at 287 (1928). Commentators have since repeated the argument that the origins of intervention “in the United States lie in the civil law of Louisiana.” Hutchings, *supra* note 10, at 702 & n.32.

144. Moore and Levi argue that, “in the United States, the Roman law influenced the Louisiana practice, and through this practice, to some extent, the common law of this country.” Moore & Levi, *supra* note 129, at 569. The origins of the “Louisiana theory” that actions at law did not welcome intervention may be the arguments and dissenting opinions in *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1854). In that case, the states of Florida and Georgia pursued an original action in the Supreme Court to settle a boundary dispute. The United States petitioned the court to allow it to appear essentially as an intervenor. *Id.* at 480-81. The United States sought this litigating status because it had granted lands in Florida to private parties, and Georgia claimed that the granted lands belonged to it and not the United States; the United States also claimed that the change of the boundary between Georgia and Florida could affect issues such as the apportionment of the House of Representatives. *See id.* at 481-82. The Supreme Court granted the motion of the United States, holding that it would model its rules in boundary disputes between states on equity and admiralty practice “with a discretionary authority, however, to deviate from that rule where its application would be injurious or impracticable.” *Id.* at 492; *see also id.* at 493 (holding that court “will deviate from [the rules of chancery practice] where the purposes of justice require it, or the ends of justice can be more conveniently attained”). The Court thus granted the federal government’s motion. The dissenting justices referred to the civil code of Louisiana in their dissents to demonstrate, in part, that the Court should have denied the federal government’s motion. *See id.* at 501 (Curtis, J., dissenting); *id.* at 516 (Campbell, J., dissenting). Both of these justices urged that under the French and Louisiana practice, an intervenor became a party to the litigation like an original party. Because they believed that the United States could not be a party in litigation with a state in the original jurisdiction of the Supreme Court, they dissented.

litigation if they could show a sufficient interest.<sup>145</sup> Gilbert argued that intervention was a species of interpleader.<sup>146</sup> Joseph Story, in his original 1836 treatise on equity jurisprudence, recognized (but did not agree with) the argument that interpleader contained some form of intervention.<sup>147</sup> Evidence for intervention in actions at law in federal court is minimal. This dearth of evidence with respect to federal courts is not surprising, however, because at that time Congress had provided that, for actions at law, the federal courts would apply the procedural rules of the states in which they sat. Evidence of the contemplation of intervention in actions at law exists in some state jurisprudence.<sup>148</sup>

Whatever its precise origin, some form of the practice of intervention has existed in the federal courts for a considerable period of time, at least in some types of cases. Here, Moore and Levi's account appears to be correct. On the federal level, admiralty cases form the most accessible and readily identifiable documented cases involving intervention as a familiar procedure.<sup>149</sup> The nature of admiralty cases in rem required intervention by necessity if courts were to protect the rights of third parties. If not, "the greatest injustice would be done, because a decree of the court *in rem* is binding on all the world as to points which are directly in judgment before it."<sup>150</sup> In equity and law actions, the practice was originally more limited. In addition to the form of interpleader mentioned above,<sup>151</sup> equity practice recognized the examination *pro interesse suo* as another, more cumbersome form of intervention. In that procedure, outsiders who claimed an interest in property that was the subject of the litigation could petition a court of equity to question them about the extent of their interest.<sup>152</sup> The parties and the outsiders could then use this examination as the basis of the outsider's claim

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145. GEOFFREY GILBERT, *THE HISTORY AND PRACTICE OF THE HIGH COURT OF CHANCERY* 47-48 (Samuel Tyler, ed., 1st American ed., Washington, D.C., W.H. & O.H. Morrison 1874, 1st ed. 1758). Interestingly, Moore and Levi do not cite Gilbert, even though he describes a broad right of intervention. For recent scholarship discussing the *Forum Romanum*, see Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 485 & n.95 (1996).

146. See GILBERT, *supra* note 145, at 47.

147. See 2 JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* 114 n.1 (1836). Moore and Levi claim that Story did not recognize the device of intervention, but they cite only his treatise on equity practice, not his *Commentaries*. See Moore & Levi, *supra* note 129, at 570.

148. See, e.g., *Campbell v. Morris*, 3 H. & McH. 535, 552 (Md. 1797) ("For any apparent defect in the proceedings before the court, the attachment may be quashed upon suggestion of such defect to the court, either by the defendant himself, or a third person claiming an interest in the property attached.").

149. See, e.g., *Stratton v. Jarvis*, 33 U.S. (8 Pet.) 4, 9 (1834) ("This is very familiar.").

150. *The Mary Anne*, 16 F. Cas. 953, 954 (D. Me. 1826) (No. 9,195).

151. See *supra* note 146, and accompanying text.

152. See 2 BATES, *supra* note 143, § 627, at 663; GILBERT, *supra* note 145, at 79-80.

and litigate who had the superior claim.<sup>153</sup>

By the time of the adoption of the Federal Rules of Civil Procedure, when Moore and Levi wrote their article, the rules for admiralty and equity actions in federal courts allowed intervention in appropriate cases.<sup>154</sup> Admiralty Rules 34<sup>155</sup> and 42<sup>156</sup> authorized courts to allow intervention, as did the Equity Rules.<sup>157</sup> In addition, some federal courts allowed intervention to take place ancillary to actions at law, such as a proceeding to attach or execute upon property claimed by an outsider.<sup>158</sup>

Whatever fault one might find with Moore and Levi's history, their article has proven to be immensely influential. Moore and Levi identified two types of intervention, namely an absolute right to intervene and a discretionary right to intervene. As they saw it:

The absolute right exists when the petitioner claims an interest in property in the hands of the court, or when the petitioner is inadequately represented in an action controlled by the court and in

153. See 2 BATES, *supra* note 143, § 627, at 663-64.

154. Under the Conformity Act, 28 U.S.C. § 724 (1934), federal courts applied appropriate state rules of procedure in actions at law before the enactment of the Rules Enabling Act, now codified at 28 U.S.C. § 2072 (1994).

155. This rule provided:

If 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 therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, on filing his allegations, to give a stipulation with sufficient sureties or an approved corporate surety to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded against him by the court on the final decree whether it is rendered in the original or appellate court, not to exceed however in any event the agreed or appraised value of the property so claimed by him, it or them, with interest at six per cent. per annum and costs.

Admiralty Rule 34, 254 U.S. 693-94 (1920).

156. This rule provided:

Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceedings, to intervene *pro interesse suo* for a delivery thereof to him, and on due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or on a hearing, be dismissed, the court may, in its discretion, award costs against the petitioner in favor of the adverse party.

Admiralty Rule 42, 254 U.S. 697 (1920).

157. This rule provided, in part: "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." Equity Rule 37, 226 U.S. 659 (1912). This rule, unlike the rules in admiralty, expressly directed the court to take into account the original proceedings and the effect of the intervention on the original parties.

158. See Edward C. Eliot, *Interventions in the Federal Courts*, 31 AM. L. REV. 377, 380 (1897) (stating that courts will entertain intervention petitions "at law as well as in causes in equity").



which a decision will be binding upon the petitioner. The discretionary right to intervene exists when the petitioner has an interest in a question of law and fact common to the pending litigation. The discretionary right is a matter of trial convenience. The absolute right is given as a protection to the petitioner.<sup>159</sup>

Moore and Levi recognized that the rules in existence at the time did not make this distinction, but they urged that courts in fact drew the distinction between intervention of right and intervention as a matter of discretion in the trial court.<sup>160</sup>

When the Supreme Court adopted the Federal Rules of Civil Procedure in 1937,<sup>161</sup> the new Rule 24 provided for intervention. Moore and Levi's influential article is the only American secondary authority cited by the Advisory Committee. Moreover, the structure of the rule followed Moore and Levi's division of intervention into two types.<sup>162</sup> On intervention of right, Rule 24(a) provided:

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.<sup>163</sup>

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159. Moore & Levi, *supra* note 129, at 581 (footnotes omitted).

160. *See id.*

161. The Supreme Court promulgated these rules under the Rules Enabling Act, presently codified at 28 U.S.C. § 2072 (1994). The propriety and desirability of engaging the Supreme Court in this sort of rulemaking is an interesting and controversial subject, but it is beyond the scope of this article. For materials on this subject, see, for example, Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887 (1999); Sherman L. Cohn, *The New Federal Rules of Procedure*, 54 GEO. L.J. 1198 (1966).

162. FED. R. CIV. P. 24, 1937 advisory committee note.

163. FED. R. CIV. P. 24(a), 308 U.S. 690-91 (1937) (amended 1946). On discretionary or permissive intervention, the original rule provided:

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

FED. R. CIV. P. 24(b), 308 U.S. at 691 (1937) (amended 1946). This rule has since been amended to allow government officials to intervene when one of the parties calls into question the application of a statute or regulation they administer. *See* FED. R. CIV. P. 24(b). Unlike the rule concerning intervention of right, the rule regarding permissive intervention expressly directs the court to consider

This rule took much of its form from the earlier equity and admiralty rules. The rule also reflected Moore and Levi's categorization of cases in which courts allowed intervention of right: where the applicant for intervention has an interest in property or a common fund in the hands of the court, where the applicant might be bound by a judgment, and where the representation of the applicant's interest is inadequate.<sup>164</sup>

The new rule also clarified several matters from the historical practice. First, it made clear that intervention was available in all civil litigation, thus settling the question of whether courts could allow intervention without express statutory authority.<sup>165</sup> Second, the new Rule 24 set forth a substantive standard by which a court was to measure a proposed intervenor's motion. Third, it made clear that an application had to be timely, implying that late applications could be denied on that ground alone. For the most part, the intervention contemplated was intervention in private litigation. The proposed intervenor had to be either prospectively bound by the judgment or a claimant for property. This version of the procedural device was therefore not adapted for public law litigation for reasons that will become clearer below.<sup>166</sup>

The Supreme Court amended Rule 24(a) in a minor way in 1946, keeping the same focus on private litigation. The amendment changed subpart (3) to expand its coverage. The rule now provided for intervention "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody *or subject to the control or disposition* of the court or an officer thereof."<sup>167</sup> The Advisory Committee's notes indicate that the amendment was intended to change the scope of the Rule so that it "cover[ed] the situation where property may be in the actual custody of some other officer or agency—such as the Secretary of the Treasury—but the control and disposition of the property is lodged in the court wherein the action is pending."<sup>168</sup> This amendment retained the private litigation focus of the original rule.

Results under the original Rule 24 varied. In particular, courts struggled

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the effect of the intervention on the original parties.

164. See Moore & Levi, *supra* note 129, at 582-95.

165. Compare Eliot, *supra* note 158, at 380, and Annotation, *Intervention*, 123 AM. ST. REP. 280, 281 (1908) (stating that there can be no intervention in actions at law without express statute), with Moore & Levi, *supra* note 129, at 570 n.31 (disagreeing with the foregoing).

166. To the extent that Moore and Levi's article influenced the private law focus of Rule 24 as originally promulgated, their article stressed the need for intervention in a particular private law setting, namely the setting of reorganization and receivership cases. See Moore & Levi, *supra* note 129, at 595-607.

167. FED. R. CIV. P. 24(a)(3), 329 U.S. 853 (1946) (amended 1966) (emphasis added).

168. FED. R. CIV. P. 24, 1948 advisory committee's note.

to interpret subsection (a)(2), which allowed intervention when the applicant's interests were inadequately represented and where the "applicant is or may be bound by a judgment in the action," and subsection (a)(3), which allowed intervention in cases in which the disposition of property involved in the case could adversely affect the proposed intervenor.<sup>169</sup> The Supreme Court's efforts to interpret these subsections came mostly in antitrust cases appealed directly from district courts to the Supreme Court under the Expediting Act.<sup>170</sup> This particular context may explain why the cases provided little solid guidance to the lower courts. These cases were on direct appeal with no decision from the court of appeals to assist the Supreme Court and no circuit conflict on the issue to flesh out the arguments. In addition, the cases reflected underlying policies that the Court had developed in the context of antitrust litigation, especially the effect that private litigation could have on government enforcement actions and vice versa. Finally, to the extent that the early cases provided guidance, the case law reflected a hostility toward intervenors. The Expediting Act was intended to speed resolution of antitrust cases, so the Supreme Court may have been less receptive to outsiders stepping into ongoing litigation in this context, lest they slow it down. Nevertheless, these cases from the Supreme Court provide insight into the Court's approach to intervention in public law litigation cases prior to the 1966 amendments of the Federal Rules. Each case involved the possible effect of a large antitrust case on an outsider to the government enforcement litigation. In each case, the Court denied intervention.

The Supreme Court first considered the requirements of Rule 24 in *Allen Calculators, Inc. v. National Cash Register Co.*<sup>171</sup> In that case, the United States sued National Cash Register (NCR) and obtained a decree requiring NCR to obtain court approval before acquiring any competitors.<sup>172</sup> When NCR later requested permission to acquire a competitor, another competitor, Allen Calculators, petitioned to intervene apparently because it believed that the proposed merger would eliminate competition in the industry.<sup>173</sup> The district court originally allowed Allen Calculators to participate in the

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169. FED. R. CIV. P. 24(a)(2), 329 U.S. 853 (1946) (amended 1966).

170. 32 Stat. 823 (codified as amended at 15 U.S.C. § 29(b) (1994)).

171. 322 U.S. 137 (1944). The Court had earlier encountered the new Rule 24 in *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502 (1941). That case involved an attempt to modify a consent decree that had settled earlier antitrust litigation. The consent decree specifically provided that the proposed intervenor in that case could intervene in the litigation to enforce one clause of the consent decree. *See id.* at 507 & n.2. The Court consequently concluded that "the codification of general doctrines of intervention contained in Rule 24(a) does not touch our problem." *Id.* at 508.

172. *See Allen Calculators*, 322 U.S. at 138-39.

173. *See id.* at 139.

proceedings, but eventually denied intervention for many reasons including that the court knew that the president of Allen Calculators would be called as a witness by the government.<sup>174</sup> Thus, the district court would hear the claims of Allen Calculators in the government's case in determining whether the proposed merger would have the anticompetitive effect that Allen Calculators claimed. On appeal, the Supreme Court briefly reviewed the requirements of Rule 24(a) and found that Allen Calculators did not fall into any of the enumerated categories of intervenors.<sup>175</sup> It also held that the district court properly denied permissive intervention because "where a suit is of large public interest, the members of the public often desire to present their views to the court in support of the claim or the defense. To permit a multitude of such interventions may result in accumulating proofs and arguments without assisting the court."<sup>176</sup> In this case, the Court found that the existing parties produced an adequate record without the assistance of Allen Calculators, especially considering the fact that the government called the president of Allen Calculators as a witness.<sup>177</sup> Overall, however, one can see that the pre-1966 attitude of the court was that members of the public would often want to participate and would often not assist the court.

The Supreme Court also dealt with Rule 24 in *Sutphen Estates, Inc. v. United States*.<sup>178</sup> That case, arose from the reorganization proceedings concerning Warner Bros., in which the movie production and movie theater businesses would be reorganized into two companies.<sup>179</sup> Sutphen Estates leased property to a subsidiary of a subsidiary of Warner Bros., and under the decree of dissolution only the new theater company would be the guarantor of the lease.<sup>180</sup> Sutphen Estates sought to intervene to protect its interest in the guaranty, and claimed that the equivalent to the old guaranty would be a guaranty from both of the new companies to secure the leases.<sup>181</sup> The district court denied intervention and the Supreme Court affirmed. The Court held that Sutphen Estates had no right to intervene under Rule 24(a)(2) because it was not in privity with Warner Bros., and therefore would not be bound by the judgment and could not be represented by it.<sup>182</sup> Further, the Court held

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174. *See id.*

175. *See id.* at 140-41.

176. *Id.* at 141-42.

177. *See id.* at 142.

178. 342 U.S. 19 (1951).

179. *See* 342 U.S. at 20-21; *see also* *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (holding that then-existing form of theater and production ownership violated antitrust law).

180. *See* 342 U.S. at 21.

181. *See id.* at 22.

182. *See id.* at 21.

Sutphen Estates could not intervene under subsection (a)(3), because it had not shown sufficiently that its interest in the unified Warner Bros. would be adversely affected by the consent decree.<sup>183</sup> The Court also suggested that Sutphen Estates could litigate the issue in a separate forum should the guaranty from the new theater company prove insufficient, but it did not identify either the forum or the type of proceeding it envisioned.<sup>184</sup>

Thus, neither *Allen Calculators* nor *Sutphen Estates* provided clear guidance to the courts of appeals. The courts of appeals split on their interpretations of both Rule 24(a)(2) and 24(a)(3). Some courts interpreted the requirement of subsection (a)(2) that the applicant “is or may be bound by a judgment in the action” to mean that the applicant had to demonstrate that it would be bound in the legal sense under the doctrine of *res judicata*.<sup>185</sup> Other courts interpreted the term “bound” in a broader, more practical sense.<sup>186</sup> Similarly, some courts interpreted subsection (a)(3), which allowed intervention when an applicant claimed an interest in property or a common fund in the court’s custody or control, to apply strictly to property before the court.<sup>187</sup> Other courts found ways of interpreting the “common fund” notion quite broadly.<sup>188</sup>

The Supreme Court resolved the tension between the circuits over the interpretation of the term “bound” in Rule 24(a)(2) in its decision in *Sam Fox Publishing v. United States*.<sup>189</sup> That case involved an antitrust enforcement action that the United States brought in 1941 against the American Society of Composers, Authors and Publishers (ASCAP), a member organization of musical publishers that functions as a clearinghouse for licensing musical compositions.<sup>190</sup> The government contended that ASCAP restrained trade in two ways, first through its dealings with outsiders and second with its dealings among its own members.<sup>191</sup> Specifically on the second alleged

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183. *See id.* at 22.

184. *See id.* at 23. Justice Black dissented from the opinion because of this possibility. *Id.* at 23 (Black, J., dissenting) (“I cannot assent to an opinion that permits this question of impairment to remain open for adjudication elsewhere at some indefinite time in the future.”).

185. *See, e.g.,* *Archer v. United States*, 268 F.2d 687 (10th Cir. 1959); *Cameron v. President & Fellows of Harvard College*, 157 F.2d 993 (1st Cir. 1946); *see also* Note, *Intervention and the Meaning of “Bound” Under Rule 24(a)(2)*, 63 YALE L.J. 408 (1954) (approving this approach).

186. *See, e.g.,* *Kozak v. Wells*, 278 F.2d 104 (8th Cir. 1960); *Clark v. Sandusky*, 205 F.2d 915 (7th Cir. 1953).

187. *See, e.g.,* *Pure Oil Co. v. Ross*, 170 F.2d 651 (7th Cir. 1948).

188. *See, e.g.,* *Formulabs, Inc. v. Hartley Pen Co.*, 275 F.2d 52 (9th Cir. 1960) (holding that trade secret constituted common fund). Moore and Levi reported that some pre-rule cases also interpreted the common fund notion broadly. *See* Moore & Levi, *supra* note 129, at 589-90.

189. 366 U.S. 683 (1961).

190. *See id.* at 685.

191. *See id.* at 685-86.

restraint of trade, the government asserted that a few large publishing houses dominated the governance of ASCAP, controlled the ASCAP board of directors, and dictated the apportionment of the licensing fees all to the disadvantage of the small publishers.<sup>192</sup> The government sought to change the method by which ASCAP selected its board of directors and to make the distribution of licensing fees more equitable.<sup>193</sup> The parties settled the original dispute by consent decree.<sup>194</sup> Later, the government twice moved to amend the consent decree—once in 1950 and again in 1959—to make ASCAP more responsible to its small-publisher members.<sup>195</sup>

Sam Fox Publishing and other small publishing houses sought to intervene in the proceeding only after the government filed its second motion to modify the consent decree. The small publishers contended that “the proposed modifications did not go far enough toward ameliorating the position of the small publishers as against the few large publishers.”<sup>196</sup> In essence, they wanted the government to pursue more relief against ASCAP and thus to weaken even more the hold that the large publishers had on the organization. The district court denied intervention and the small publishers appealed.

The case turned on the knotty problem of adequate representation and the binding nature of the judgment in the original litigation. The small publishers argued that their interests were not adequately represented by either the United States or ASCAP. As to the former, the small publishers argued that the government had sold short the interests of the small publishers and had therefore sought insufficient relief for their needs.<sup>197</sup> As to the latter, the small publishers argued that ASCAP clearly did not represent their interests because it was under the stranglehold of the large publishers, but, as members of the defendant class, they would still be bound by the decree.<sup>198</sup> The Supreme Court rejected both contentions. First, the Court held that, in the context of a government-initiated antitrust enforcement action,

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192. *See id.* at 686.

193. *See id.*

194. *See id.*

195. *See id.* at 686-87.

196. *Id.* at 687.

197. *See id.* at 688-89.

198. *Id.* at 690. The Court described the small publishers argument:

Their claim is that [ASCAP], acting through its Board of Directors, could not adequately represent their interests as small publishers, whose very claim is that they are caught between the practical need to remain in the Society and the impossibility of obtaining adequate representation on the Board of Directors which determines both the weighting of votes in Board elections and the distribution of Society revenues.

*Id.*

intervention by a private party would be inappropriate because it would entail questioning the wisdom of the government's policy decisions.<sup>199</sup> In any event, the Court reasoned, the small publishers would not be bound by the consent decree because of the nature of antitrust enforcement actions and the established principle that government and private enforcement actions coexist.<sup>200</sup> “[J]ust as the Government is not bound by private antitrust litigation to which it is a stranger, so private parties, similarly situated, are not bound by government litigation.”<sup>201</sup> The small publishers could always bring their own action against ASCAP and attempt to obtain relief they considered adequate.

Similarly, the Supreme Court held that the small publishers could not satisfy the requirements of Rule 24(a)(2) that they be both inadequately represented and bound by the judgment in the litigation. The Court understood why the small publishers felt inadequately represented. But as the Court saw it, the small publishers “face[d] this dilemma: the judgment in a class action will bind only those members of the class whose interest have been adequately represented by existing parties to the litigation; yet intervention as of right presupposes that an intervenor’s interests are or may *not* be so represented.”<sup>202</sup> Thus, the small publishers would be bound by the judgment only if they were adequately represented in the class action; if the representation was inadequate, then they would not be bound. Intervention was not necessary in either scenario. While at first glance this reasoning may seem to exclude any potential intervenor, the Court further explained that its result turned on the particular setting of the case and the particular claims that the government pursued against ASCAP. The government sued ASCAP alleging antitrust violations from ASCAP’s dealings with outsiders and also from its internal functioning; the small publishers were concerned only with the internal governance claim. As the Court saw it:

[A]s to any claims or defenses which [the small publishers] have *against the Government*, the representation of ASCAP is entirely adequate, and as to any claims which they may have *against ASCAP* there is nothing to require [the small publishers] to bring them into this

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199. *See id.* at 689. The Court concluded that,

[a]part from anything else, sound policy would strongly lead us to decline appellants’ invitation to assess the wisdom of the Government’s judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting.

*Id.*

200. *See id.* at 689.

201. *Id.* at 690.

202. *Id.* at 691 (citation omitted).

litigation, simply because they are “bound” for other purposes.<sup>203</sup>

Even though the small publishers lost in their effort to enter the government’s lawsuit against ASCAP, the Supreme Court made it clear that the small publishers could initiate their own action against ASCAP.<sup>204</sup> The Court realized that the existing consent decree might as a practical matter dissuade another court from imposing different relief more favorable to the small publishers.<sup>205</sup> Nevertheless, because the small publishers were not legally bound by that decree, they could not establish a right to intervene under Rule 24.

Although it is difficult to determine the effect of the *Sam Fox* decision, the reported cases suggest that it became something of an impediment to intervention. Most of the reported court of appeals and district court cases after *Sam Fox* and before the subsequent amendment to the rules discussed below denied intervention to proposed intervenors.<sup>206</sup> The limited secondary literature that reacted to the case similarly predicted that the Court’s decision would eliminate or drastically limit the right to intervene, especially in class action cases.<sup>207</sup> Moreover, *Sam Fox* did not resolve the tension in the appellate cases involving Rule 24(a)(3), allowing intervention if a common fund were subject to the control of the court. As mentioned above, some courts read this narrowly and others broadly. Pressure to amend the rule grew.

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203. *Id.* at 692.

204. *See id.* at 694.

205. *See id.*

206. *See Carey, Baxter & Kennedy, Inc. v. Wilshire Oil Co.*, 346 F.2d 110 (10th Cir. 1965); *Alleghany Corp. v. Kirby*, 344 F.2d 571 (2d Cir. 1965), *cert. granted sub nom. Holt v. Alleghany Corp.*, 381 U.S. 933 (1965), and *cert. dismissed as improvidently granted*, 384 U.S. 28 (1966); *Degge v. City of Boulder*, 336 F.2d 220 (10th Cir. 1964); *Reich v. Webb*, 336 F.2d 153 (9th Cir. 1964); *Stadin v. Union Elec. Co.*, 309 F.2d 912 (8th Cir. 1962); *Peterson v. United States*, 41 F.R.D. 131 (D. Minn. 1966); *Apache County v. United States*, 256 F. Supp. 903 (D.D.C. 1966); *Blocker v. Board of Educ.*, 229 F. Supp. 714 (E.D.N.Y. 1964) (denying intervention to local taxpayers in school desegregation case); *H.K. Ferguson Co. v. Mickel Processing Corp.*, 33 F.R.D. 268 (S.D.N.Y. 1963); *Haiduk v. Atlantic Indep. Union*, 31 F.R.D. 241 (E.D. Pa. 1962); *United States v. ASCAP*, 202 F. Supp. 340 (S.D.N.Y. 1962). There were, however, cases that allowed intervention, some in instances that the decision in *Sam Fox* appeared to preclude. *See Levin v. Ruby Trading Corp.*, 333 F.2d 592 (2d Cir. 1964); *Formulabs, Inc. v. Hartley Pen Co.*, 318 F.2d 485 (9th Cir. 1963); *Atlantic Refining Co. v. Standard Oil Co.*, 304 F.2d 387 (D.C. Cir. 1962); *International Mortgage & Inv. Corp. v. Von Clemm*, 301 F.2d 857 (2d Cir. 1962).

207. *See, e.g.,* Recent Case, 15 VAND. L. REV. 647 (1962); John W. Stack, Note, *Intervention of Right in Class Actions: The Dilemma of Federal Rule of Civil Procedure 24(a)(2)*, 50 CAL. L. REV. 89 (1962); *The Supreme Court 1960 Term*, 75 HARV. L. REV. 40, 162-63 (1961).



*B. The 1966 Amendments to the Federal Rules of Civil Procedure*

In the 1966 amendment to the Federal Rules of Civil Procedure the Supreme Court adopted numerous changes to the rules governing party structure as recommended by the Advisory Committee. Specifically, the changes affected Rule 19, concerning joinder, Rule 23, concerning class actions, and Rule 24, concerning intervention. These amendments highlighted the Advisory Committee's new approach, a focus on using litigation to settle all issues arising from a single transaction or series of transactions, which the Advisory Committee saw as a more practical and pragmatic approach. Thus, the Advisory Committee's amendment of the joinder rule sought to include all parties necessary to fully adjudicate a case for both liability and remedy.<sup>208</sup> The amendment to the rule concerning class actions "describe[d] in more practical terms the occasions for maintaining class actions."<sup>209</sup> And the rule for intervention was amended to provide intervention of right for outsiders in litigation "which as a practical matter" could impair the outsider's interests.<sup>210</sup>

The Advisory Committee explicitly saw intervention as a counterpart to joinder.<sup>211</sup> Specifically, the Committee believed that intervention of right was

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>212</sup>

Thus, although the language of the two rules did not resemble each other, the Committee theoretically linked intervention and joinder, and it intended that the new rule on intervention would fill in any gaps created by the joinder rule.<sup>213</sup>

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208. See FED. R. CIV. P. 19, 1966 advisory committee note.

209. FED. R. CIV. P. 23, 1966 advisory committee note.

210. FED. R. CIV. P. 24(a)(2).

211. FED. R. CIV. P. 24, 1966 advisory committee note.

212. *Id.* Rule 19(a) now provides in relevant part:

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) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest.

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

213. The joinder rule extends beyond the intervention rule in that it calls on a court to weigh the

In its notes to the amendment of Rule 24, the Advisory Committee singled out *Sam Fox* as a problematic case. Although the reasoning of *Sam Fox* might have been “linguistically justified,” it was still a “poor result.”<sup>214</sup> In particular, the Committee believed that the result in *Sam Fox* would make class actions unworkable and potentially unfair. The Committee reasoned that

[a] class member who claims that his “representative” does not adequately represent him, and is able to establish that proposition with sufficient probability, should not be put to the risk of having a judgment entered in the action which by its terms extends to him, and be obliged to test the validity of the judgment as applied to his interest by a later collateral attack. Rather he should, as a general rule, be entitled to intervene in the action.<sup>215</sup>

The amendment would overcome the precise problem in *Sam Fox* because it would not require that the applicant for intervention be bound by the judgment in a technical sense. On the other hand, the Committee recognized that adequate representation under the new rule

is not confined to formal representation like that provided by a trustee for his beneficiary or a representative party in a class action for a member of the class. A party to an action may provide practical representation to the absentee seeking intervention although no such formal relationship exists between them. . . .<sup>216</sup>

The Committee also perceived problems in the cases that had interpreted the common fund basis for intervention, former Rule 24(a)(3). Despite Supreme Court cases that apparently limited the availability of this form of intervention, “some decided cases [from the courts of appeals] virtually disregarded the language of this provision.”<sup>217</sup> But the Advisory Committee did not fault the courts for doing so because the rule was “unduly

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effect of joinder on the original parties to the action if the absentee cannot be joined and to consider whether to dismiss the action. *See* FED. R. CIV. P. 19(b). In the intervention context, this problem does not arise because the applicant for intervention presumably wants to proceed in the court. The rule also reflects a holdover from older third party practice. Under the traditional rule, which still prevails, a party could not be joined if the party destroyed the basis for federal jurisdiction (e.g., the party was not of diverse citizenship from an opposing party), but a similar rule did not apply in the context of intervention. *See* *Krippendorf v. Hyde*, 110 U.S. 276, 281-82 (1884).

214. FED. R. CIV. P. 24, 1966 advisory committee note.

215. *Id.*

216. *Id.*

217. *Id.*

restricted.”<sup>218</sup> In the Committee’s view, the right to intervene “should not depend on whether there is a fund to be distributed or otherwise disposed of;” rather, “[i]f 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. . . .”<sup>219</sup>

To get around the problems it identified in the old rule, the Committee unified the former separate bases for intervention—the inadequately represented party that would be bound by the judgment and the common fund problem—and set forth a rule that addressed the problem from its new transactional point of view. In the 1966 amendments, then, the primary focus of the intervention rule shifted to include a focus on complex private litigation and class actions, and the Committee deliberately intended to assist the litigation of these types of cases. Rule 24(a) now provided for intervention under the following circumstances:

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>220</sup>

The new Rule 24(a) retained intervention where a statute expressly demanded it, and it retained the timeliness requirement. Instead of the two theories of intervention, however, it replaced the required interest with a practical concern, and it subjected all cases of intervention to the test of whether the original parties adequately represented the applicant’s interest.

In addition to demonstrating the need for the amendment, the Committee tacked on a closing comment at the end of its notes that did not fit with the tenor of the rest of the notes. The Committee stated that “[a]n intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.”<sup>221</sup> The Committee provided no reference to support this statement, and it did not suggest what conditions or restrictions a court could impose on an intervenor. This statement had little support in the

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218. *Id.*

219. *Id.*

220. FED. R. CIV. P. 24, 383 U.S. 1039, 1051 (1966). The Supreme Court amended Rule 24(a) again in 1987 to eliminate the masculine pronouns. FED. R. CIV. P. 24(a)(2).

221. FED. R. CIV. P. 24, 1966 advisory committee note.

prior existing case law, probably because courts usually treated intervenors as full parties to the litigation.<sup>222</sup> Along with providing no support for the statement and no sense of what conditions and restrictions would be appropriate, the rule itself did not specifically authorize district courts to impose conditions and restrictions on intervention. As explained below, this small fillip would prove to cause other problems in modern intervention practice.

The Supreme Court reacted swiftly to the 1966 amendment to Rule 24 in yet another antitrust case appealed directly to the Court under the Expediting Act, but with a drastically different outcome than the prior cases. In that case, *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*,<sup>223</sup> the Supreme Court considered the possible divestiture of one natural gas company from another because the merged entity constituted an unlawful combination in restraint of trade.<sup>224</sup> Contrary to the narrow reading of the right to intervention that the Court had established in its pre-1966 intervention jurisprudence, the Court in *El Paso* announced a sweeping right to intervene.

*El Paso* involved the acquisition of Pacific Northwest Pipeline Corporation by El Paso Natural Gas Corporation.<sup>225</sup> The United States objected to the acquisition, asserting that the acquisition left El Paso as the only out-of-state supplier of natural gas to California.<sup>226</sup> The Court agreed, and not only held that the merger violated antitrust law but also took the unusual step of directing the district court “to order divestiture without delay.”<sup>227</sup> On remand, three parties moved to intervene to challenge the divestiture remedy: the State of California, which sought to promote a competitive natural gas market for its citizens; Southern California Edison, a major industrial purchaser of natural gas; and Cascade Natural Gas, a distributor of natural gas in Washington and Oregon which alleged that the divestiture order disadvantaged it in future competition by leaving it with only the divested company as its sole supplier and creating conditions that

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222. In the admiralty context, the rules themselves may have caused this treatment. *See supra* notes 155-156 (setting forth former admiralty rules).

223. 386 U.S. 129 (1967).

224. *Id.* at 131; *see also* *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964) (holding that acquisition of Pacific Northwest Pipeline Corporation by El Paso Natural Gas violated Clayton Act); *California v. Federal Power Comm’n*, 369 U.S. 482 (1962).

225. *See* *United States v. El Paso Natural Gas Co.*, 376 U.S. at 652.

226. *See id.* at 657-62. The case contained an anomaly, however, because the Federal Power Commission had previously approved the merger as being in the public interest. *See id.* at 663-64 (Harlan, J., concurring in part and dissenting in part).

227. *Id.* at 662; *see also id.* at 664 (Harlan, J., concurring in part and dissenting in part) (dissenting from Court’s “peremptory ordering of divestiture”).

raised the prices the new company would have to charge.<sup>228</sup> The district court denied intervention to all three and the Supreme Court reversed.

The Court's opinion in *El Paso* stands out for two reasons, one primarily of historical interest and the other of more lasting importance. First, it broadly reinterpreted the right of intervention under the former version of Rule 24(a). Where *Sam Fox* appeared to have almost eliminated the right to intervene granted under former Rule 24(a)(2)—at least as it involved class actions—the Court reinterpreted former Rule 24(a)(3) in a manner that would have allowed intervention by the applicants in *Sam Fox*. In *El Paso*, the Court read the category of interventions for those adversely affected by disposition of property before the court to include the disposition of a company alleged to be in violation of antitrust law.<sup>229</sup> In reaching this conclusion, the Court relied exclusively on its decision in *Missouri-Kansas Pipe Line Co. v. United States*—a case that the Court had said did not actually involve the application of Rule 24<sup>230</sup>—and completely ignored its earlier decisions that the common fund type of intervention did not apply in the antitrust context.<sup>231</sup> This novel reading of the case law justified the intervention of the state of California and Southern California Edison, but even that reading would not necessarily justify intervention by Cascade.<sup>232</sup> This problem led to the second, more significant part of the Court's decision. The Court held that even if intervention were not available to Cascade under the old rule, it would surely be available under the new rule because Cascade clearly claimed “‘an interest’ in the ‘transaction which is the subject of the action.’”<sup>233</sup> In so interpreting the new rule, the Court announced a potentially sweeping reach to the right of intervention. The decision in *El Paso* thus set the stage for a broad right of intervention that the appellate courts would further refine.

### C. Intervention Practice Today

Today, federal courts routinely grant intervention to parties that could not have intervened under the pre-Rules intervention case law or the original Rule 24. The 1966 amendments have had the effect desired by the Advisory Committee; indeed, to the extent that the Advisory Committee saw

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228. See *Cascade Natural Gas v. El Paso Natural Gas*, 386 U.S. at 132-33.

229. *Id.* at 133-35.

230. *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 508 (1940).

231. See *Sutphen Estates, Inc. v. United States*, 342 U.S. 19, 22 (1951); *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 141 (1944).

232. See *Cascade Natural Gas Co. v. El Paso Natural Gas Co.*, 386 U.S. at 135.

233. *Id.* at 135 (quoting FED. R. CIV. P. 24(a)(2)).

intervention as simply a complement to joinder, the right to intervene now exceeds instances in which joinder would apply.

Petitions for intervention of right now must meet the four requirements of the rule: they must be timely; they must demonstrate that the applicant “claims an interest relating to the property or transaction which is the subject of the action”; they must show that the applicant “is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest”; and they must show that the applicant’s interests are not already adequately represented.<sup>234</sup> The second and third requirements are intertwined issues; I will therefore treat them together.<sup>235</sup> I will then examine the current jurisprudence concerning appellate review of decisions on intervention motions and the status of the intervenor in the litigation. An understanding of the underlying law of each of these is central to my larger task, namely, describing how the device of intervention functions in public law litigation.

### 1. *Timeliness*

The original rule required that an application for intervention be made in a timely manner, and the revised rule did not change that requirement. The decision of whether a motion to intervene is timely “is to be determined from all the circumstances.”<sup>236</sup> Courts have listed a number of factors that they consider relevant in making the timeliness determination, including: the status of the pending litigation; how long the applicant knew or should have known that the pending action would affect its interest; the purpose for which intervention is sought; the reasons that the applicant delayed moving for

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234. FED. R. CIV. P. 24(a)(2).

235. See MOORE’S FEDERAL PRACTICE, *supra* note 140, § 24.03[1][b], at 24-24 (“Although each of the three criteria is independent, practical application of Rule 24(a)(2) involves a balancing and blending of the independent components. The three criteria are not analyzed in a vacuum and, instead, are often applied as a group.”); 7C WRIGHT ET AL., *supra* note 129, § 1908, at 263 (“The nature of the applicant’s interest and the effect that the disposition of the action may have on his ability to protect that interest are closely related issues and are treated together in the present section.” (footnote omitted)). To an extent, all of the issues surrounding intervention are intertwined. As Judge Henry Friendly put it:

The various components of the Rule are not bright lines, but ranges—not all “interests” are of equal rank, not all impairments are of the same degree, representation by existing parties may be more or less adequate, and there is no litmus paper test for timeliness. Application of the Rule requires that its components be read not discretely, but together. A showing that a very strong interest exists may warrant intervention upon a lesser showing of impairment or inadequacy of representation. Similarly, where representation is clearly inadequate, a lesser interest may suffice as a basis for granting intervention.

United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 983 (2d Cir. 1984).

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

intervention; the prejudice to existing parties if the court grants intervention; the prejudice to the applicant if intervention is denied; and the presence of any unusual factors militating in favor of or against intervention.<sup>237</sup> The courts appear to weigh the factors equally and do not single out one pivotal factor, although at least one commentator claims that the courts focus primarily on the effect of the intervention on the existing parties.<sup>238</sup> These factors all help vindicate the fundamental purpose the timeliness requirement, which “is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal.”<sup>239</sup>

Not surprisingly, because of the multitude of different factors that courts consider, there is great variation in the cases concerning what constitutes a timely motion to intervene.<sup>240</sup> For example, one court denied as untimely a motion to intervene presented merely twelve days after the plaintiff filed the complaint,<sup>241</sup> while other courts have allowed outsiders to intervene even after the court has entered judgment for purposes of appealing the judgment.<sup>242</sup> Courts are particularly wary about allowing intervention if the

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237. See, e.g., *Winbush v. Iowa by Glenwood State Hosp.*, 66 F.3d 1471, 1479 (8th Cir. 1995) (focusing on “the status of the proceedings at the time of the motion, prejudice others may suffer as a result of the delay, and the reason for the delay”); *Arrow v. Gambler’s Supply, Inc.*, 55 F.3d 407, 409 (8th Cir. 1995) (“Among the considerations that bear on the question of timeliness are how far the litigation had progressed . . . the prospective intervenor’s prior knowledge of the pending action, the reason for the delay in seeking intervention, and the likelihood of prejudice to the [original] parties. . . .”); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66 (2d Cir. 1994) (author served as principal government counsel on appeal); *Linton by Arnold v. Commissioner of Health & Env’t*, 973 F.2d 1311, 1317 (6th Cir. 1992) (considering “(a) the point to which the suit has progressed; (b) the purpose for which intervention is sought; (c) the length of time preceding the application during which the applicant knew or reasonably should have known of its interest in the case; (d) prejudice to the original parties due to the failure of the applicant to apply promptly for intervention upon acquiring the knowledge of its interest; and (e) any unusual circumstances of the case”); *United States v. New York*, 820 F.2d 554, 557 (2d Cir. 1987) (examining “(a) the length of time the applicant knew or should have known of his interest before making the motion; (b) prejudice to existing parties resulting from the applicant’s delay; (c) prejudice to applicant if the motion is denied; and (d) presence of unusual circumstances militating for or against a finding of timeliness”).

238. See 7C WRIGHT ET AL., *supra* note 129, § 1916, at 435. *But see, e.g., Catazano by Catazano v. Wing*, 103 F.3d 223, 232-234 (2d Cir. 1996) (affirming denial of intervention as untimely solely because applicant was aware of litigation and waited too long before moving to intervene); *Doe v. Duncanville Ind. School Dist.*, 994 F.2d 160, 167-68 (5th Cir. 1993) (affirming denial of intervention as untimely because of lack of prejudice to applicant).

239. *United States v. South Bend Community Sch. Corp.*, 710 F.2d 394, 396 (7th Cir. 1983).

240. In addition, the standard of review applied on appeal also can explain the variation. See *infra* note 325 and accompanying text.

241. See *Arkansas Elec. Energy Consumers v. Middle South Energy, Inc.*, 772 F.2d 401, 403 (8th Cir. 1985) (affirming denial of intervention as untimely where party filed only twelve days after complaint filed because “a substantial amount of the litigation had been completed during these twelve days”).

242. See *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977) (allowing putative class member to appeal denial of class certification after settlement).

original parties have spent a great deal of time trying to formulate a settlement.<sup>243</sup> Nevertheless, courts will order intervention if the settlement itself creates the interest of the outsider or reveals that a party is no longer adequately represented.<sup>244</sup> Otherwise, few hard guidelines define the contours of the timeliness rule.

## 2. *Interest and Impairment*

The second (in some formulations, the second and third) requirement of Rule 24(a)(2) is that an “applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest.”<sup>245</sup> The Supreme Court has opined sporadically on the nature of the interest required to intervene, and commentators have bemoaned the resulting dearth of guidance.<sup>246</sup> Nevertheless, the few cases from the Supreme Court provide some idea of the interest required to intervene under Rule 24(a)(2).

After the *El Paso* decision discussed above,<sup>247</sup> the Supreme Court’s next treatment of Rule 24(a)(2) occurred in *Donaldson v. United States*.<sup>248</sup> In that case, the Internal Revenue Service (IRS) initiated an investigation of a taxpayer who had once worked for a circus.<sup>249</sup> The IRS issued summonses to the circus and its accountant to obtain employment and income records concerning the taxpayer.<sup>250</sup> The taxpayer sued the circus and the accountant

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243. See, e.g., *United States v. Metropolitan Dist. Comm’n*, 865 F.2d 2, 6 (1st Cir. 1989) (“[T]he purpose of the basic requirement that the application to intervene be timely is to prevent last minute disruption of painstaking work by the parties and the court.”) (quoting *Culbreath v. Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980)).

244. See, e.g., *United States v. Union Elec. Co.*, 64 F.3d 1152 (8th Cir. 1995); *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174 (3d Cir. 1994); *United States v. Detroit Int’l Bridge Co.*, 7 F.3d 497, 502 (6th Cir. 1993); *Officers for Justice v. Civil Service Comm’n*, 934 F.2d 1092 (9th Cir. 1991); *Jansen v. City of Cincinnati*, 904 F.2d 336 (6th Cir. 1990); *Association of Prof’l Flight Attendants v. Gibbs*, 804 F.2d 318 (5th Cir. 1986); *Sanguine, Ltd. v. United States Dep’t of Interior*, 736 F.2d 1416 (10th Cir. 1984).

245. FED. R. CIV. P. 24(a)(2).

246. See, e.g., Tobias, *Standing to Intervene*, *supra* note 10, at 432 (“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.”); Vreeland, *supra* note 10, at 283 (“Lack of guidance in the Advisory Committee Notes and a paucity of Supreme Court decisions on intervention of right have resulted in widely varying interpretations of the Rule 24(a) requirements.”).

247. See *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); see also *supra* notes 223-233 and accompanying text.

248. 400 U.S. 517 (1971).

249. See *id.* at 518-19.

250. See *id.* at 519.



and obtained preliminary relief enjoining them from turning over the records to the IRS.<sup>251</sup> The IRS responded by instituting a civil action to enforce the summonses, and the taxpayer sought to intervene.<sup>252</sup> Neither the circus nor the circus's accountant cared about the litigation, and each averred that it would submit the requested papers to the IRS were it not for the injunctions that the taxpayer had obtained.<sup>253</sup> Both the district court and the court of appeals denied intervention.

On the surface, the taxpayer's interest (in the nontechnical sense) in preventing his former employer and the accountant from responding to the summons was obvious: If the IRS obtained the records from the third parties, it might have been able to substantially advance a civil or criminal enforcement proceeding against the taxpayer. The question before the Court was thus whether the taxpayer's interest in hampering an investigation of him using the records of third parties warranted formal intervention of right. In deciding whether this constituted a sufficient interest in the sense used in Rule 24(a)(2), the Supreme Court emphasized that

what is sought here by the Internal Revenue Service from [the accountant] and from [the circus] is the production of [the circus's] records and not the records of the *taxpayer*. Further . . . this is not a case where a summons has been issued to the taxpayer himself seeking access to his books and information from his mouth. Neither is it a case where the summons is directed at the taxpayer's records in the hands of his attorney or his accountant, with the attendant questions of privilege, or even in the hands of anyone with whom the taxpayer has a confidential relationship of any kind.<sup>254</sup>

Placed in this context, then, the issue of whether the taxpayer had a sufficient interest in the dispute between the IRS and the circus and the accountant was not a close question. The IRS sought information through the summonses that it could obtain by calling the accountant or a representative of the circus to testify or from an examination of the circus's records concerning its own deductions.<sup>255</sup> The taxpayer neither owned the records, nor had a special relationship with the circus or the accountant. Thus, the Supreme Court affirmed the denial of intervention.<sup>256</sup>

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251. *See id.* at 519-20.

252. *See id.* at 520-21.

253. *See id.* at 521.

254. *Id.* at 522-23.

255. *See id.* at 531.

256. *See id.* In reaching this conclusion, the Court distinguished *Reisman v. Caplin*, 375 U.S. 440 (1964), a case that suggested intervention might be available for taxpayers in summary proceedings

In reaching this decision, however, the Court added a new phrase to the lexicon of intervention analysis. The Court held that Donaldson's interest "cannot be the kind contemplated by Rule 24(a)(2) when it speaks in general terms of 'an interest relating to the property or transaction which is the subject of the action.' What is obviously meant there is a significantly protectable interest."<sup>257</sup> As critics have noted, the term "significantly protectable interest" neither derives from any earlier intervention jurisprudence, nor adds anything to the analysis of what constitutes the necessary interest to warrant intervention under Rule 24(a)(2).<sup>258</sup> The phrase "significantly protectable interest" raises more questions than it answers, including how significant the interest must be, and by what means the interest must be protectable. One leading commentator has interpreted the term "protectable" to mean that the interest must be "legally protectable."<sup>259</sup> But that formulation proves to be tautological. If the interest is "legally protectable," then the applicant for intervention can intervene, that is, resort to the law, to protect it; if the interest is not "legally protectable," then the applicant cannot resort to law to protect it.

After a decision that essentially assumed the existence of sufficient interest,<sup>260</sup> the Court next discussed the interest required by Rule 24(a)(2) in

against third parties seeking to enforce summonses. In that case, the IRS issued a summons to accountants for married taxpayers. Attorneys for the couple filed a suit for declaratory and injunctive relief claiming that the summons was "null and void" because it unlawfully appropriated privileged work product and violated the taxpayers' right against self-incrimination. *See id.* at 441-42. The suit came before the IRS made any attempt to enforce the summons. The Court denied relief because it held that the attorneys had adequate relief at law. *Id.* at 443. Specifically, the Court determined that the attorneys or the taxpayers could intervene in the proceeding if the IRS sought to enforce the summons. The Court stated:

There are cases among the circuits which hold that both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims. We agree with that view and see no reason why the same rule would not apply before the hearing officer.

*Id.* at 445 (citations omitted). Instances in which third parties could intervene in such proceedings included instances where "the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, as well as that it is protected by the attorney-client privilege." *Id.* at 449 (citations omitted).

257. *Donaldson*, 400 U.S. at 531 (quoting FED. R. CIV. P. 24(a)(2)).

258. As one commentator noted:

Lower courts cannot ignore this direct interpretation of the rule by the Supreme Court. But "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 on the rule is not likely to provide any more guidance than does the bare term "interest" used in Rule 24 itself.

7C WRIGHT ET AL., *supra* note 129, § 1908, at 270; *see also* Shreve, *supra* note 10, at 924 n.125; Tobias, *Standing to Intervene*, *supra* note 10, at 433.

259. MOORE'S FEDERAL PRACTICE, *supra* note 140, § 24.03[2][a], at 24-25.

260. *See* *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 (1972) (holding that interest in democratic union elections sufficient to warrant intervention).

*Bryant v. Yellen*.<sup>261</sup> That case involved the allocation of land in the Imperial Valley of California. Farms in the Imperial Valley receive water from the Boulder Canyon Project, mostly known for Hoover Dam.<sup>262</sup> As a general rule, the reclamation laws “limit[] water deliveries from reclamation projects to 160 acres under single ownership.”<sup>263</sup> The Secretary of the Interior originally interpreted the reclamation laws to exempt lands in the Imperial Valley that had been irrigated prior to the construction of the project from the 160-acre limitation.<sup>264</sup> This remained the view of the Department of the Interior until 1964, when, because of other events—including the litigation in *Arizona v. California*,<sup>265</sup> which allocated the water in the Colorado River—the Department reassessed and reversed its position.<sup>266</sup> It attempted to impose the 160-acre limitation on the Imperial Valley District, which supplies water from the Project to individual farmers, and, when the District resisted, the United States sued for declaratory relief that the 160-acre limitation applied in the Imperial Valley.<sup>267</sup> The district court permitted individual landowners in the Valley to intervene, and then ruled that the 160-acre limitation did not apply to the lands in the Imperial Valley.<sup>268</sup> When the government decided not to appeal the adverse judgment, “a group of Imperial Valley residents, who had been given leave to participate as *amici* in the District Court and who desired to purchase the excess lands that might become available if [the 160 acre limitation] were held applicable, attempted to intervene for purpose of appeal, but the District Court denied the motion.”<sup>269</sup> The court of appeals reversed both on the denial of intervention and on the merits.<sup>270</sup> Thus, unless the Supreme Court reversed, the large landowners in the Valley faced a Hobson’s choice. They could either divest themselves of lands in excess of 160 acres—and if they did, the Secretary of the Interior would set a price that

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261. 447 U.S. 352 (1980).

262. *See id.* at 355.

263. *Id.*; *see also* 43 U.S.C. § 423e (1994) (providing that Secretary of the Interior shall appraise and sell “all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres” at a price that does not reflect the value added by the existence of the reclamation project).

264. *See Bryant v. Yellen*, 447 U.S. at 355.

265. 373 U.S. 546 (1963).

266. *See Bryant v. Yellen*, 447 U.S. at 363-65.

267. *See id.* at 365.

268. *See id.*

269. *Id.* at 366. The lead intervenor was Ben Yellen, a doctor who provided medical services to migrant farm workers. For a profile of this colorful character and the early stages of the litigation that became *Bryant v. Yellen*, see Michael E. Kinsley, *Ben Yellen’s Fine Madness*, WASH. MONTHLY, Jan. 1971, at 38.

270. *See United States v. Imperial Irrigation Dist.*, 559 F.2d 509 (9th Cir. 1977), *modified*, 595 F.2d 524 (9th Cir.), *and reh’g denied*, 595 F.2d 525 (9th Cir. 1979), *rev’d in part and vacated in part sub nom. Bryant v. Yellen*, 447 U.S. 352 (1980).

excluded the value added by the availability of water for irrigation—or they could withdraw from irrigation all irrigable acreage over 160 acres.

The Supreme Court did reverse, and held that the 160-acre limitation did not apply to lands in the Imperial Valley. Before reaching the merits of the dispute, however, the Court had to determine whether the court of appeals correctly allowed the frustrated landowners who claimed that they would purchase the divested land to intervene. The Court determined that “the respondents who sought to enter the suit when the United States forwent an appeal from the District Court’s adverse decision had standing to intervene and press the appeal on their own behalf.”<sup>271</sup> Like the opinions in *El Paso* and *Donaldson*, the Court’s opinion in *Bryant v. Yellen* does not provide a thorough analysis of the interest required for Rule 24(a)(2). The Court simply held that the interest asserted—namely, a desire to purchase excess land “at prices below the market value for irrigated lands”<sup>272</sup>—was sufficient.

In the same way that the Court’s pre-1966 intervention jurisprudence may have stemmed from the antitrust setting of those cases, it is tempting to dismiss the Supreme Court’s post-1966 jurisprudence concerning the definition of “interest” for purposes of Rule 24(a)(2) as being motivated by concerns other than the narrow question of intervention. Under this reading, the Court read the interest requirement loosely in *El Paso* because it was dissatisfied with the consent decree, and a grant of intervention was the only way to fix the decree.<sup>273</sup> The Court read the interest requirement narrowly in *Donaldson* to vindicate the policy of effective enforcement of the tax laws.<sup>274</sup>

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271. 447 U.S. at 366.

272. *Id.* at 367.

273. See *Smuck v. Hobson*, 408 F.2d 175, 179 n.16 (D.C. Cir. 1969) (“The majority’s splenetic displeasure with the substantive provisions of the divestiture plan approved by the Government and the trial court may have been an important factor in the liberal reading given Rule 24(a) in [*El Paso*].”); 7C WRIGHT ET AL., *supra* note 129, § 1908, at 266 (“Thus the Court’s desire to see that its mandate be obeyed provided strong pressure for a liberal reading of the requirements for intervention.”); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 406 (1967) (“But perhaps the case is just one where an anxiety to reach for and correct substantive error, as the Court saw it, produced questionable procedural law which the Court will in time recognize as such.”); Shapiro, *supra* note 10, at 730 (“[T]he decision in *El Paso* may lie outside the mainstream and . . . the apparent novelty of the rulings on intervention may have been largely a result of the Court’s dissatisfaction with the substantive provisions of the decree.”). One piece of evidence supporting this argument is the Court’s unusual decisions in the *El Paso* litigation to first direct divestiture and then, when remanding for the second time, to direct the “Chief Judge of the Circuit or the Judicial Council of the Circuit to assign a different District Judge to hear the case.” *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 142-43 (1967) (citation omitted).

274. See 7C WRIGHT ET AL., *supra* note 129, § 1908, at 270 (“A narrow reading of the intervention rule was thought necessary in *Donaldson* in order to protect the public interest in prompt and effective investigation and enforcement of the revenue laws.”).

The Court then read the interest requirement broadly again in *Bryant v. Yellen* because it wanted to preserve the ownership of lands in the Imperial Valley.<sup>275</sup> Whatever the Court's true motivation, these cases have provided scant guidance to the lower courts.

Without firm direction from the Supreme Court, the courts of appeals have attempted to determine what kinds of parties meet the interest and impairment requirements of Rule 24(a)(2).<sup>276</sup> In this sense, the courts of appeals are in the same position as they were before the 1966 amendments, when they were attempting to follow the scant direction of *Allen Calculators*, *Sutphen Estates*, and *Sam Fox Publishing*. But, following the spirit of the 1966 amendments and the *El Paso* decision, the courts of appeals have greatly expanded the right to intervene compared to past practice. Many interests that would not have warranted intervention under the old rule now suffice for intervention. At one extreme, courts have held that a party's interest in the stare decisis effect of a decision constitutes a sufficient interest to warrant intervention.<sup>277</sup> Usually, however, these cases involve such unusual facts that they resemble the common fund cases described by former Rule 24(a)(3).<sup>278</sup> More typically, the courts of appeals require something

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275. Justice Scalia has recently criticized *Bryant v. Yellen* in *Clinton v. City of New York*, 524 U.S. 417, 462 (Scalia, J., concurring in part and dissenting in part). In Justice Scalia's view, *Bryant v. Yellen* "represents a crabbed view of the standing doctrine that has been superseded." *Id.* According to Justice Scalia,

*Bryant* was decided at the tail-end of "an era in which it was thought that the only function of the constitutional requirement of standing was 'to assure that concrete adverseness which sharpens the presentation of issues.'" Thus, the *Bryant* Court ultimately afforded the respondents standing simply because they "had a sufficient stake in the outcome of the controversy," not because they had demonstrated injury in fact, causation and redressability. "That parsimonious view of the function of Article III standing has since yielded to the acknowledgment that the constitutional requirement is a 'means of "defin[ing] the role assigned to the judiciary in a tripartite allocation of power;"' and 'a part of the basic charter . . . provid[ing] for the interaction between [the federal] government and the governments of the several States.'"

*Id.* at 462 (citations omitted; quoting *Spencer v. Kemna*, 523 U.S. 1, 11 (1998)).

276. Professor Shreve has criticized the tendency of commentators to analyze intervention problems from the point of view of appellate courts. Shreve, *supra* note 10, at 894-95. I agree with this criticism for reasons explained *infra* at text accompanying notes 397-398. Nevertheless, to understand the state of the jurisprudence, one must analyze the law that the courts of appeals have created, and the reasoning of the district courts is much less important to this analysis.

277. See, e.g., *Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994); *Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989); *United States v. Oregon*, 839 F.2d 635, 638 (9th Cir. 1988); *Oneida Indian Nation v. New York*, 732 F.2d 261 (2d Cir. 1984); *Corby Recreation, Inc. v. General Elec. Co.*, 581 F.2d 175, 177 (8th Cir. 1978); *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967) ("[S]tare decisis principles may in some cases supply the practical disadvantage that warrants intervention as of right."); *Atlantis Dev. Corp. v. United States*, 379 F.2d 818 (5th Cir. 1967). But see, e.g., *In re Benn*, 791 F.2d 712, 721 (9th Cir. 1986) (disallowing intervention based on stare decisis because applicants were in different judicial circuit that would not be bound by stare decisis in underlying case).

278. For example, *Atlantis Development Corp.* "involve[d] a little bit of nearly everything—a

more substantial than a passing curiosity in how the case comes out. The verbal formulae that the appellate courts have generated to capture the interest necessary for intervention are no more satisfying than those generated by the Supreme Court.<sup>279</sup> Nevertheless, a fairly reliable set of fact patterns has developed to flesh out what courts believe satisfies the necessary interest requirement in the public law context. The courts of appeals consistently have held several multifarious types of interests sufficient for purposes of the rule. These interests include those of parents and teachers in school desegregation cases;<sup>280</sup> of majority employees in employment discrimination cases brought by minority employees;<sup>281</sup> of employees or their representatives in other cases in which the court is restructuring an institution like a school system, prison, or mental hospital;<sup>282</sup> of environmentalists and

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little bit of oceanography, a little bit of marine biology, a little bit of the tidelands oil controversy, a little bit of international law, a little bit of latter day Marco Polo exploration.” 379 F.2d at 819. At issue was the ownership of reefs off of the coast of Florida on which Atlantis wished to construct “facilities for fishing club, marina, skin diving club, a hotel, and, perhaps as the chief lure, a gambling casino.” *See id.* at 820. Atlantis asserted that the reefs lay outside the territorial jurisdiction of either Florida or the United States. *Id.* at 819-20. The United States subsequently sued other parties that attempted to build on the reefs, asserting that the reefs were subject to the territorial jurisdiction of the United States.

In granting Atlantis’s petition to intervene, the Fifth Circuit held that Atlantis’s claim would be “worthless” if the government prevailed in its lawsuit against the original defendants. *See id.* at 828. As a practical matter, if the original defendants lost, “the only way by which Atlantis can win is to secure a rehearing en banc with a successful overruling of the prior decision or, failing in either one or both of those efforts, a reversal of the earlier decision by the Supreme Court on certiorari.” *Id.* Understandably, the Fifth Circuit believed it “an understatement to characterize these prospects as formidable.” *Id.* Nevertheless, the Fifth Circuit limited its opinion, stating that the unusual facts of the case, and not the normal operation of principles of stare decisis, warranted intervention in that case:

It bears repeating, however, that this holding does not presage one requiring intervention of right in every conceivable circumstance where under the operation of the Circuit’s stare decisis practice, the formidable nature of an en banc rehearing or the successful grant of a writ of certiorari, an earlier decision might afford a substantial obstacle. We are dealing here with a conjunction of a claim to and interest in the very property and very transaction which is the subject of the main action.

*Id.* at 829 (citations omitted).

279. One commonly cited case derived the following formula: “What is required is that the interest be one which the *substantive* law recognizes as belonging to or being owned by the applicant.” New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 464 (5th Cir. 1984) (en banc).

280. *See, e.g.,* Bradley v. Milliken, 828 F.2d 1186, 1192 (6th Cir. 1987) (“[I]t has generally been accepted that students, parents of children in the school system and parent organizations have a sufficient interest to satisfy [the Rule 24(a)(2) interest] requirement, and that their interest could be impaired by the disposition of a school desegregation case.” (citing cases)); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 738 F.2d 82 (8th Cir. 1984) (allowing intervention to teachers whose contracts with school districts could be upset by unification remedy).

281. *See, e.g.,* Edwards v. City of Houston, 78 F.3d 983, 1004 (5th Cir. 1996) (en banc); Howard v. McLucas, 782 F.2d 956, 959 (11th Cir. 1986).

282. *See, e.g.,* Little Rock Sch. dist. v. Pulaski County Special Sch. Dis. No. 1, 738 F.2d 82 (8th Cir. 1984)

other public interest groups in cases brought by the regulated community;<sup>283</sup> of the regulated community in cases brought by public interest organizations;<sup>284</sup> and, to some extent, of people claiming economic interests that the litigation could affect.<sup>285</sup> A significant split of authority exists over whether an organization that has lobbied for legislation has a sufficient interest to intervene to defend the legislation. Some courts of appeals hold that this interest provides a sufficient stake in the matter to satisfy Rule 24,<sup>286</sup> others hold the opposite.<sup>287</sup>

The most important question that has plagued the courts of appeals in defining the interest necessary to intervene is whether a proposed intervenor must show legal standing to sue in order to intervene. The standing inquiry asks whether a party has a sufficient interest in a dispute to initiate a lawsuit in the first place. It derives from the requirement of Article III of the Constitution that the judicial power extends to “Cases” and “Controversies.”<sup>288</sup> The Supreme Court has held that the standing inquiry

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283. See, e.g., *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of Interior*, 100 F.3d 837 (10th Cir. 1996); *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995); *Sagebrush Rebellion v. Watt*, 713 F.2d 525 (9th Cir. 1983). But see, e.g., *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825 (9th Cir. 1996).

284. *Sierra Club v. EPA*, 995 F.2d 1478 (9th Cir. 1993); *Natural Resources Defense Council v. Costle*, 561 F.2d 904 (D.C. Cir. 1977). But see *Portland Audubon Soc’y v. Hodel*, 866 F.2d 302 (9th Cir. 1989).

285. See, e.g., *United States v. Union Elec. Co.*, 64 F.3d 1152 (8th Cir. 1995) (allowing intervention by potentially responsible parties to challenge settlement of liability at hazardous waste site); *Conservation Law Found. v. Mosbacher*, 966 F.2d 39, 43 (1st Cir. 1992) (holding interest of members of fishing industry in consent decree concerning fishery management plan sufficient) (author served as principal government counsel on appeal). The economic interest cannot, however, be too generalized. See, e.g., *Public Serv. Co. v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998) (holding interest in lower electric rates too generalized).

286. See *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982).

287. See *Keith v. Daley*, 764 F.2d 1265, 1269 (7th Cir. 1985); *United States v. 36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985); *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982).

288. U.S. CONST. art. III, § 2, cl. 1. The Supreme Court has most recently iterated the requirements that a prospective plaintiff must meet to demonstrate standing in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 120 S. Ct. 693 (2000).

[T]o satisfy Article III’s standing requirements, a plaintiff must show (1) it has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

*Id.* at 704 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 444, 560 (1992)). Of most relevance to the application of the standing requirement to intervention motions is the injury-in-fact requirement. The question of whether someone is actually injured would have great bearing on whether someone has a sufficient interest in litigation to intervene.

Several recent cases of the supreme Court interpret the injury-in-fact requirement narrowly in the context of environmental litigation. See, e.g., *Steel Co. v. Citizens for a Better Env’t.*, 523 U.S. 83 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). The *Laidlaw* case, quoted earlier, is exceptional because it held that the

limits the federal courts to their proper role in the tripartite system of government created by the Constitution.<sup>289</sup> The Court has recently decided a number of cases discussing and expanding the standing requirement,<sup>290</sup> and these developments in the Court's jurisprudence have generated considerable academic criticism.<sup>291</sup> Evaluating the merits of the Court's decisions in this area and the academic criticism those decisions engender lies beyond the purview of this article. What is relevant here is whether courts should apply the standing criteria to the question of whether it should allow an outsider to participate in an existing lawsuit. That presents a different inquiry. As Professor Shapiro has observed, "A may not have a dispute with C that could qualify as a case or controversy, but he may have a sufficient interest in B's dispute with C to warrant his participation in the case once it has begun. . . ."<sup>292</sup>

The Supreme Court has never squarely addressed whether a prospective intervenor must have standing sufficient to satisfy the case and controversy requirement of Article III to support a motion for intervention. Indeed, it explicitly passed on that question in *Diamond v. Charles*.<sup>293</sup> In that case, the original plaintiffs attacked the constitutionality of an Illinois statute that regulated abortion. The lower courts held the statute unconstitutional. Diamond was a physician who had intervened as a defendant and petitioned

environmental organizations had proved a sufficient injury-in-fact to proceed with their citizen enforcement suit under the Clean Water Act. See *Laidlaw*, 120 S. Ct. at 704-06.

289. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992) ("Obviously, then, the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts."). While still a circuit court judge, Justice Scalia wrote an article that foreshadowed the development of much of the Supreme Court's recent standing jurisprudence. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). In that article, Scalia puts the standing inquiry in "more pedestrian terms [as] an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'" *Id.* at 882.

290. In addition to *Lujan*, 504 U.S. 555, see, for example, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656 (1993); *Whitmore v. Arkansas*, 495 U.S. 149 (1990).

291. It would be difficult to list all of the articles on Article III standing. Important contributions include: Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); Fallon, *supra* note 39; William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221 (1988); Harold J. Kent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793 (1993); Gene R. Nichols, Jr., *Justic Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988).

292. Shapiro, *supra* note 10, at 726 (footnote omitted).

293. 476 U.S. 54, 68-69 (1986) ("We need not decide today whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2) but also the requirements of Art. III.").



the Supreme Court to reverse the decisions below. The Supreme Court held that an intervenor must possess Article III standing to continue litigation on appeal if the original party has discontinued litigating.<sup>294</sup> It further held that Diamond's interests, while perhaps sufficient to warrant intervention under rule 24(a)(2), were insufficient to establish Article III standing.<sup>295</sup> The Court recently revisited this holding in *Arizonans for Official English v. Arizona*,<sup>296</sup> a case with a procedural history similar to *Diamond v. Charles*.<sup>297</sup> There, the Court expressed "grave doubts whether [the intervenors] have standing under Article III to pursue appellate review."<sup>298</sup> But again, the question of whether a lawsuit should continue absent one of the original parties if the intervenor lacks standing is a separate question from whether courts should the intervenor to demonstrate standing as a prerequisite to intervening.<sup>299</sup>

Three courts of appeals have held that a proposed intervenor must demonstrate interests sufficient to satisfy the standing inquiry in order to intervene. In the first such decision, *Southern Christian Leadership Conference v. Kelley*, the District of Columbia Circuit held that Article III required an applicant for intervention to demonstrate standing.<sup>300</sup> More

294. *See id.* at 69.

295. *See id.* at 71. Diamond sought to protect his interests as a "doctor, father, and a protector of the unborn." *Id.* at 64.

296. 520 U.S. 43 (1997).

297. The procedural history in that case was considerably more protracted than in *Diamond v. Charles*, *see id.* at 49-64 (reciting history), but the relevant schematic is similar: A state employee challenged the constitutionality of an amendment to the Arizona constitution that made English the official language of the state. An organization and an individual intervened on behalf of the state. The state lost in the court of appeals and declined to appeal to the Supreme Court, so the intervenors petitioned for certiorari.

298. *Id.* at 66. The Court did not rely on this justification to reach its decision. *Id.* ("we need not definitively resolve the issue"). Instead, the Court determined that the case was moot because the original plaintiff had left her job with the state. *See id.* at 67-75 (analyzing mootness of case). This case is seriously misread by Coffey, *supra* note 10. Coffey asserts that the Court held, or at least strongly suggested, in *Arizonans for Official English* that "intervenors must have Article III standing." *Id.* at 819. This reading is implausible. First, although the Court expressed "grave doubts" about whether the intervenors had standing, it expressly did not decide the issue. *See Arizonans for Official English*, 520 U.S. at 66. Second, it seems unlikely, to say the least, that the Court would "strongly suggest" the resolution to a question it expressly passed on in both an earlier case and the case before it.

299. As Professor Shapiro aptly put it:

A distinction between standing to intervene and to appeal makes particular sense when the "case or controversy" limitation on the federal judicial power is recalled. Adding *C* to a litigation between *A* and *B* may pose no problems under Article III of the Constitution, but permitting *C* to be the sole adversary of *B* on appeal, when his interest in the case may be only in its value as precedent, certainly does give difficulty since there is no real controversy between *A* and *C*.

Shapiro, *supra* note 10, at 753-54. I believe that Shapiro must have meant "since there is no real controversy between *B* and *C*," the parties to the appeal.

300. 747 F.2d 777 (D.C. Cir. 1984). In that case, Senator Jesse Helms sought to intervene in litigation between civil rights plaintiffs and the Federal Bureau of Investigation (FBI) over the

recently, that court held that an intervenor must demonstrate Article III standing to intervene in a case in the court's original jurisdiction "because a Rule 24 intervenor seeks to participate on an equal footing with the original parties to the suit."<sup>301</sup>

The Seventh Circuit similarly requires an intervenor to demonstrate standing to sue. That court has reasoned that a prospective intervenor must demonstrate standing because "[t]he intervenor seeks control of the suit, acquires a right to conduct the case in a way that may undermine the interest of the original plaintiff . . . and may become eligible for a separate grant of relief or an award of attorneys' fees."<sup>302</sup> Moreover, the Seventh Circuit sees imposing the standing requirement as an effective means of "keeping the scope of intervention of right within reasonable bounds."<sup>303</sup>

disposition of electronic surveillance tapes that the FBI made of Dr. Martin Luther King, Jr. *Id.* at 778. In 1977, the district court entered judgment, sealing the tapes for fifty years, with any disclosure to be made only under court order. *Id.* Six years later, Senator Helms sought to intervene to gain access to the tapes "to better inform his and the Senate's vote" on whether to create the national Martin Luther King Day holiday. *See id.* The D.C. Circuit affirmed the district court's denial of intervention, holding that the senator did not meet the requirements for legislator standing. *Id.* at 779-81. The Supreme Court recently discussed the requirements for congressional standing in *Raines v. Byrd*, 521 U.S. 811 (1997).

301. *City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994) (intervention under 28 U.S.C. § 2348 (1994)); *see also* *Cook v. Boorstin*, 763 F.2d 1462, 1470-71 (D.C. Cir. 1985). Recently, the D.C. Circuit recognized an inconsistency in its case law and reaffirmed that it would require applicants for intervention to prove Article III standing in support of their petitions. *See Rio Grande Pipeline Co. v. Federal Energy Regulatory Comm'n*, 178 F.3d 533 (D.C. Cir. 1999), *noted in* Recent Case, 113 HARV. L. REV. 1557 (2000) (criticizing decision).

302. *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988). The Seventh Circuit decided *Bethune Plaza* before the Supreme Court's decision in *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989). In that case, the Court held that an intervening defendant in a civil rights action would not be liable for attorneys' fees unless the intervenor violated the civil rights of the plaintiffs. More recently, the Ninth Circuit has held that an intervening environmental plaintiff does not qualify for attorneys' fees when it intervenes in an enforcement action brought by the federal government under the Clean Air Act. *See United States v. Stone Container Corp.*, 196 F.3d 1066 (9th Cir. 1999). Thus, the Seventh Circuit's last observation that an intervenor participates fully as a party because it can qualify for attorneys' fees may no longer represent good law in a number of areas.

303. *Solid Waste Agency v. United States Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996). To be sure, the Seventh Circuit stated in one decision that the "interest of a proposed intervenor . . . must be *greater* than the interest sufficient to satisfy the standing requirement." *United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (1985) (emphasis added). Many commentators have interpreted this comment literally and used it as evidence of the hostility of the courts to intervenors. *See, e.g.,* Tobias, *Public Law Litigation*, *supra* note 10, at 324-25; Tobias, *Standing to Intervene*, *supra* note 10, at 437; Bullock, *supra* note 10, at 637 & n.310; Dickinson, *supra* note 10, at 995-96; Vreeland, *supra* note 10, at 288.

A close examination of the decision in *36.96 Acres* reveals faults in this analysis and demonstrates that the Seventh Circuit does not hold that a proposed intervenor must show an interest greater than that required by Article III. First, the interest that the court discussed in that case was the prudential zone of interest standing test, not the Article III standing test. *See 36.96 Acres*, 754 F.2d at 859 (comparing interest necessary for intervention and interest sufficient to fall within zone of interest to bring APA action). Second, the unusual facts of the case caution against reading the opinion too

More recently, the Eighth Circuit followed the D.C. Circuit's decision in *Kelley* and held that the Constitution mandates that intervenors show standing under Article III to support a motion for intervention.<sup>304</sup> In its decision, the Eighth Circuit concluded that intervenors must show Article III standing because they seek to participate fully as parties to the case.<sup>305</sup> In that court's "view, an Article III case or controversy, once joined by intervenors who lack standing, is—put bluntly—no longer an Article III case or controversy."<sup>306</sup> The court concluded that "a federal case is a limited affair, and not everyone with an opinion is invited to attend."<sup>307</sup>

Other courts of appeals have held that a proposed intervenor need not satisfy the requirements of Article III to support intervention.<sup>308</sup> These courts reason that the language of Rule 24 itself does not speak in terms of standing but only requires an interest in the litigation. Furthermore, the limitations imposed on the courts by Article III are not violated when a party without standing participates as an intervenor because "[o]nce a valid Article III case-or-controversy is present, the court's jurisdiction vests. The presence of additional parties, although they alone could independently not satisfy Article III's requirements, does not of itself destroy jurisdiction already established."<sup>309</sup>

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broadly. That case involved an attempt by the federal government to condemn a parcel of land owned by the Northern Indiana Public Service Company (NIPSCO) and add it to the Indiana Dunes National Lakeshore. When Congress enacted the Indiana Dunes National Lakeshore Act, 16 U.S.C. §§ 460u to 460u-24 (1994), it directed the Secretary of the Interior to acquire the NIPSCO parcel but "only if such area can be acquired for not more than \$800,000, exclusive of administrative costs of acquisition, as adjusted by the Consumer Price Index. . . ." 16 U.S.C. § 460u-12 (1994). At the time of the enactment of the National Lakeshore Act, the parcel was undisputedly worth over \$1.7 million. *36.96 Acres*, 754 F.2d at 857. The government instituted a condemnation action, but understandably abandoned it because it legally could not pay the fair market value of the parcel. *See id.* at 857-58; *see also* *Save the Dunes Council, Inc. v. Lujan*, 899 F.2d 647 (7th Cir. 1990) (affirming denial of mandamus to order Secretary of the Interior to condemn parcel because government could not legally pay full fair market value). The *Save the Dunes Council* moved to intervene on the side of the government, but it is impossible to see what it would have added to the proceeding unless it could provide the additional money necessary to pay fair market value for the parcel. Since the decision in *36.96 Acres*, the Seventh Circuit has only required intervenors to demonstrate Article III standing. *See, e.g., Solid Waste Agency*, 101 F.3d at 507-08.

304. *Mausolf v. Babbitt*, 85 F.3d 1295 (8th Cir. 1996).

305. *See id.* at 1300.

306. *Id.*

307. *Id.* at 1301.

308. *See, e.g., Associated Builders and Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994); *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991); *Chiles v. Thornburgh*, 865 F.2d 1197 (11th Cir. 1989); *United States Postal Serv. v. Brennan*, 579 F.2d 188 (2d Cir. 1978).

309. *Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 2046 (1999). To be sure, the *Ruiz* case involved the application of FED. R. CIV. P. 24(a)(1), not 24(a)(2). Furthermore, the Fifth Circuit limited its holding to the question of whether the Constitution requires a demonstration of standing to support intervention, not whether Rule 24(a)(2) requires such a showing.

### 3. Adequacy of Representation

If a court finds that the applicant's motion to intervene is timely and that the applicant has shown the necessary interest and impairment of the interest, the court must grant intervention "unless the applicant's interest is adequately represented by existing parties."<sup>310</sup> In its only decision addressing the adequate representation issue, the Supreme Court has held that "the burden of making that showing should be treated as minimal."<sup>311</sup> The Court has not stated what level of representation would be adequate or whether the concept of adequate representation in intervention is the same as in other contexts such as class actions.<sup>312</sup>

The courts of appeals have developed a number of factors to determine whether an applicant makes the necessary minimal showing of inadequate representation. The most difficult case to find inadequate representation is when an intervenor is seeking the same ultimate result as an original party. After all, if an intervenor is seeking the same result as the original plaintiff or defendant, it is unlikely that the intervenor will raise additional issues or arguments. In this context, some courts have held that "representation is adequate if there is no collusion between the representative and an opposing party; if the representative does not have or represent an interest adverse to the applicant; or if the representative does not fail in the fulfillment of his or her duty."<sup>313</sup> Most courts do not now follow this narrow view of what constitutes inadequate representation even if the proposed intervenor seeks the same end result as one of the original parties. Rather, most courts examine a number of factors concerning the behavior and litigating strategies

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*Id.* at 832 n.26. The Fifth Circuit has previously implied that Article III standing is not required to satisfy the requirements of Rule 24(a)(2). *New Orleans Public Serv. v. United Gas Pipe Line*, 732 F.2d 452 (5th Cir. 1984).

310. FED. R. CIV. P. 24(a)(2). There is a small debate over who has the burden to show adequate representation. The leading treatises differ on this question. Compare MOORE'S FEDERAL PRACTICE, *supra* note 140, § 24.03[4][a][I], at 24-41 ("The applicant bears the burden of showing that the existing parties inadequately represent his or her interests in the action.") with 7C WRIGHT ET AL., *supra* note 129, § 1909, at 314-15 ("[T]he language of the rule clearly suggests that [the prospective intervenor] is to be allowed in . . . unless the court is persuaded that the representation of him is in fact adequate.").

311. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972).

312. For a recent discussion of the concept of adequate representation in the class action context, see Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997).

313. *Liddell v. Caldwell*, 546 F.2d 768, 771 (8th Cir. 1976); see also *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987); *Wade v. Goldschmidt*, 673 F.2d 182, 186 n.7 (7th Cir. 1982); *Martin v. Kalvar Corp.*, 411 F.2d 552, 553 (5th Cir. 1969). One might place in this category instances where an apparent conflict of interest could exist. See *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983) (finding that government inadequately represented environmental organization because Secretary of the Interior had been associated with original plaintiff).

of the original parties. These factors include whether the original parties will make the arguments that the intervenor would make, whether the existing parties are able and willing to make those arguments, whether the intervenor's and the original parties' interests are sufficiently divergent to believe that the representative will not give these interests sufficient attention, and whether the parties will neglect any evidence or information that the intervenor could supply.<sup>314</sup> Nevertheless, representation is not inadequate simply because the intervenor has a different motivation to litigate than an existing party or because of disagreements in litigation strategy.<sup>315</sup>

It is of particular relevance to public law litigation that courts formerly applied a strong presumption that a government adequately represented any party aligned with its interests, on the theory that a government would adequately represent the views and needs of all citizens as *parens patriae*.<sup>316</sup> More courts now recognize that outsiders might have interests that a government would overlook or fail to emphasize.<sup>317</sup> This premise opens the

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314. As one court put it:

[I]n determining adequacy of representation, we consider whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; whether the present party is capable and willing to make such arguments; and whether the intervenor would offer any necessary elements to the proceedings that other parties would neglect.

*Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1498-99 (9th Cir. 1995); *see also United States v. Oregon*, 839 F.2d 635, 638 (9th Cir. 1988) (finding representation inadequate where intervenor would raise constitutional issue that original plaintiff would not); *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986) (finding representation adequate where each of intervenor's "concerns is being addressed by at least one of the existing parties"); *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982); *Hoots v. Pennsylvania*, 672 F.2d 1133, 1135 (3d Cir. 1982) ("The applicant may demonstrate that its interests, though similar to those of an existing party, are nevertheless sufficiently different that the representative cannot give the applicant's interests proper attention.");

315. *See Natural Resources Defense Council, Inc. v. New York State Dep't of Envtl. Conservation*, 834 F.2d 60, 61-62 ("A putative intervenor does not have an interest not adequately represented by a party to a lawsuit simply because it has a motive to litigate that is different from the motive of an existing party."); *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("A mere disagreement over litigation strategy or individual aspects of a remediation plan does not, in and of itself, establish inadequacy of representation.")

316. *See, e.g., United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 984-85 (2d Cir. 1984); *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982). For a discussion of intervention in government enforcement actions, *see Note, Intervention in Government Enforcement Actions*, 89 HARV. L. REV. 1174 (1976).

317. *See, e.g., Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995); *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994) ("The government must represent the broad public interest, not just the economic concerns of the [intervenors]."); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1001 (8th Cir. 1993) (overcoming presumption of adequate representation for landowners); *Conservation Law Found. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992) (finding that the "Secretary's judgments are necessarily constrained by his view of the public welfare") (author served as principal government counsel on appeal).

possibility for intervention in a greater number of cases.

#### 4. Appellate Review

Once a district court has determined whether to grant or deny a motion to intervene, a court of appeals faces three questions in reviewing that order. First, is the order reviewable through immediate appeal or must review wait until a final judgment? Second, under what standard should the appellate court review the district court? Finally, is intervention available to a party who wishes to appeal a final judgment if none of the original parties decides to appeal?

The older cases and literature spent a great deal of time on the first question, namely, whether a party denied intervention could immediately appeal the district court's adverse decision. The problem surrounding immediate appeal of the denial of intervention was that the decision denying intervention was typically not a final judgment and an appellate court would therefore lack jurisdiction.<sup>318</sup> On the other hand, the decision denying intervention was final as far as the applicant for intervention was concerned. In the traditional view, the question of the appellate court's jurisdiction turned on the merits of the appeal. Under this circular view, an appellate court had jurisdiction to review a district court's decision to deny intervention only if the district court erred in its decision.<sup>319</sup> If the district court erred, then the appellate court had jurisdiction and could reverse; if the district court acted properly, then the appellate court lacked jurisdiction and therefore had to dismiss the appeal. Most courts of appeals now treat the denial of intervention as an order that is immediately appealable, reversing if the district court erred and affirming if it acted properly.<sup>320</sup> While this approach has not been formally adopted by the Supreme Court, and some courts of appeals still follow the traditional approach, the effect of the distinction between the traditional and the more modern approaches to the

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318. For a classic statement of the finality requirement, see generally *Catlin v. United States*, 324 U.S. 229 (1945).

319. See *Sutphen Estates, Inc. v. United States*, 342 U.S. 19, 20 (1951) ("If appellant may intervene as of right, the order of the court denying intervention is appealable."); *accord*, *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 688 (1961); *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 524-25 (1947).

320. See, e.g., *Williams v. Katz*, 23 F.3d 190, 191-92 (7th Cir. 1994); *Corby Recreation, Inc. v. General Elec. Co.*, 581 F.2d 175 (8th Cir. 1978). Some courts of appeals follow a related rule that requires rejected applicants for intervention to appeal immediately following the denial of intervention; the putative intervenor cannot wait for the final judgment to appeal. See, e.g., *Credit Francias Int'l v. Bio-Vita, Ltd.*, 78 F.3d 698, 703 (1st Cir. 1996); *B.H. by Pierce v. Murphy*, 984 F.2d 196, 199 (7th Cir. 1993).

appeal of a district court's decision to deny intervention is essentially nil.<sup>321</sup> The circuits agree, however, that courts of appeals lack jurisdiction over a district court's decision to grant intervention, even when the court limits the rights of the intervenor.<sup>322</sup> Courts of appeals can review such orders only in the context of an appeal from a final judgment.<sup>323</sup>

The standard of review that an appellate court should apply to a district court's denial of intervention, like many other elements of intervention, has not been resolved by the Supreme Court.<sup>324</sup> The Court has definitively held that a district court's determination of timeliness is committed to the "sound discretion" of the district court and will not be reversed except for an abuse of discretion.<sup>325</sup> Otherwise, the circuits have split on the standard of review. Some circuits apply the abuse of discretion standard to the other elements as well.<sup>326</sup> These courts reason that the district court has a better "feel for the

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321. On rare occasions, the difference between the traditional approach—holding that courts of appeals lack appellate jurisdiction over the appeal from the denial of intervention unless the denial is reversible error—and the more modern approach—treating all orders denying intervention as immediately appealable final orders—may make a difference. The recent litigation over the affirmative action policy of the University of Texas Law School provides an example. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) [*Hopwood II*]; *Hopwood v. Texas*, 21 F.3d 603 (5th Cir. 1994) (per curiam) [*Hopwood I*]. In *Hopwood I*, the Fifth Circuit affirmed the district court's decision to deny intervention to two organizations representing the interests of minorities that wished to defend the law school's affirmative action program. The *Hopwood I* panel affirmed on the merits. See *Hopwood I*, 21 F.3d at 604. This affirmance ignored the Fifth Circuit's jurisdictional rule that requires the court of appeals to find reversible error before it can assert jurisdiction over the appeal. Following trial, the two organizations renewed their motions to intervene. On the second appeal, the court of appeals had to determine the binding effect of the earlier litigation on the intervention motion. See *Hopwood II*, 78 F.3d at 961. If the first panel had followed Fifth Circuit practice, it should have dismissed the earlier appeal for want of jurisdiction, thus rendering a possibly non-binding judgment. For further discussion of the intervention problems presented in cases like the *Hopwood* litigation, see *infra* notes 409-410 and accompanying text.

322. See *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987).

323. See *id.* For this reason, cases reversing a district court for erroneously granting intervention are rare, although they do exist. See, e.g., *Cunningham v. David Special Commitment Ctr.*, 158 F.3d 1035 (9th Cir. 1998); *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525 (7th Cir. 1988). Such reversals are especially rare because parties seldom appeal the grant of intervention in the context of an appeal from a final judgment.

324. The Court has also stated no standard of review for a district court's grant of intervention, but as argued above, the original parties cannot appeal immediately if the district court grants intervention, and appeals of grants of intervention following final judgment are rare.

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

326. See *Building & Constr. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) ("We review the district court's decision to deny intervention under an abuse of discretion standard."); *International Paper Co. v. Inhabitants of the Town of Jay*, 887 F.2d 338, 343 (1st Cir. 1989); *Gould v. Alleco*, 883 F.2d 281, 284 (4th Cir. 1989); *Getty Oil Co. v. Department of Energy*, 865 F.2d 270, 274 (Temp. Emer. Ct. App. 1988); *Harris v. Pernesley*, 820 F.2d 592, 597 (3d Cir. 1987); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 990 (2d Cir. 1984). In an unpublished opinion, the Federal Circuit held that it would apply the abuse of discretion standard, see *Abbott Lab. v. Ortho Diagnostic Sys., Inc.*, 32 U.S.P.Q.2d 1694 (Fed. Cir. 1994), but it expressly passed on the issue in *American Maritime Transp. v. United States*, 870 F.2d 1559, 1561 (Fed. Cir. 1989).

case,” and is therefore better equipped to make the various complex factual and legal judgments that go into weighing a motion for intervention.<sup>327</sup> Other courts of appeals review the district court’s decision *de novo*.<sup>328</sup> These courts echo Justice Brennan’s admonition that “a district court has less discretion to limit the participation of an intervenor of right than that of a permissive intervenor.”<sup>329</sup>

On the final question, whether an intervenor can intervene for purposes of appeal, the Supreme Court has held in the context of a class action that a member of a class can intervene for purposes of appealing a judgment that would bind the class.<sup>330</sup> Other courts have permitted intervention solely for the purpose of taking an appeal, especially when the original parties have no intention to appeal because of a settlement.<sup>331</sup>

### 5. *Status of the Intervenor*

The courts vary on what rights an intervenor possesses in the litigation. Traditionally, an intervenor was a full party to the litigation and could file briefs, present witnesses, and otherwise fully participate in the litigation.<sup>332</sup> This view comported with the limitations on who could intervene—because the right to intervene was limited to those who had a close relationship to the case, courts treated them as full parties. This result apparently held true even under the former Equity Rule 37 which provided that the intervention would

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327. See *Hooker*, 749 F.2d at 990; see also *International Paper*, 887 F.2d at 343-44 (“[A]pplication of the Rule involves the pragmatic balancing of a range of factors that arise in varying factual situations.”); *Harris v. Pernsley*, 820 F.2d at 597 (“The variety of situations in which an application [of Rule 24] may arise counsels against setting strict legal standards . . . [and] supports an abuse of discretion standard of review. . .”).

328. See *Coalition of Arizona/New Mexico Counties for Stable Econ. Growth v. Department of Interior*, 100 F.3d 837, 840 (10th Cir. 1996); *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1995); *United States v. Union Elec. Co.*, 64 F.3d 1152, 1158 (8th Cir. 1995); *Edwards v. City of Houston*, 37 F.3d 1097 (5th Cir. 1994); *Nissei Sangyo Am., Ltd. v. United States*, 31 F.3d 435, 438 (7th Cir. 1994); *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1477 (11th Cir. 1993); *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989). In a recent opinion, the Fourth Circuit stated that it would review an intervention decision *de novo* and reverse the district court’s findings of facts only if they were clearly erroneous. *In re Richman*, 104 F.3d 654, 656 (4th Cir. 1997). This appears to be a change from older Fourth Circuit case law. See, e.g., *In re Sierra Club*, 945 F.2d 776, 778 (4th Cir. 1991).

329. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 382 (1987) (Brennan, J., concurring in part and concurring in the judgment).

330. See *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977).

331. See cases cited *supra* note 244.

332. The Admiralty Rules were explicit concerning the intervenor’s status, making clear in Admiralty Rule 34 that intervenors had to post bond and stipulate that they would be bound by any judgment and would pay any costs, see *supra* note 155, and in Admiralty Rule 42 that intervenors involving themselves through the examination *pro interesse suo* could have costs imposed on them. See *supra* note 156 (setting out former Admiralty Rule 42).



be “in subordination to and in recognition of the propriety of the main proceeding.”<sup>333</sup>

In its notes to the 1966 amendments, the advisory committee stated that a court had the discretion to limit its grant of intervention.<sup>334</sup> As noted above, the committee provided no authority for this reference. Nevertheless, more and more courts have granted limited forms of intervention in which the intervenor is not permitted to present witnesses or is limited in its discovery rights. An example commentators frequently cite is *United States v. Reserve Mining Co.*, described above, in which the district court granted intervention to fifteen parties, but limited the extent to which they could participate.<sup>335</sup> As noted above, if a district court grants a limited form of intervention, the intervenor cannot appeal that decision until final judgment in the case.<sup>336</sup>

Participation in an appeal and in the judgment that may result from the lawsuit are also issues that arise in the context of intervention. As stated above, if the original party with which the intervenor is aligned appeals, then the intervenor can appeal, but if that original party declines to appeal, then the intervenor cannot appeal unless it can demonstrate that it has standing to sue under Article III.<sup>337</sup> In some cases, however, a party can intervene simply for the purpose of prosecuting an appeal if the original parties fail to, presuming that the applicant can demonstrate Article III standing.<sup>338</sup> An intervenor that cannot appeal is not bound by the judgment entered below.<sup>339</sup> An intervenor is not liable to a civil rights plaintiff for attorneys’ fees or costs unless the reasons for the intervention were frivolous because the intervenor did not cause the discrimination.<sup>340</sup>

In addition to the limits that courts can place on intervention, the original parties can in many circumstances leave an intervenor out of settlement

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333. See *supra* note 157 (setting out former Equity Rule 37). In an article subsequent to Moore & Levi, *supra* note 129, Professors Levi and Moore studied the subordination requirement and the general status of the intervenor prior to the adoption of the Federal Rules of Civil Procedure. See Edward H. Levi & James Wm. Moore, *Federal Intervention: II. The Procedure, Status, and Federal Jurisdictional Requirements*, 47 *YALE L.J.* 898, 907-926 (1938). Regarding the extent to which orders bind an intervenor, they argued that the statement “that once intervention has been allowed the intervenor is a party for all purposes” was “too broad,” because federal courts had the authority and “under the Rules the court should have the power to limit intervention to certain claims or defenses.” *Id.* at 926.

334. See FED. R. CIV. P. 24, 1966 advisory committee notes; see also *supra* notes 221-222 and accompanying text.

335. *United States v. Reserve Mining Co.*, 56 F.R.D. 408, 420 (D. Minn. 1972); see also *supra* note 55-59 and accompanying text (discussing *Reserve Mining*).

336. See *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987).

337. See *Diamond v. Charles*, 476 U.S. 54, 64 (1986).

338. See *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977).

339. See *Sierra Club v. Babbitt*, 995 F.2d 571, 575 (5th Cir. 1993).

340. See *Independent Fed’n of Flight Attendants v. Zipes*, 491 U.S. 754 (1989).

negotiations. An intervenor cannot block the entry of a settlement or a consent decree “merely by withholding its consent.”<sup>341</sup> An intervenor “is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree.”<sup>342</sup> However, “[a] court’s approval of a consent decree between some of the parties . . . cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor.”<sup>343</sup> Thus, even if an intervenor has all of the rights of one of the original parties, the original parties can still settle the litigation through their agreement, although the intervenor may have rights it can assert in subsequent litigation.

### III. THE SUPPOSED HOSTILITY OF THE FEDERAL COURTS TO INTERVENTION AND THE SUPPOSED BENEFITS OF INTERVENTION

A review of the literature demonstrates that most commentators on the subject of public law litigation advocate broad public participation. They argue that courts should consider all perspectives to render the best decision, and that a value exists in more full participation in the proceedings. There is certainly value in participation, but there are also costs to increased participation. These costs are borne by the court, which has to listen to and evaluate the claims of additional parties, and by the original parties, who have to respond to additional arguments, demands for discovery, and witnesses. The commentators in favor of a broad right of intervention argue that courts—perhaps reluctant to impose additional burdens on themselves or additional cost on the original parties, or perhaps out of substantive disagreement with the interlopers—have treated potential intervenors with disdain. They also argue that the quality of litigation would improve if courts reacted more favorably to the outsiders. I question both propositions in this section.

#### A. *Are Courts Hostile to Intervenors?*

Many commentators argue that courts have read Rule 24 too narrowly and thereby have left important voices out of public law litigation.<sup>344</sup> Their

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341. Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986).

342. *Id.*

343. *Id.*

344. See Jones, *Problems and Prospects*, *supra* note 10, at 225 (arguing that courts are hostile to minority intervenors because they are hostile to claims for affirmative action on the merits); Tobias, *Public Law Litigation*, *supra* note 10, at 328 (arguing that judicial interpretation of Rule 24(a)(2) “has had numerous adverse implications for public interest litigants” while benefitting those with private

attack focuses primarily on interpretations of the interest requirement and, to a lesser extent, the requirement that the applicant for intervention show that its interests are not adequately represented by the original parties.<sup>345</sup> Before evaluating these claims, it is important to recall the function of these two requirements. All commentators recognize at least tacitly that adding intervenors imposes costs on the original litigants and the courts, that the presence of intervenors can delay the proceedings, and that some parties are properly excluded from participating in the litigation. The interest requirement serves to ensure that the court is not bogged down with unnecessary intermeddlers who bring nothing to the litigation. A court quite properly would not allow a citizen outraged with the result in the criminal trial of O.J. Simpson to intervene in the subsequent wrongful death civil proceeding or the proceedings concerning the guardianship of Simpson's children.<sup>346</sup> That conclusion would not change if the prospective intervenor had more of an interest in the case (in the sense of emotional attachment) than most people, like a white supremacist particularly outraged by black on white crime. Nor would the conclusion change if the proposed intervenor was someone claiming an actionable, but unrelated, legal right against Simpson, such as a dispute over a trademark.<sup>347</sup> Giving voice to these interests would not assist the court in determining Simpson's civil liability, the remedy the court should impose, Simpson's fitness as a parent, or what decision would best serve the interests of his children; it would, however, delay the outcome of the litigation to the detriment of the original parties. As far as the court is concerned, the problem before it has nothing to do with race relations or the problems with the jury system in criminal cases (no matter how much the O.J. Simpson case may have spurred popular discourse on these and other issues). As the Supreme Court said of the interest requirement for standing, the requirement "prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of

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interests); Bullock, *supra* note 10, at 639 (arguing that by incorporating standing requirements, courts have acted "detrimental[ly] to public interest applicants"); Vreeland, *supra* note 10, at 309 (concluding that courts should read Rule 24 more flexibly in public law cases); *see also* Bandes, *supra* note 10, at 288 ("The intervention device can adequately perform this function [of "public norm creation"] only if it is released from the common law notion of legally protectable rights.").

345. For the most part, the commentators have not focused on the possible effects that the timeliness requirement may have on public law litigation. For an example of one commentator who argues that the timeliness requirement places too much discretion in district court judges and thus thwarts intervention, see Note, *The Timeliness Threat to Intervention of Right*, 89 YALE L.J. 586 (1980) (arguing that Rule 24(a) should be amended to require courts to decide interest and adequate representation before deciding timeliness of petition).

346. *See* Guardianship of Simpson, 79 Cal. Rptr. 2d 389 (1998).

347. *See* Ritchie v. Simpson, 170 F.3d 1092 (Fed. Cir. 1999) (holding that plaintiff had standing to challenge O.J. Simpson's trademark applications for "O.J.," "O.J. Simpson," and "The Juice").

concerned bystanders.”<sup>348</sup> As anyone who has suffered traffic delays from an accident knows, too many concerned bystanders become a nuisance.

Similarly, the provision that allows a court to deny intervention if an original party adequately represents the applicant for intervention makes eminent sense. Courts do not benefit from numerous briefs that restate the same argument repetitively. At some point, the court will simply become overwhelmed with information and its effective use of that information will decrease.<sup>349</sup> A court should not need to involve as a party every person with an opinion on a subject simply because each opinion will be expressed with slightly different nuances.<sup>350</sup> A court quite properly evaluates the claims of outsiders who desire to involve themselves against the background legal issues presented in the original litigation.

Thus, it comes as no surprise that one can find cases in which courts exclude outsiders who want in. A review of the reported appellate decisions, however, demonstrates that courts frequently treat applicants for intervention favorably.<sup>351</sup> Some courts have created presumptions in favor of intervention.<sup>352</sup> Courts also have decided that applicants need make only a minimal showing that the present representation of their interests is inadequate.<sup>353</sup> In this connection, many decisions mark a retreat from the former strong presumption that the government adequately represents all interests.<sup>354</sup> This retreat has enabled public law litigants to participate more fully in cases that would not have involved them in the past.

In the specific context of environmental litigation, the courts have applied uncritically principles developed in the civil rights context to the problems before them. As suggested in the first section, environmental public law litigation has certain characteristics that makes intervention unnecessary, especially in the liability phase of a trial.<sup>355</sup> If the liability phase is limited to

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348. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973).

349. Professor Brunet has elaborated on this point in Brunet, *supra* note 10, at 715-18.

350. As the Eighth Circuit put it, “a federal case is a limited affair, and not everyone with an opinion is invited to attend.” *Mausolf v. Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996). Although the Eighth Circuit used this to support its conclusion that Article III standing should be required for intervention (a holding with which I disagree, see *infra* notes 357-375 and accompanying text) the general premise is true. Despite its potentially broad impact, public law litigation arises from particular events and leads to concrete results, even if ongoing participation of a judge may be entailed; it is not a game that welcomes mere kibitzers.

351. See cases cited *supra* notes 280-285.

352. See, e.g., *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993) (citing cases).

353. See *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); see also cases cited *supra* note 314.

354. See cases cited *supra* note 317.

355. See *supra* notes 101-125 and accompanying text.

the administrative record, it is difficult to see how an outsider helps the court and the original litigants sift through that record. For example, if an environmental organization sues a federal agency claiming that the agency is not protecting the salmon assiduously enough, it is difficult to see how a user of electricity whose interest is keeping electric rates low will help the court in making that underlying decision. Yet in the salmon cases one regularly sees the hydropower interests intervening when the environmentalists sue the government, and vice versa.<sup>356</sup> The cases in this area reveal no discussion of the propriety of involving these parties; the intervenors appear to invite themselves into the litigation. These cases surely do not resemble the crabbed view of intervention that the Supreme Court created under the old rule in cases such as *Allen Calculators*, *Sutphen Estates*, and *Sam Fox*. Rather, they represent the modern vision of *El Paso* and *Bryant v. Yellen*.

Thus, for the most part, courts have been receptive to potential intervenors in public law litigation. The requirement that intervenors possess Article III standing constitutes a possible exception to this generally positive reception, and this subject has concerned most commentators who support a broad right to intervention. On its face, making applicants for intervention prove Article III standing does impose an unnecessary burden on applicants for intervention and would tend to indicate that courts that require standing are hostile to intervention in public law litigation. Briefly stated, the standing requirement has no basis in the text of Rule 24 or the Supreme Court's intervention or standing jurisprudence; the justifications offered in support of standing are unpersuasive; and adding the requirement of standing creates

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356. A quick sampling of the salmon cases cited *supra* note 60 shows that intervenors participated in most of them. See, e.g., *Northwest Envtl. Defense Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1520 (9th Cir. 1997) (listing DSIs and several utilities as intervenors); *American Rivers v. National Marine Fisheries Serv.*, 109 F.3d 1484 (listing DSIs, Public Power Council, and Pacific Northwest Generating Cooperative as intervenors), *as amended*, 126 F.3d 1118 (9th Cir. 1997) (author served as principal government counsel on appeal); *Idaho Conservation League v. Thomas*, 91 F.3d 1345, 1345 (9th Cir. 1996) (listing Intermountain Forest Industry Association as intervenor); *Northwest Resource Info. Ctr. v. National Marine Fisheries Serv.*, 56 F.3d 1060, 1060-61 (9th Cir. 1996) (listing State of Idaho, Public Power Council, Pacific Northwest Generating Cooperative, and DSIs as intervenors) (author served as principal government counsel on appeal); *Idaho Dep't of Fish & Game v. National Marine Fisheries Serv.*, 56 F.3d 1071, 1071 (9th Cir. 1995) (listing State of Oregon, DSIs, and Pacific Northwest Generating Cooperative as intervenors); *Aluminum Co. of Am. v. Bonneville Power Admin.*, 56 F.3d 1075, 1075 (9th Cir. 1995) (listing Pacific Northwest Generating Cooperative and Public Power Council as intervenors); *Pacific N.W. Generating Coop. v. Brown*, 38 F.3d 1058, 1058 (9th Cir. 1994) (listing State of Oregon as intervenor); *Northwest Resource Info. Ctr. v. Northwest Power Planning Council*, 35 F.3d 1371, 1371-72 (9th Cir. 1994) (listing State of Idaho, DSIs, and utilities as intervenors); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994) (listing Northwest Forest Resource Council as intervenor); *Northwest Resource Info. Ctr. v. National Marine Fisheries Service*, 25 F.3d 872, 872 (9th Cir. 1994) (listing utilities and Public Power Council as intervenors).

more problems than it solves. Nevertheless, even applying the criteria of Article III standing to intervention of right has not and will not thwart intervention in public law litigation.

The courts that have imposed this requirement have indeed imposed an unnecessary and unwarranted burden on proposed intervenors. First, the requirement has no basis in the rules. Rule 24 by its terms does not require an applicant to prove standing; rather, the rule requires the applicant to show that the litigation could impair an interest of the proposed intervenor as a practical matter, not as a legal matter.<sup>357</sup> The Supreme Court's own jurisprudence interpreting this requirement seems to indicate that intervenors need not show Article III standing to intervene, or at least need not be able to institute their own action to intervene. For example, in *Trbovich v. United Mine Workers of America*,<sup>358</sup> the Court held that a member of a union could intervene in an enforcement action that the Secretary of Labor brought against the member's union, even though the member could not institute an action of his own. In *El Paso*, the Supreme Court allowed California to intervene to represent the interests of its citizens even though the United States had brought the suit and presumably also represented California's citizens.<sup>359</sup> Finally, in *Diamond v. Charles*, the Supreme Court held that the intervenor, whom the Court held lacked Article III standing, could have continued participating in the litigation if the real party in interest with whom he was aligned had continued litigating.<sup>360</sup> Thus, although some commentators have suggested the contrary,<sup>361</sup> Article III standing is not required by the Supreme Court's case law; indeed, the cases suggest the opposite.

Furthermore, the justifications provided by those courts that require standing to gain intervention fall flat. Some courts justify imposing the standing requirement because the intervenor "seeks to participate on an equal footing with the original parties to the suit."<sup>362</sup> But, as was discussed earlier,

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357. See FED. R. CIV. P. 24(a)(2) (allowing intervention "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest" (emphasis added)).

358. 404 U.S. 528 (1971).

359. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982) ("A State does not have standing as *parens patriae* to bring an action against the Federal Government."); *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923).

360. *Diamond v. Charles*, 476 U.S. 54, 64 (1986) ("Had the State sought review . . . *Diamond*, as an intervening defendant below, also would be entitled to seek review, enabling him to file a brief on the merits, and to seek leave to argue orally.").

361. See, e.g., *Coffey*, *supra* note 10, at 818-20.

362. *City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994) (per curiam); *accord* *Rio Grande Pipeline Co. v. Federal Energy Regulatory Comm'n*, 178 F.3d 533 (D.C.

courts have not allowed all intervenors to participate as full parties to the litigation.<sup>363</sup> Intervention of right does not necessarily entail the right to discovery or to present evidence or witnesses. Other courts require intervenors to demonstrate standing “because intervention can impose substantial costs on the parties and the judiciary, not only by making the litigation more cumbersome but also (and more important) by blocking settlement.”<sup>364</sup> Although an intervenor can impose costs on the original parties and on the court, the Supreme Court has held that an intervenor “does not have power to block the decree merely by withholding its consent.”<sup>365</sup> If settlement would infringe on a legal interest or claim of the intervenor, then the court may not enter it because it would resolve claims or impose duties or obligations on unconsenting third parties.<sup>366</sup> But if the settlement does not affect legal rights of the intervenor, the court can enter it over the intervenor’s objection.

As a final justification for requiring standing, one court of appeals has held that

an Article III case or controversy, once joined by intervenors who lack standing, is—put bluntly—no longer an Article III case or controversy. An Article III case or controversy is one where all parties have standing, and a would-be intervenor, because he seeks to participate as a party, must have standing as well.<sup>367</sup>

But the Supreme Court has repeatedly held that federal courts have a justiciable case or controversy before them provided that one party has standing to sue, even if other parties to the litigation lack standing.<sup>368</sup>

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Cir. 1999); *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988) (“The intervenor seeks control of the suit, acquires a right to conduct the case in a way that may undermine the interests of the original plaintiff (this may, indeed, be the intervenor’s principal objective, if the intervenor contends that it has interests adverse to that party), and may become eligible for a separate grant of relief or an award of attorneys’ fees.”).

363. See *supra* text accompanying notes 335-336.

364. *Solid Waste Agency v. United States Army Corps of Eng’rs*, 101 F.3d 503, 507 (7th Cir. 1996). For support, the Seventh Circuit relied on dicta from *Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 531 (7th Cir. 1988) (requiring showing of standing when the “extra litigant may block settlement or receive an award of attorneys’ fees”).

365. *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986).

366. See *id.*

367. *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996).

368. See *Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999); *United States Dep’t of Labor v. Tripplett*, 494 U.S. 715, 719 (1990); *Bowsher v. Synar*, 478 U.S. 714, 720 (1986); *Director, Office of Workers’ Compensation Programs v. Perini N. River Assocs.*, 459 U.S. 297, 302-05 (1983); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977); see also *Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998) (allowing many intervenors to participate once one established standing). In addition to this

Moreover, the basic question of intervention differs from the question of whether the original plaintiff has standing to sue the original defendant, and the addition of an intervenor does not alter the justiciability of the case.<sup>369</sup> The former practice of allowing an intervenor into an action even though it would destroy diversity jurisdiction similarly supports the notion that the presence of an intervenor without standing does not alter the ability of the courts to adjudicate the matter.<sup>370</sup> Thus, none of the justifications for requiring applicants for intervention to show standing prove persuasive in the end.

My second opposition to adding an Article III standing requirement to the interest required by Rule 24(a)(2) is that it creates conceptual difficulties. These difficulties become exceptionally pronounced when a party seeks to intervene as a defendant. The standing inquiry usually focuses on a plaintiff and “whether the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.”<sup>371</sup> Thus, the question of standing—at least as to the injury-in-fact inquiry<sup>372</sup>—focuses entirely on the plaintiff. A defendant need not prove standing to sue, and a person wishing to intervene as a defendant might have a concrete interest in

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established case law, the conclusion that the presence of an intervenor without Article III standing somehow transforms the proceeding into one outside of the Article III case or controversy requirement is at odds with *Diamond v. Charles*, 476 U.S. 54 (1986). In that case the Court held that Diamond—who, the Court concluded, lacked Article III standing, *see id.* at 64-71—could nevertheless have ridden “‘piggyback’ on the State’s undoubted standing” if the state had appealed. *See id.* at 64. As suggested *supra* notes 358-360 and accompanying text, the Supreme Court does not appear to believe that the presence of an intervenor that lacks Article III standing somehow taints the case or renders it a non-Article III case or controversy.

369. As Professor Shapiro observed:

[I]t 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 of whether one is entitled to intervene. . . . When one seeks to intervene in an ongoing lawsuit, the[] basic questions [of standing] have presumably been resolved; the disposition of the request, then, should focus on whether the prospective intervenor has a sufficient stake in the outcome and enough to contribute to the resolution of the controversy to justify his inclusion. . . . A may not have a dispute with C that could qualify as a case or controversy, but he may have a sufficient interest in B’s dispute with C to warrant his participation in the case once it has begun, and the case or controversy limitation should impose no barrier to his admission.

Shapiro, *supra* note 10, at 726.

370. Formerly, a nondiverse party could intervene in an action without destroying diversity. *See* Rensberger, *supra* note 10. Congress eliminated this practice by amending 28 U.S.C. § 1367(b) (1994). Before this amendment, however, federal courts adjudicated actions using the concept of supplemental jurisdiction to support the presence of a party whose presence would normally divest the court of jurisdiction.

371. Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

372. *See supra* note 288.



the case but lack standing.<sup>373</sup> It is difficult, but not impossible, to determine how a court would decide that a prospective intervenor would have standing to become a defendant, especially because the court cannot predict the ultimate outcome of the litigation or the scope of the judgment.<sup>374</sup> The same could be true with a party seeking to intervene as a plaintiff, but those problems may be less pronounced.

Even though it is therefore incorrect to require proposed intervenors to prove standing in order to demonstrate the necessary interest for intervention, “[t]he question of the right to intervene is inevitably linked to the question of standing to initiate litigation in the first place.”<sup>375</sup> Certainly, some of the inquiries involved in determining the necessary interest for intervention of right overlap with the requirements that one must show to initiate litigation in

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373. Professor Shapiro has identified this problem in the private litigation context as well.

The difference [between the right to initiate a suit and the right to intervene in ongoing litigation] is most evident in the case of one who seeks to intervene on the side of the defendant in civil litigation. When property owners sue to enjoin a railroad from maintaining storage tracks in a residential neighborhood, a local businessman who is heavily dependant on the use of that trackage may have an important interest to protect and much to contribute to the court’s understanding of the case, even though he has no claim that could be asserted against any of the parties and they have none that could be asserted against him.

Shapiro, *supra* note 10, at 726. Shapiro’s analysis would apply in the public law context as well.

374. One could liken the problem faced by prospective intervenor-defendants to *Asarco, Inc. v. Kadish*, 490 U.S. 605 (1989). In that case, taxpayers sued in state court to invalidate a state law governing the lease of state lands because the law did not conform to the terms of the original federal grant of those lands. *Id.* at 609. The taxpayers won in state court and arguably would have lacked standing to sue in federal court. Accepting jurisdiction, the Supreme Court held that a defendant who receives an adverse judgment has standing to appeal that judgment to the Supreme Court even if the original plaintiffs lacked standing to bring the action in federal court. *Id.* at 623-24 (“When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.”). The Seventh Circuit, through Judge Posner, has used similar reasoning to determine whether a party can intervene as a defendant. *Solid Waste Agency v. United States Army Corps of Eng’rs*, 101 F.3d 503, 506-08 (7th Cir. 1996); *see also* *Mausolf v. Babbitt*, 85 F.3d 1295, 1301-02 (8th Cir. 1996) (employing similar reasoning). But in *Asarco*, the Court knew exactly what the outcome of the litigation was: The state declared the challenged law unconstitutional and that declaration had a direct effect on the petitioner. In *Solid Waste Agency*, by contrast, the court knew only what the outcome “may be.” 101 F.3d at 507. Although the Seventh Circuit held that the applicants for intervention had standing, Supreme Court precedent requires a plaintiff to show more than a speculative effect on him or her to prove standing. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (“The plaintiff must show that he ‘has sustained or is immediately in danger of sustaining some direct injury’ as the result of the challenged official conduct and the injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’”). Thus, if courts require individuals to show standing to sue in order to become defendants, they run the real risks of excluding parties that should be involved or of bending the rules of standing to allow these parties into the litigation.

375. Chayes, *supra* note 1, at 1290.

the first instance.<sup>376</sup> If a proposed intervenor can prove standing to sue, it is difficult to see how a court could find that the applicant lacks the interest necessary to intervene.<sup>377</sup> Thus, it is at least appropriate for a court to investigate whether an applicant has Article III standing in deciding whether to allow the applicant to intervene even though an applicant should not have to make that demonstration as a *sine qua non* of intervention.

Federal courts also properly consider an intervenor's standing when the original losing party has decided not to appeal, and the intervenor seeks to prosecute an appeal. In that instance, a party commanding the litigation to continue should have standing so that a real case or controversy exists. Peace would be restored were it not for the intervenor's desire to continue waging battle. Requiring an intervenor to prove standing to appeal without the original losing party has two bases of support. In the traditional view of intervention, litigation is between the original parties and the intervenor's claim depends on the existence of the original suit.<sup>378</sup> Once that suit disappears, so too does the intervenor's claim. But the values advanced in defense of intervention in public law litigation also support this conclusion. If the intervenor appeals and is successful, the nonappealing party will get a victory that perhaps it does not want. If the intervenor appeals and loses, the nonappealing party will be stuck with an adverse decision from a higher

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376. See *Chiles v. Thornburgh*, 865 F.2d 1197 (11th Cir. 1989).

377. A court could, however, determine that the existing parties adequately represent the applicant's interest or that the applicant's remedy in appropriate cases is to initiate litigation. The latter suggestion would parallel the Supreme Court's decisions in the antitrust enforcement cases decided before the 1966 Amendments to the Federal Rules of Civil Procedure. See discussion *supra* notes 171-207 and accompanying text. If the applicant for intervention could initiate an independent action, however, a court may wish to allow intervention to decide all matters at once. Of course, the more compelling case for intervention is when the applicant has a definite interest but cannot presently sue.

378. See, e.g., *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 163-64 (1914); *McClune v. Shamah*, 593 F.2d 482, 486 (3d Cir. 1979); *Black v. Central Motor Lines, Inc.*, 500 F.2d 407, 408 (4th Cir. 1974); *Mattice v. Meyer*, 353 F.2d 316, 319 (8th Cir. 1965). Some courts have recognized an exception to this rule: A court has discretion to adjudicate an intervenor's claim "in a case in which it appears that the intervenor has a separate and independent basis for jurisdiction and in which failure to adjudicate the claim will result only in unnecessary delay." *Fuller v. Volk*, 351 F.2d 323, 323 (3d Cir. 1965). As the Sixth Circuit has described the rule:

Because intervention presumes a valid lawsuit in a court of competent jurisdiction, ordinarily the intervening party cannot breathe life into a non-existing action. However, where the intervenor carries with it a separate and independent jurisdictional basis, it would be a senseless waste of judicial resources to require the parties to begin again merely to arrive at the same place. Therefore, it has been held to be within a court's discretion to adjudicate the claims of a party who brings independent subject matter jurisdiction.

*Kelly v. Carr*, 691 F.2d 800, 806 (6th Cir. 1980) (footnote omitted). Most courts that have relied upon this rule have described it as discretionary. See, e.g., *Allgeier v. United States*, 909 F.2d 869, 875 (6th Cir. 1990); *Arkoma Assocs. v. Carden*, 904 F.2d 5, 7 (5th Cir. 1990); *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 675 (5th Cir. 1985).

court that will bind it in the future through principles of stare decisis. Because the court knows that there is an absent party that will be directly and unquestionably affected by its decision, it should require the intervenor to show a vested, concrete interest by demonstrating standing.<sup>379</sup> Thus, the Supreme Court correctly held in *Diamond v. Charles* that “an intervenor’s right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.”<sup>380</sup> The leading commentators have endorsed this conclusion as well.<sup>381</sup>

Even if the Supreme Court were to impose the standing requirement on all potential intervenors, intervention would still occur in public law litigation. Although the Supreme Court’s jurisprudence on standing has tightened the requirements, the Court has, along the way, recognized that threats to environmental concerns and other nontraditional interests can form a sufficient injury to vest someone with standing to sue. For example, “the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.”<sup>382</sup> This exceeds the bounds of the interests traditionally protectable at common law. Thus, public interest groups need not worry that adding standing to the requirements of intervention will slam the door on their involvement in litigation completely, although it may make it more difficult to intervene.<sup>383</sup>

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379. One might reply that the intervenor will adequately represent the nonappealing party, and so standing should not be required. But the nonappealing party made a conscious decision not to pursue appellate review for whatever reason, be it a decision that an appeal would be too costly, a determination that the case presented unsympathetic facts, or a change in administration. This decision goes beyond a mere difference in litigating strategy or which arguments to present. See *supra* notes 314-315 and accompanying text. Rather, it implicates the decision of whether to litigate at all.

380. 476 U.S. 54, 68 (1986).

381. See Tobias, *Standing to Intervene*, *supra* note 10, at 445 (“One clear instance in which standing would be appropriately invoked is the peculiar factual context presented by *Diamond v. Charles*.”); see also Shapiro, *supra* note 10, at 753-54 (writing before *Diamond v. Charles* but endorsing basic principle). While *Diamond v. Charles* has received much criticism for its determination that Dr. Diamond lacked standing, no commentator has contended that the Supreme Court erred in holding that the consequence of his lack of standing was that he could not proceed alone.

382. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992). Even in *Sierra Club v. Morton*, 405 U.S. 727 (1970), the modern case first discussing standing requirements in the environmental context, the Supreme Court held that an individual’s interest in the environment could serve as a basis for standing. See *id.* at 734 (“Aesthetic and environmental well-being, like economic well-being, are important ingredients to the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.”).

383. A good example of the argument that imposing a requirement of standing on intervenors will not thwart their participation is the Eighth Circuit litigation that created the standing requirement in that circuit. The case was *Mausolf v. Babbitt*, 85 F.3d 1295 (8th Cir. 1996), and it involved a challenge to snowmobiling regulations for the Voyageurs National Park. Conservation groups moved to

Finally, requiring standing to support intervention might benefit public law litigation in two practical ways. First, it would help create a factual record to assist the appellate court in evaluating the impact of the litigation on the proposed intervenor, should the intervenor's side lose and the principal party fail to appeal. If a district court requires the applicant to submit affidavits that support not merely an interest in the action but actual Article III standing, the successful intervenor can then appeal from an adverse decision without problem.<sup>384</sup> This justification alone does not

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intervene on the government's side to defend the regulations. The Eighth Circuit held that the proposed intervenors were required to show standing to intervene. *See id.* at 1300. The court then held that the conservation groups had standing and were not adequately represented by the government. *See id.* at 1301-1304. On remand, the district court invalidated the regulations, and the government declined to appeal. In an appeal prosecuted by the intervenors, the Eighth Circuit reversed and reinstated regulations that the government had abandoned. *Mausolf v. Babbitt*, 125 F.3d 661 (8th Cir. 1997). This does not necessarily mean that all supporters of a regulation or agency decision will have standing to defend that regulation. For example, in *Idaho Dep't of Fish & Game v. NMFS*, 56 F.3d 1071 (9th Cir. 1995), hydropower interests aligned with the government appealed an adverse decision even though the government did not appeal. Although the court of appeals dismissed the case as moot, I believe that the hydropower interests likely lacked Article III standing to defend the regulation as well.

384. Typically, a court will not allow an intervenor to make a factual case for standing on appeal because review in appellate courts is usually limited to the record before the district court. However, the Ninth Circuit allowed a permissive intervenor to make out the case for standing in *Didrickson v. United States Dep't of the Interior*, 982 F.2d 1332 (9th Cir. 1992). In that case, Alaska natives challenged regulations restricting the use of sea otters in native handicrafts. The district court granted permissive intervention under Rule 24(b) to organizations interested in protecting sea otters so that these organizations could assist the government in defending the regulations. The district court invalidated the regulation. *See id.* at 1337. Both the government and the organizations filed timely notices of appeal, but the government dismissed its appeal. *See id.* The Ninth Circuit allowed the intervenors to demonstrate their standing to appeal using affidavits originally filed in the court of appeals. *See id.* at 1340. It then affirmed the district court's invalidation of the regulation without according the normal deference to the regulation. It reached this decision because the government dismissed its appeal. *See id.* at 1341 ("The dismissal appears to be a determination that the regulation does not properly interpret the [relevant act]."). Thus in order for the intervenors to win on appeal, they had to show that the regulation was the only reasonable interpretation of the relevant act. *See id.* at 1341.

The outcome in *Didrickson* is unsatisfying for two reasons. First, the court of appeals allowed the intervenors to litigate the issue of standing directly in the court of appeals. The standing inquiry can be intensively fact-specific, and the court of appeals is the worst forum to litigate that issue. The court based its conclusion solely on affidavits, *see id.* at 1340, and the appellees never had a chance to depose or examine these witnesses if they had doubts as to the truth of the allegations. At the very least, the court should have remanded the case to the district court for factfinding; it also could have reached the harsher result of dismissing the appeal because the intervenors failed to establish standing in the district court. *See United States v. AVX Corp.*, 962 F.2d 108, 120 (1st Cir. 1992). Second, the court gave no deference to the regulation at issue because the government had dismissed its appeal. The court construed this dismissal as the agency's judgment that the regulation was improper. *See id.* at 1341. But the Department of Justice, not the Department of the Interior, makes litigation decisions on behalf of the United States, *see* 28 U.S.C. § 516 (1994), and regulations commit to the discretion of the Solicitor General the decision whether to appeal an adverse judgment. 28 C.F.R. § 0.20(b) (1999). The Solicitor General "might decide for reasons unrelated to the likely outcome not to authorize

warrant imposing a standing requirement just to address the somewhat unlikely instance in which an intervenor becomes the sole appellant, but at least it helps the reviewing courts.

Second, and more importantly, the standing inquiry may assist the applicants to focus more clearly on their relationship to the litigation. In a recent and provocative article,<sup>385</sup> Professor Ann Carlson argued that the Supreme Court's recent decisions defining the injury-in-fact requirement for standing in an environmental case<sup>386</sup> have helped shape environmental litigation in this respect. Although Professor Carlson believes that the recent developments in the standing jurisprudence lack a basis in constitutional law,<sup>387</sup> she argues that the recent limitations on the injury-in-fact necessary to establish standing may, from a pragmatic perspective, "have a bright side for environmentalism."<sup>388</sup> In particular, she argues that the injury-in-fact requirement transforms environmental litigation from a resource focus—by which she means "an environmental ethic that values resources without reference to human needs and wants. . ."<sup>389</sup>—to a human focus—namely an ethic which concentrates on the utility of the resource to humans.<sup>390</sup> Carlson concludes that "environmental litigation would be improved by a stronger focus on the human relationship with the environmental resource at issue."<sup>391</sup> The benefits she identifies from this shift in focus are: 1) telling a more gripping story by "requiring the testimony of individuals who are most

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appeal. The case might be unimportant and the Solicitor General reluctant to pester the court of appeals with an unimportant case, which might dilute the impact of other government appeals." *Solid Waste Agency v. United States Army Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996). If the Ninth Circuit decided it could hear the case, it should have deferred to the judgment of the expert agency. See *National Wildlife Fed'n v. Lujan*, 928 F.2d 453, 456 (D.C. Cir. 1991) (applying principles of deference to agency regulation where government failed to appeal but intervenor did), cited in *Didrickson*, 982 F.2d at 1340; see also *Mausolf v. Babbitt*, 125 F.3d 661, 667 (8th Cir. 1997) (applying principles of deference).

385. See Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931 (1998).

386. See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (denying standing to citizen organization seeking redress for past violations of reporting statute); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (denying standing to challenge regulation declining to extend obligations of Endangered Species Act extraterritorially); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990) (denying standing to citizens to challenge activity roughly in the vicinity of plaintiffs' activities). In its most recent decision on this question, however, the Court held that an environmental organization had standing to challenge environmental degradation caused by the defendant's permit violations. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 120 S. Ct. 693 (2000).

387. See Carlson, *supra* note 385, at 935 n.15 ("I find persuasive the arguments of several scholars that current standing doctrine is indefensible from a constitutional perspective.")

388. *Id.* at 1004.

389. *Id.* at 964.

390. See *id.* at 965-66.

391. *Id.* at 963.

directly harmed by the behavior at issue”;<sup>392</sup> 2) requiring testimony about the importance of the resource involved as opposed to focusing exclusively on the defendant’s behavior;<sup>393</sup> 3) providing a counterbalance to economic arguments against environmental regulation;<sup>394</sup> 4) overcoming free-rider problems by “remind[ing] skeptical audiences why they *should* care”;<sup>395</sup> and 5) encouraging more outreach by environmental organizations to groups that historically they have overlooked.<sup>396</sup>

Much of what Carlson argues about standing applies in the intervention context. By requiring applicants to state concretely their interest in the litigation, courts can ensure that intervenors assist the litigation in the ways that public law litigation scholars assert that they will. The standing requirement necessarily focuses the court on the impact of the litigation on the outsider. This focus could become crucial in the remedial phase, when outsiders will feel the greatest impact of the litigation. Requiring standing will also force institutions like trade organizations and national environmental organizations to think twice before expending the energy attempting to intervene, and as a result to marshal their resources more effectively towards cases in which they can clearly show detriment to their interests. In the end, the standing requirement might assist intervenors in presenting their cases and assist courts in finding those outsiders whose presence will truly benefit the litigation.

Thus, although courts should not require applicants for intervention to prove standing based on any requirement of Rule 24, the Constitution, or the effect that an intervenor has on the original proceeding, a standing inquiry or requirement is not necessarily hostile to prospective intervenors. Moreover, adding that inquiry could have pragmatic benefits. It will force trial courts to consider, at the outset, the extent to which they should shape the intervenor’s participation in the original litigation. It will help the trial court and the parties to develop a record more tailored for appellate court review, thus aiding the appellate court in the event the intervenor becomes the sole appellant. Finally, it could help the representatives of intervenors to focus

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392. *Id.* at 974.

393. *See id.* at 976-80.

394. *See id.* at 980-81.

[I]n a world in which economic self-interest dominates, standing rules that eliminate the injury-in-fact standard or ignore human harm from environmental degradation may implicitly encourage judges and juries to favor particularized gains in economic development over abstract invocations of wilderness, without even thinking about the particular value of wilderness that might be sacrificed to a given development.

*Id.* at 981.

395. *Id.* at 984.

396. *See id.* at 985-88.

more on the individual needs of their clients and not use intervention as much to push generalized concerns.

So far, this section has focused primarily on the case law of the courts of appeals and the scant jurisprudence of the Supreme Court to determine whether courts are hostile to applications for intervention. This examination of doctrinal developments, while useful, is nevertheless incomplete.<sup>397</sup> As explained above, courts of appeals almost always receive intervention cases on appeal from a district court denial of intervention. For a variety of reasons not directly relevant here, courts of appeals tend to affirm the decisions that they receive from the district courts.<sup>398</sup> Moreover, although courts of appeals tend to publish those decisions in which they reverse the district court—because such decisions are more instructive—courts of appeals nevertheless publish a great number of decisions in which they affirm, especially if the case has broad impact. The body of published case law developed by the courts of appeals is heavily skewed toward cases in which the district court found intervention unwarranted. Thus, even if one finds hostility to intervenors in the jurisprudence of the courts of appeals—which, with the possible exception of those courts that require standing, I do not readily see—the data set of published appellate cases is biased toward generating that apparent hostility.

An explanation and examination of appellate case doctrine also will not answer the question of how a district court will actually treat applications for intervention. Although the evidence is spotty, a good case nevertheless exists that district courts are receptive to applications for intervention. For example, a cursory examination of the salmon cases would support the conclusion that district courts routinely grant intervention. But even these decisions would not prove an accurate measure of how district courts generally react when they receive an application for intervention.<sup>399</sup> Similarly, an examination of

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397. Thus, as stated above, *see supra* note 276, I agree with Professor Shreve that an exclusive focus on the decisions of the courts of appeals in something like intervention overlooks a great deal of relevant information. *See* Shreve, *supra* note 10, at 894 (“Legal thinking about intervention, as about rules of procedure and evidence generally, has dwelt too much in the middle latitudes of appellate judicial doctrine.”). Nevertheless, attention to the case law of the courts of appeals has proven useful to demonstrate that the courts are not necessarily hostile to intervenors.

398. The federal courts of appeals reversed in only 10.1% of the cases that came to them in the year ended March 31, 1999. *See* ADMINISTRATIVE OFFICE, U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 21, tbl. B-5 (1999). This percentage includes criminal cases, but it figure remains about the same even if one excludes criminal cases.

399. The salmon cases are concentrated in one judicial district, the United States District Court for the District of Oregon, and many of them involve the same district judge, the Honorable Malcolm F. Marsh. The welcome reception that intervenors have received in the salmon cases may thus turn on the proclivities of one judge, the culture of one judicial district, or the fact that the relevant court of appeals reviews intervention decisions *de novo*. On the last point regarding the standard of appellate

reported district court cases would not necessarily yield a sound measure of how district courts react to intervention motions, for the reporters pick and choose among district court decisions and publish only noteworthy ones. Moreover, reported decisions from district courts involve only those instances in which the district took the time to write an opinion, and not those numerous instances in which the busy judge directs a law clerk to draft a brief order granting the motion. A district court will likely draft a reportable opinion only in instances in which it wishes to avoid reversal. The case that district courts usually will entertain motions to intervene favorably must therefore proceed indirectly, reasoning from the incentives that face a district court when presented with an application for intervention.<sup>400</sup>

A trial court has several structural incentives to grant intervention, even if intervention would burden the existing parties, complicate the proceeding, not assist the court, and have limited benefits for the prospective intervenor. These incentives stem largely from the substantive rules concerning intervention and the rules that govern appellate review of applications for intervention. As stated earlier, courts have read the interest and adequate representation requirements with some flexibility and have started to limit older presumptions against intervention. Moreover, if a district court denies intervention, the dissatisfied applicant can appeal immediately.<sup>401</sup> If a district court grants intervention, however, no party can appeal that order until final judgment.<sup>402</sup> Thus, the district court faced with a motion for intervention has two choices. The court can deny the motion and face a substantial possibility of an appeal which could disrupt the proceedings later if the court of appeals reverses. On the other hand, the court can grant the motion and simply bear the additional aggravation of having the intervenor participate without the possibility of immediate appellate review and a greatly reduced chance that the appellate court will even review the intervention decision. Moreover, if the district court can limit the intervention, it can visit most of the attendant problems on the parties, at least relieving the judge of the burden, and avoiding an immediate appeal.<sup>403</sup> Thus, wholly apart from the merits of any given intervention motion, a district court has great incentive to allow the motion.

The incentive structure just described applies to all district courts. District

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review, see *infra* notes 392-393 and accompanying text.

400. A useful starting point for study of the effect of rules of appellate procedure on the thinking of district courts from a public choice perspective is in Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469 (1998).

401. See *supra* notes 318-323 and accompanying text.

402. See *supra* note 322-323 and accompanying text.

403. See *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987).



court judges who sit in circuits that review decisions on intervention *de novo* have even more reason simply to grant the motion for intervention. If the dissatisfied applicant appeals, the more removed court of appeals will second-guess the trial court and not realize the full burden that the court and the parties will face if the court grants intervention.<sup>404</sup> Thus the structure of appellate review creates a strong incentive for a district court to grant intervention, especially where the court of appeals reviews the denial of intervention *de novo*.<sup>405</sup>

Furthermore, if the trial court erroneously grants intervention, little effective relief exists except in unusual cases. An original litigant burdened by an unwarranted intervenor cannot recover the time wasted, the costs of reproducing pleadings for the new party (with some limited exceptions),<sup>406</sup> or the costs spent on additional time in depositions or at unforeseen depositions (if the intervenor is granted the right to call and examine witnesses). An appellate court can grant relief if the intervenor wins some positive relief against one of the parties (for example, attorneys' fees).<sup>407</sup> But the fact that an appellate court can rarely fashion effective relief for the original parties when a district court erroneously grants intervention probably explains why the cases reversing grants of intervention are difficult to find. Affected parties will not appeal orders that the court of appeals cannot fix effectively.

Thus, the argument that federal courts are generally hostile to prospective intervenors has significant flaws. Many courts of appeals routinely allow intervention for broad purposes and some have created presumptions in favor of it.<sup>408</sup> Some courts allow an organization that lobbied for a statute to intervene to defend it. More courts are receptive to arguments that the government does not adequately represent the interests of outsiders. Even those courts that require an applicant for intervention to demonstrate standing allow parties with less traditional interests to intervene. Furthermore, the

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404. *Cf. Drahozal, supra* note 400, at 484 (describing approach to summary judgment of trial court and court of appeals in similar fashion, i.e., the appellate court will not have to bear many of the negative effects of its decision if it reverses).

405. Personal experience, albeit anecdotal, supports this claim. When I worked at the Department of Justice, I specialized in appellate litigation. The appellate litigators would frequently caution trial attorneys not to object to motions to intervene. This advice had nothing to do with the merits of the motions. Rather, if the trial attorney successfully convinced the district court to deny intervention, the appellate staff was faced with an appeal that would frequently prove a loser, especially in circuits that review decisions on intervention *de novo*. This, I believe, explains why the federal government often does not take a position on intervention motions. *See, e.g., Conservation Law Found. v. Mosbacher*, 966 F.2d 39 (1st Cir. 1992) (author served as principal government counsel on appeal).

406. *See* FED. R. APP. P. 39 (authorizing collection of costs for reproducing appellate briefs).

407. *See, e.g., Bethune Plaza, Inc. v. Lumpkin*, 863 F.2d 525, 534 (7th Cir. 1988) (vacating award of attorneys' fees to intervenor because district court should not have granted intervention).

408. *See, e.g., Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993).

standing inquiry, albeit unwarranted, might actually benefit the litigation in pragmatic ways, so that incorporating the standing requirement to intervention of right is not in all ways inimical to public law litigation. Finally, an examination of the reported appellate cases necessarily skews one's impression, because the structure of intervention, particularly with respect to appellate review, gives district court judges much stronger incentives to allow intervention than to deny it. Despite recent perceived threats in the reported appellate decisions, intervention is alive and well in public law litigation.

*B. The Contributions that Intervenors Make in Public Law Litigation and the Potential Problems They Can Bring*

Proponents of a broad right to intervene in public law cases make four claims about how intervenors assist in and benefit from the litigation. First, intervenors make new arguments and bring to light evidence that would otherwise not be before the court. Second, intervenors might simply bring better lawyering to represent their concerns. Third, if nothing else, a broad right to intervene allows the intervenor to be heard, thus increasing the legitimacy of the proceeding. Finally, formal intervention of right helps in the remedial phase of a given case. Intervention provides the intervenor with a seat at the table during settlement negotiations and provides the intervenor with a formal opportunity to contest a remedy that the intervenor finds unduly harsh.

The problems with a broad right to intervene stem from one underlying difficulty. The commentators who favor broad rights of participation seek a device to add more players to a particular case, especially a device that allows unwanted outsiders to muscle their way into ongoing litigation that the outsiders perceive will affect their interests. Searching for a means to accomplish this end—which, I will demonstrate below, is not without problems—the commentators latch onto the device of intervention. After all, broadly speaking, intervention is the means for third parties to add themselves to litigation where the original parties have not thought of them, or more likely, do not want them. But intervention was not designed to accomplish that end for all outsiders. Historically, the rule arose to protect the rights of specific outsiders with specific claims to intervene. These were parties that had such a pronounced interest in the litigation that litigating that interest away would probably present due process problems, at least to modern eyes. The various interests now thought sufficient to warrant intervention go far beyond those originally permitted. But the device of intervention is still not suited for all of the multiple uses to which the

advocates of a broad right of intervention wish to put it. Moreover, expanding the right of intervention too much might create practical and theoretical problems for public law litigation. I will examine the four supposed benefits of intervention, however, before turning to the problems of expanding the right to intervene.

The first defense of a broad right to intervene is that the intervenor can present arguments and evidence that the original parties will not. Emma Coleman Jones and Alan Jenkins offer as a good example of this possibility a lawsuit filed by a non-minority challenging an affirmative action policy at a public university.<sup>409</sup> In that setting, neither the dissatisfied majority applicants nor the university will want to present evidence on past discrimination that might justify the affirmative action policy. The majority applicants will not make out the case because it will harm their case against the affirmative action policy; the university will not want to admit publicly its past wrongdoing. An intervenor interested in preserving the affirmative action program will have sufficient incentive to make the case that the university had to adopt the affirmative action program to make up for past wrongs and not simply to achieve diversity in its student body. In this context, the intervenor would assist the litigation by providing legally relevant information to the judge.<sup>410</sup>

Not all institutional reform cases contain this possible involvement for an intervenor, however. To return to the salmon litigation, suppose the power industry sues the federal government and claims that federal agencies have acted too favorably toward the fish and too detrimentally toward the generation of inexpensive electricity. In that instance, the district court does not take evidence or hear witnesses but is limited to the administrative record

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409. Jenkins, *supra* note 10; Jones, *Litigation Without Representation*, *supra* note 10, at 62-69.

410. Indeed, just such a situation was presented in the litigation concerning the University of Texas Law School. In that case, rejected white students challenged the affirmative action program at the law school. Minority organizations moved to intervene. The district court denied intervention and the court of appeals affirmed on the ground that the minority organizations were adequately represented. *See Hopwood v. Texas*, 21 F.3d 603 (5th Cir. 1994) (per curiam). The minority organizations wished to raise the issue that former discrimination against minorities at the University of Texas justified the affirmative action program. Texas apparently failed to raise this contention at trial. Following trial, the minority organizations again moved to intervene and were again denied. On appeal, the Fifth Circuit affirmed on the ground that the students were bound by the earlier decision under the law of the case doctrine. *See Hopwood v. Texas*, 78 F.3d 932, 961 (5th Cir. 1996). The only solace that the Fifth Circuit held out to the rejected intervenors was that the court expressly did not judge the merits of the substantive issue that the minority organizations wished to make, and stated clearly that the “associations are not precluded from instituting a separate and independent . . . action” challenging the law school’s admissions policy. *Id.* at 961 n.62. It would have seemed to be in the interest of judicial efficiency, however, to hear all challenges to and defense of the law school’s admissions policy at once, rather than invite more litigation. The Sixth Circuit recently reached a decision in tension with the *Hopwood* cases in *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999).

that the agency assembles unless one of the rare exceptions to that rule applies.<sup>411</sup> The agencies involved develop the factual record, and the district court must defer to the expert policy judgments of the agencies. The original parties have incentives to comb through the record looking for information that supports their views, and the district court has an obligation to review the record in its entirety. The only thing an intervenor could add in these circumstances is an additional set of eyes to review the record, and perhaps a different motivation behind its review.<sup>412</sup> This additional set of eyes will not benefit the proceeding or the outcome.<sup>413</sup>

A second and related argument—although it is generally not stated in the pages of law reviews—is that intervenors must intervene because the parties representing their interests are inadequate. These critics do not mean inadequate in the sense contemplated by Rule 24(a)(2), but rather in the sense that the attorneys for the intervenors believe that the attorneys for their interest are inept, inexperienced, overworked, underpaid, or all four.<sup>414</sup> These critics might also believe that the party representing their interests does not care as passionately about the outcome of the litigation as the outsider.<sup>415</sup> But

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411. See cases cited *supra* note 120.

412. See *Natural Resources Defense Council, Inc. v. New York State Dep't of Envtl. Conservation*, 834 F.3d 60, 61-62 (2d Cir. 1987) (holding representation of applicant's interests adequate where only difference between applicant and original party is motivation for participating).

413. To be sure, if the proposed intervenor could have brought its own lawsuit, then intervention may be appropriate as a means of avoiding duplicative litigation. For example, if the Bureau of Reclamation restricts water supplies from a dam to preserve an endangered species, then irrigators who use that water and face a reduced supply can challenge that decision. See *Bennett v. Spear*, 520 U.S. 154 (1997). If an environmental organization believes that the Bureau of Reclamation is in fact doing too little to save the endangered species, it too can challenge the Bureau's decision in its own lawsuit. Intervention by the environmental organization into the irrigators' lawsuit would be appropriate to avoid multiple lawsuits. In that instance, the irrigators would argue that the Bureau was doing too much for the species, the environmentalists would argue that the Bureau was doing too little, and the Bureau would argue that its actions were just right (or at least not arbitrary or capricious). My point is that if the environmental organization agreed with the Bureau's position, adding it as an intervenor-defendant in the irrigators' action against the Bureau would not aid the litigation. The attorneys for the Bureau would have every incentive to find material in the administrative record to support the Bureau's decision and explain the decision to the court. In that context, unlike the affirmative action situation presented by *Jones and Jenkins*, the environmental organization can add little to the proceeding in the form of expertise. Of course, if the Bureau wavered in its support of its decision and the environmental organization could prove standing, then a district court could appropriately grant intervention to the environmentalists to support the district court's decision on appeal. See *Solid Waste Agency v. United States Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996); *Mausolf v. Babbitt*, 85 F.3d 1295 (8th Cir. 1996), *appeal after remand*, 125 F.3d 661 (9th Cir. 1997).

414. As I mentioned in the text, this comment is purely anecdotal, but it came up a surprising number of times in casual discussions I had with others while working on this article.

415. Indeed, some courts have used this argument to justify finding that the government does not adequately represent the interests of a private outsider, because the government must take into account the public interest as a whole, not the parochial interests of an individual. See cases cited *supra* note 317.

a nonparty is not entitled to the best lawyer available. Moreover, if this is the concern, then outsiders can provide assistance directly to the party with whom they want to align themselves. Outsiders do not need to burden the court and the original parties by involving themselves formally into the litigation, and they can still prove effective through this informal participation.<sup>416</sup>

As their third claim, proponents of a broad right of intervention argue that intervention offers a chance for unrepresented views to participate in litigation that affects the holders of those views. In this argument, the value of intervention is not to the proceeding or to the original parties, but to give the intervenor a sense that it has at least been heard, even if its views do not carry the day.<sup>417</sup> It is hard, however, to quantify the benefit of being heard, and often additional voices can drown out the effective presentation of argument. The Supreme Court made this point effectively in *Allen Calculators*.<sup>418</sup> Moreover, in many instances the intervenor has had the right to participate in the proceedings that led to the underlying source of the litigation. Suppose environmentalists challenge the sufficiency of environmental review supporting a decision by the Army Corps of Engineers regarding the flow of a river and its effects on salmon listed as endangered or threatened.<sup>419</sup> Hydropower interests would have had an opportunity to participate in the Corps' decisionmaking process and to comment on the environmental documentation. Participation at the agency level, where interested groups can supply raw data and scientific theories to the agency decisionmakers, might have value. Participation in the subsequent court proceedings, in which the scope of review is limited, is much less necessary and is simply burdensome.

Supporters of a broad right of intervention make the best case for

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416. For example, in the litigation between President Clinton and Paula Jones, a group of attorneys, motivated by political interest, assisted the Jones legal team in devising arguments and writing briefs. See Don van Natta, Jr. & Jill Abramson, *The President's Trial: The Lawsuit*, N.Y. TIMES, Jan 24, 1999, at A1. This benefitted Ms. Jones directly in the form of a settlement and furthered the political interests of the outsiders. Obviously, the suggestion will not work in all instances—one could imagine a government lawyer being quite reluctant to take work prepared by a private law firm and pass it off as the government's view—but this suggestion does provide a means of providing assistance without as many of the problems entailed in formal intervention.

417. See Yeazell, *supra* note 10, at 256-57 (seeing benefits to allowing people to grouse about potential remedies).

418. *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 141-42 (1944) (stating that members of the public frequently want to involve themselves in a "suit of large public interest" but result of permitting multiple interventions is "accumulating proofs and arguments without assisting the court").

419. See, e.g., *Northwest Resource Info. Ctr. v. NMFS*, 56 F.3d 1060 (9th Cir. 1995) (author served as primary government counsel on appeal).

participation with their fourth claim, that intervention allows interested groups a voice in the litigation's final remedy or settlement. Other forms of participation, for example, as *amicus curiae*, do not provide interested parties with a seat at the table for settlement discussions, and the original parties will therefore ignore their legitimate concerns and the impact of the litigation on them. This argument certainly has weight. Many courts have recognized that the settlement of litigation may create the interest necessary to intervene.<sup>420</sup> In addition, one would expect the original parties to fashion settlements that visit the costs of the settlement on outsiders if they can.

This argument goes to the very core of the legitimacy of public law litigation. One of the central characteristics of public law litigation is that the relief in the case "often [has] important consequences for many persons including absentees."<sup>421</sup> Normally, the law balks at the idea of a court binding people without having heard them out first.<sup>422</sup> The exclusion of outsiders becomes even more problematic in the context of a consent decree, where the two parties are using the court to make their preferences binding on outsiders.<sup>423</sup> Chayes recognized this problem, but in the end dismissed it for persuasive reasons.<sup>424</sup> Chayes argued that, in the context of public law litigation, representation of all affected groups would be difficult to achieve, but that no more representation occurred in other areas of government, such as administrative agencies or legislatures.<sup>425</sup> In addition, courts have at their disposal a number of ways to find and protect unrepresented interests. These means include intervention, to be sure, but also include such techniques as appointing guardians ad litem (rather than relying on self-appointed guardians in the form of intervenors) and retaining special masters and other experts. Interestingly, proponents of a broad right of intervention in public law litigation do not question this defense of the legitimacy of leaving some out. Rather, they appear to take the view, at least sub silentio, that it is acceptable to leave out interests so long it is not their own.

Nevertheless, for public law litigation to work, the court must be able to proceed with parties that could be affected by the litigation. Actions taken to

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420. See cases cited *supra* note 244.

421. Chayes, *supra* note 1, at 1302.

422. See, e.g., *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

423. See Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321 (1988); Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103; see also Peter M. Shane, *Federal Policy Making by Consent Decree: An Analysis of Agency and Judicial Discretion*, 1987 U. CHI. LEGAL F. 241 (discussing particular problems of consent decrees that set federal policy).

424. See Chayes, *supra* note 1, at 1310-13.

425. See *id.* at 1311-12.

revitalize the wild salmon stocks in the Pacific Northwest might affect individual property owners in Seattle, but a court cannot realistically expect to hear from each and every one of them. Intervention for every interested person would not be a viable solution in a case involving this problem.

Moreover, what proponents of broad intervention ignore is that the original parties may, in many instances, have existing incentives to invite the outsiders into settlement negotiations or the structure of the remedy. First, if a remedy will involve a number of individuals, allowing them to be heard either individually or through a representative may increase the likelihood they will accept the proposed solution.<sup>426</sup> Second, in the context of a consent decree, the original parties might have a more concrete desire to involve known outsiders. In *Martin v. Wilks*, the Supreme Court made clear that “[j]oinder as a party, not knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.”<sup>427</sup> This conclusion stems from the fact that “[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.”<sup>428</sup> Thus, the original parties to a particular litigation event often have sufficient impetus to involve outsiders in litigation during the settlement process. Otherwise, dissatisfied outsiders can deprive the original parties of what they achieved at the negotiation table.<sup>429</sup> Thus, suppose that the Sierra Club sued the Bureau of Reclamation for operating a dam in a manner that jeopardizes the continued existence of a species of fish listed under the Endangered Species Act. The Bureau and the Sierra Club reach an agreement that requires the Bureau to leave a certain amount of water in the river system for the fish. The agreement would likely take the form of a consent decree. If that were the case, the result in *Martin v. Wilks* would strongly encourage the Bureau and the Sierra Club to involve irrigators who take their water from the dam. If they are not parties to the consent decree, the irrigators could challenge the Bureau’s actions taken

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426. See Yeazell, *supra* note 10, at 258 (“[T]he involvement of bitterly opposed parties in a process of hearing, negotiation, and compromise . . . may be the only way to give them all a stake in implementing the decree which results.”).

427. 490 U.S. 755, 765 (1989).

428. *Id.* at 762.

429. In 1991, Congress responded to *Martin v. Wilks* in legislation that now prevents an outsider to a decree in an employment discrimination case from challenging the remedy imposed in the decree if the person knew of the proposed remedy and had an opportunity to object or if the person was adequately represented. See 42 U.S.C. § 2000e-2(n)(1) (1994). This amendment changes the ground rules in such cases to some extent by mandating joinder or intervention of outsiders who may be affected by the decree.

pursuant to the settlement,<sup>430</sup> and a court would not pay any deference to the effect of the consent decree.<sup>431</sup>

Proponents of broad intervention also overlook some of the practical problems that intervention necessarily entails. As stated above, no one questions the need for some limitation on who can become a participating party to litigation, if only to avoid the burden intervention places on the original parties. This burden is hard to quantify in terms of hours or money spent. The consensus of all commentators is a recognition that adding parties adds time to the proceeding and requires more coordination costs (such as scheduling hearings or filing pleadings). Second, the history of the device demonstrates that intervention is not adapted to all of the uses to which the proponents of the broad right wish to put it. The flaws in this procedural device attend each stage of the proceeding. If the district court errs in allowing intervention, the rules concerning appellate review provide no way to oust the erroneously admitted intervenor until it is too late to fashion

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430. See *Bennett v. Spear*, 520 U.S. 54 (1997) (granting standing to challenge government action that allegedly protected listed species too much).

431. The aftermath of the litigation in *Martin v. Wilks* provides a persuasive example on this point. In that case, black firefighters sued the City of Birmingham for discrimination in the hiring and promotion of black firefighters. After a trial, the parties agreed to the terms of a consent decree that required affirmative action. A union, which presumably desired to preserve the status quo, moved to intervene; the court denied intervention. See 490 U.S. at 759. Subsequently, individual white firefighters challenged the employment decisions that the city made pursuant to the consent decree. In *Martin v. Wilks*, the Supreme Court held that the white firefighters could “collaterally attack” the terms of the consent decree, and that the decree itself did not provide a defense to their claim that the employment decisions that the city took were racially biased. See *id.* at 761-69. On remand, the Eleventh Circuit eventually held that the terms of the consent decree violated the Constitution, and voided the affirmative action program established by the consent decree. See *In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525 (11th Cir. 1994). Although one can never predict counterfactual history with confidence, one can suspect that if the original parties had explained the need for the consent decree and brought the white firefighters on board, the remedy imposed may not have been as aggressive as the consent decree actually reached by the original parties, but it may not have suffered a challenge by the outsiders. Ironically, the original parties opposed intervention by the organizations that opposed the decree in the first place. See *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983). Unfortunately for the original plaintiffs, they lost everything because of the subsequent litigation.

Indeed, in some instances, the original parties may wish to force a recalcitrant party into the litigation. One example is *Seattle Audubon Soc’y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996). That case involved a challenge to the President’s Plan for settling the spotted owl controversy. See *supra* note 61. Representatives of the timber industry had participated in the litigation as intervenors on behalf of the defendant federal agencies. See *Seattle Audubon Soc’y v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), *aff’d* 80 F.3d 1401 (9th Cir. 1996). The timber interests were not pleased with the President’s Plan, but wished to challenge it in the United States District Court for the District of Columbia rather than the United States District Court for the Western District of Washington, presumably because they believed that the Western District of Washington would approve of the plan to rid itself of the myriad spotted owl cases. See *id.* at 1300. The federal government therefore sued the intervenor as a defendant, specifically with the intent of binding it with the judgment, and the Ninth Circuit approved of this practice. *Moseley*, 80 F.3d at 1405-06.



effective relief for the burden borne by the original parties. The present rules regarding the status of the intervenor do not make clear exactly what rights the intervenor has and what responsibilities the intervenor bears. Finally, the present rules provide no clear way for an intervenor to prove its standing to sue should one of the original parties drop out and the intervenor wish to appeal.

The potential for a broad right of intervention raises more than just practical problems. One argument that Chayes and Fiss advance in support of broader rights of participation stems from the self-appointed nature of the original parties, especially the plaintiff. In institutional reform litigation,

the named plaintiff and his lawyer speak not just for themselves, but also for a group, for example, the present and future users of the institution. There is no basis for assuming they are adequate representatives of the group, for they simply elect themselves to that position. Similarly, there is no reason to assume that the named defendant and his lawyer are adequate representatives of the organization's interests. Here it is not a matter of self-election, but election by an adversary.<sup>432</sup>

Chayes puts the same idea more succinctly: "Participation of those affected by the decision has a reassuringly democratic ring, but when participation is mediated by group representatives, often self-appointed, it gives a certain pause."<sup>433</sup> To counter this problem, Fiss and Chayes advocate that the judge involve outsiders in the litigation in order to ensure that the judge knows of potential facts that the parties might hide and interests that the parties would not advance.

But the concerns that Chayes and Fiss have about the self-appointed nature of the original parties to the litigation are just as strong, if not stronger, in the context of intervention. An intervenor participates in litigation purely as a matter of its own choice, and, under many instances, it is interested in vindicating a policy view that transcends the particular facts involved in the litigation. One proponent for broad intervention argues that a court should evaluate potential intervenors based on the "potential quality of the applicant's proposed participation."<sup>434</sup> This will usually mean that the well-heeled and well-organized will be favored. In addition, institutions such as national public interest groups and trade associations frequently move to participate as intervenors, and there is every reason to believe that these

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432. Fiss, *supra* note 39, at 25.

433. Chayes, *supra* note 1, at 1310.

434. Tobias, *Standing to Intervene*, *supra* note 10, at 447.

organizations pursue self-interest beyond the interests of their members every bit as much as a plaintiff or institutional defendant.<sup>435</sup> Even organizations that are on the same side of the controversy can have disputes among themselves. For example, in the salmon litigation the commercial interests include hydropower users, who want to increase salmon populations by decreasing harvest, and the commercial fishing industry, which blames the dams for the decline of the salmon. Similarly, one can imagine that differences in opinion could arise between local and national environmental organizations.<sup>436</sup> If so, a court might do well to recognize the institutional bias of intervenors and possibly downplay the information it receives from them.

In sum, intervenors make a contribution in some cases and do not in others. The exact contribution that an intervenor can make in particular litigation necessarily depends on the issues involved in the litigation, the type of facts that the court can find or whether the court is limited in the sources to which it can turn, the quality of information that the intervenor can supply, and the representative capacity of the intervenor. One cannot conclude, as

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435. In the context of environmental organizations initiating litigation, Professor Carlson makes one doubt the extent to which these organizations actually represent their members. According to her, [t]he attorneys working for NRDC or EDF [two national environmental organizations] have virtually no contact with the members, and the cases they file tend to be cases the lawyers decide are worthy causes, or are part of an overall litigation strategy. Members have no direct input in the selection of litigation or in the direction of litigation strategy. The lawyers do not consult with or even know the members of their organizations.

Carlson, *supra* note 385, at 961-62. These observations lead her to conclude that the tightened injury-in-fact requirement will force the lawyers in these groups to pay heed to the needs of their human clients. *See id.* at 986 (injury-in-fact requirement might help dispel the notion that “modern, mainstream environmental movement is elitist and out of touch with real human concerns”). If environmental organizations—and presumably other organizations—can be inattentive to the needs of their members when they participate as a plaintiff, one can only suspect that they would be even worse representatives of those views in the intervention context, when the interest required to participate is much more attenuated and theoretical.

436. I am not aware of whether tensions between local and national environmental organizations in fact exist in the salmon context. I merely point this out to show that a court could become complacent thinking that environmental concerns were represented because for example, a national organization such as the Sierra Club intervened, when a local organization might have a vastly different view. In a recent article, Todd Zywicki harshly criticizes the national environmental movement as representing parochial interests at the expense of effective environmental regulation. Todd J. Zywicki, *Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform*, 73 TUL. L. REV. 845, 874 (1999) (“[R]ather than being unbiased advocates of the public interest, environmental interest groups are riven with conflicts of interest that lead them unerringly to support centralized command-and-control methods of pollution control.”). In particular, Zywicki condemns the national-level groups for having a national focus and for attempting to “strong-arm” local level organizations. Similarly, Zywicki argues that present members of the regulated community have a vested interest in retaining command-and-control regulation either because the companies make money from it or because the regulations create a barrier to market entry and therefore reduce competition. *See id.* at 856-74. Although this overstates the point, one can confidently predict that there will be self-interest in those who decide to intervene in a case.

proponents of a broad right to intervene do, that intervention across the board is usually good or at worst benign; it can result in serious costs to the parties, the tribunal, and the litigation itself.

#### IV. SUGGESTED IMPROVEMENTS TO INTERVENTION

The preceding section should not be taken as a broad-based objection or aversion to intervention. Intervention can be valuable in appropriate cases. But as the materials describing the history of the device and the present state of the jurisprudence demonstrate, intervention is not well-suited to accomplish the goals that the advocates of a broad right support.

Much of the disarray in intervention jurisprudence stems from the problem of identifying the appropriate participants in a particular case. The court must winnow out who is needed, who is desirable, who is acceptable, and who would simply be an officious intermeddler. The factors that a court must examine under Rule 24 are tailored to help the court make that decision. In particular, the interest and impairment criteria should assist the court in identifying appropriate parties to add. Nevertheless, the cases have not firmly established the necessary type of interest, nor have they elucidated how impaired the interest must be by the ongoing litigation. The Supreme Court has not helped matters because it has not precisely defined the necessary interest except to describe it as a “significantly protectable interest.”<sup>437</sup> In addition, district courts in those circuits where the court of appeals reviews *de novo* a district court’s denial of intervention have great incentive to allow intervention where it is not required by the rule to avoid the delay of an appeal. Thus, the device of intervention could be improved by some changes to the approach to Rule 24 itself and to the appellate procedure that surrounds the rule.

In particular, the courts of appeals should alter how they review decisions denying intervention.<sup>438</sup> Specifically, the courts of appeals should review all decisions for abuse of discretion, and consider the litigating posture of the case and whether the district court permitted some participation when

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437. *Donaldson v. United States*, 400 U.S. 517, 531 (1971).

438. The courts could reduce the incentives to grant intervention somewhat by altering the rules concerning the timing of appellate review and either making all decisions concerning intervention immediately appealable, or by making all decisions appealable only after final judgment. Apart from the historical explanation of the current approach, the courts have struck the appropriate balance on the timing question. If a court erroneously denies intervention, then the impact on the nonparty is immediately palpable. The case, so far as that party is concerned, is over. However, if a court erroneously grants intervention, the original parties will still be around for the rest of the litigation. Allowing an immediate appeal of a grant of intervention probably would spawn more appeals than necessary.

reviewing denials of intervention. To be sure, the changes that I suggest are minor, and do not call for a full-blown alteration of Rule 24. I suggest minor changes because the courts, by and large, have made proper decisions on intervention. If anything, however, they have typically leaned in favor of intervention. My suggested changes tip the balance somewhat against intervention, but should not be taken as hostility to the practice.

Initially, those courts that review intervention decisions *de novo* should abandon that approach and review the district court's decision for abuses of discretion.<sup>439</sup> The Supreme Court could accomplish this by reviewing the split in the circuits; if it does not, those courts of appeals that have adopted the *de novo* standard should reconsider that decision *en banc* and reverse it. The abuse of discretion standard of review has several benefits in the public law context. Most importantly, it would change the incentive structure that district courts face. This shift in the standard of review would encourage judges to act in the manner they think best for the issues before them. In addition to having an appeal from the view of the judge, the shift from *de novo* review to abuse of discretion review has theoretical appeal. Putting more authority in the hands of the district court comports with Chayes's original conception of the judge in public law litigation. Chayes explicitly compared the judge in public law litigation to the chancellor in equity and hailed the "[t]riumph of [e]quity" that the development of public law litigation represented.<sup>440</sup> Intervention itself has strong origins in equity. Federal appellate courts usually review equitable decisions such as the scope of an injunction under the abuse of discretion standard.<sup>441</sup> Leaving the decision of intervention to the discretion of the trial judge would thus comport with Chayes's original thinking and the jurisprudence on equity.

Second, intervention is like joinder, and the Advisory Committee saw joinder and intervention as interrelated. Joinder decisions—in particular, the question of whether to dismiss an action for want of an indispensable party—are left to the discretion of the district court judge.<sup>442</sup> If a district court has discretion to determine whether to dismiss an action altogether, surely district

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439. Several commentators exploring intervention in the private law context have made this suggestion, including some who advocate eliminating intervention of right altogether. *See, e.g.*, Brunet, *supra* note 10, at 742; Kennedy, *supra* note 10, at 375; Shapiro, *supra* note 10, at 758-59; Shreve, *supra* note 10, at 924.

440. *See* Chayes, *supra* note 1, at 1292 (emphasis omitted).

441. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-13 (1982) (describing discretionary power of court sitting in equity).

442. *See, e.g.*, Kescoli v. Babbitt, 101 F.3d 1304, 1309 (9th Cir. 1996); HB Gen. Corp. v. Manchester Partners, L.P., 95 F.3d 1185, 1190 (3d Cir. 1996); Cloverleaf Standardbred Owners Ass'n v. National Bank, 699 F.2d 1274, 1275 (D.C. Cir. 1983).

court judges can be entrusted with the decision of whether to add a party to litigation.

Some may fear that using the abuse of discretion approach will make intervention of right under Rule 24(a) resemble permissive intervention under Rule 24(b). Judge Friendly noted this possibility, but dismissed it.

Although [the abuse of discretion] standard of review may tend in practice to blur somewhat the distinction between intervention as of right under Rule 24(a)(2) and permissive intervention under Rule 24(b), the great variety of factual circumstances in which intervention motions must be decided, the necessity of having the “feel of the case” in deciding these motions, and other considerations essential under a flexible reading of Rule 24(a)(2) . . . are precisely those which support an abuse of discretion standard of review.<sup>443</sup>

The tendency to blur the two is only a tendency, however, not an inflexible reality. In some instances an intervenor will have a right to intervene even with an abuse of discretion standard in place. For example, if the intervenor can show Article III standing and inadequate representation, a court would abuse its discretion by denying intervention of right. Nevertheless, as a general matter, the trial court is in a better position than an appellate court to determine whether the intervenor will add to the litigation and whether the litigation could adversely affect the intervenor’s stated interests. The appellate court faces the intervention question in a vacuum and generally does not bear the costs of adding the additional party. Although one may argue that this makes the court of appeals more neutral on the intervention question, in reality it allows the court of appeals to overestimate the benefit, and underestimate the cost, of potential intervenors when it has only the narrow question of intervention before it.

In addition to altering the standard of review, courts of appeals should take into account additional considerations when determining whether the district court abused its discretion. First, the courts of appeals should look at the subject matter and scope of the litigation. For example, the court should examine whether the district court will itself determine facts or whether the law will restrict the court’s ability to look beyond a set record. The Tenth Circuit considered this criterion in *Alameda Water & Sanitation District v. Browner*.<sup>444</sup> In that case, the plaintiffs requested a permit from the Army Corps of Engineers to build a large water project.<sup>445</sup> The Corps granted the

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443. *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 991 (2d Cir. 1984).

444. 9 F.3d 88 (10th Cir. 1993).

445. *See id.* at 90.

permit, but the Environmental Protection Agency (EPA) vetoed the approval, and the plaintiffs challenged EPA's decision.<sup>446</sup> A number of environmental organizations moved to intervene. The district court denied intervention on the ground that the government adequately represented the intervenors. On appeal, the Tenth Circuit found another reason to affirm this decision, namely that the intervenors had an insufficient interest in the action.

Here, the [intervenor] wishes to participate in the lawsuit so that it can offer additional reasons for upholding the denial of the permit. That evidence, however, would be irrelevant in the district court where the only issue is whether, when confined solely to the reasons cited in the administrative record, the EPA lawfully vetoed the . . . permit. The opportunity to offer extraneous evidence beyond the administrative record, and thus beyond the scope of the narrow issue before the district court, is not an interest protectable in the underlying action.<sup>447</sup>

In my view, the Tenth Circuit's actions here take proper account of the interests of the parties, the role the intervenor can play, and the task before the trial court. Looking at the underlying subject matter of the case would move away from the oversimplified view of the Federal Rules of Civil Procedure that Robert Cover described as "trans-substantive."<sup>448</sup> The underlying legal issues in a case must at some point affect the procedures used, because they determine what can happen as a result of the suit.

A second and related consideration that the court of appeals should take into account in reviewing an intervention motion is whether the applicant for intervention had an opportunity to participate in prior administrative proceedings. If an environmental organization had the opportunity to inform the National Marine Fisheries Service (NMFS) of its data concerning salmon mortality, and NMFS considered it, then the need for the environmental organization to participate as a party in subsequent litigation is reduced.

Another factor that the courts of appeals should consider in deciding whether a district court abused its discretion is whether the district court permitted the proposed intervenor to participate as an *amicus curiae*. The *amicus curiae*, unlike the intervenor, historically accomplished much of what

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446. *See id.*

447. *Id.* at 91.

448. *See* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 *YALE L.J.* 718, 718 (1975) ("We have become so transfixed by the achievement of James Wm. Moore and his colleagues in creating, nurturing, expounding and annotating a great trans-substantive code of procedure that we often miss the persistent and inevitable tension between procedure generalized across substantive lines and procedure applied to implement a particular substantive end.").

the proponents of public law litigation set out for intervenors. The amicus curiae developed as a means of assisting a court reach the right decision, whether it be through providing recent case authority to which the judge may not have access or by pointing out facts that tend to undermine the claims of the parties or by demonstrating that the lawsuit was collusive.<sup>449</sup> Although the amicus was originally thought of as providing a neutral, disinterested voice, more recently courts have allowed the participation of parties with a political agenda.<sup>450</sup> Although some scholars have criticized the contents of amicus briefs,<sup>451</sup> participation as an amicus curiae can in many instances prove an effective alternative to formal intervention of right.

To many, participation as amicus curiae in lieu of intervention is less than satisfying because a court need not necessarily address the views of the amicus, and the amicus has no right to present arguments and witnesses.<sup>452</sup> But these concerns are unpersuasive for two reasons. First, an amicus can have a significant impact on the outcome of litigation. Scholarship suggests that amicus filings may have influenced the decisions of the Supreme Court,<sup>453</sup> and recent experience demonstrates forcefully that an amicus can direct the result in litigation despite the best efforts of the original parties.<sup>454</sup>

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449. See Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 695-97 (1963).

450. See *id.* at 697-704.

451. See, e.g., Andrew P. Morriss, *Private Amici Curiae and the Supreme Court's 1997-1998 Term Employment Jurisprudence*, 7 WM. & MARY BILL RTS. J. 823 (1999) (criticizing arguments in amicus briefs to the Supreme Court); Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Brief*, 72 N.C. L. REV. 91 (1993) (criticizing social science arguments to Supreme Court in amicus briefs); Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave*, 41 AM. U. L. REV. 1243 (1992) (discouraging amicus participation in district courts).

452. See Jones, *Litigation Without Representation*, *supra* note 10, at 33, 68 (downplaying usefulness of amicus participation); Vreeland, *supra* note 10, at 297.

453. See, e.g., Susan Behuniak-Long, *Friendly Fire: Amici Curiae and Webster v. Reproductive Health Services*, 74 JUDICATURE 261 (1991); Suzanne Uttaro Samuels, *Amici Curiae and the Supreme Court's Review of Fetal Protection Policies*, 78 JUDICATURE 236 (1995). The most recent thorough study of the overall influence of amicus briefs in the Supreme Court is Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Brief on the Supreme Court*, 148 U. PA. L. REV. 743 (2000). There is some evidence that amicus participation in the Supreme Court has not influenced the court in environmental litigation. See Susan Helman, *Friends of the Earth and Friends of the Court: Assessing the Impact of Interest Group Amici Curiae in Environmental Cases Decided by the Supreme Court*, 10 VA. ENVTL. L.J. 187 (1991).

454. In *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 578 (1999), the court of appeals held that the warnings called for by *Miranda v. Arizona*, 384 U.S. 486 (1966), did not apply to detainees in federal custody because of the enactment of 18 U.S.C. § 3501 (1994). *Dickerson* involved an appeal by the United States from the grant of a motion to suppress a defendant's testimony because the defendant had not received *Miranda* warnings. The Justice Department did not rely on § 3501 because it had taken the position that § 3501 was unconstitutional. Amicus curiae urged the court to apply § 3501, which it did over the objection of all parties. See *Dickerson*, 166 F.3d at 681-83. To be sure, Judge Posner of the Seventh Circuit has opined that many

Second, as a practical matter, in many instances a grant of intervention may resemble participation as an amicus. Commentators recognize that courts may limit grants of intervention or place conditions on an intervenor's participation; indeed, they urge that this ability ameliorates the potential negative effects that a broad right of intervention may inject into litigation.<sup>455</sup> Similarly, the Supreme Court's rules concerning appellate review of a limited grant of intervention make it difficult to obtain a broader grant of intervention.<sup>456</sup> Although some find participation as an amicus insufficient because an amicus cannot appeal, neither can an intervenor who lacks Article III standing.<sup>457</sup> Although an amicus does not have a formal seat at the table in potential settlement discussions, neither can an intervenor block a settlement "merely by withholding its consent."<sup>458</sup> Thus, in many instances participation as an amicus will vindicate the interests of the outsider without necessitating formal intervention as a party. Therefore, if a district court permits an outsider to participate as an amicus, a court of appeals should be more reluctant to reverse the decision denying intervention as an abuse of discretion.<sup>459</sup>

The Advisory Committee could encourage amicus participation in the district court by amending the Federal Rules of Civil Procedure to provide expressly for amicus participation. Both the Rules of the Supreme Court and Rules of Appellate Procedure provide for amicus participation.<sup>460</sup> The Advisory Committee could model a new rule on either of these existing rules. A new rule might encourage potential intervenors to focus their attention on amicus participation, rather than seeking formal intervention of right.

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amicus filings do not benefit the court and simply repeat the positions of the original parties, and he accordingly denied leave to participate as an amicus. See *Ryan v. CFTC*, 125 F.3d 1062 (7th Cir. 1997); see also Luther T. Munford, *Listening to Friends of the Court*, A.B.A. J., Aug. 1998, 128.

455. See, e.g., Tobias, *Standing to Intervene*, *supra* note 10, at 449-50 (arguing that courts should condition intervention in close cases to ensure high-quality input with minimal disruption to parties); Vreeland, *supra* note 10, at 307-09.

456. See *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987) (holding limited grant of intervention not subject to immediate appellate review).

457. See *Diamond v. Charles*, 476 U.S. 54 (1986).

458. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986).

459. A favorable example of this idea is found in *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825 (9th Cir. 1996). That case involved a suit by members of the timber industry who wished to have certain sales released under the 1995 timber salvage sale rider. See *supra* note 108. Environmental organizations moved to intervene. The Ninth Circuit affirmed the denial, noting that the intervenors could add nothing to the consideration of the case. 82 F.3d at 837. But the Ninth Circuit allowed the intervenor to participate as an amicus on the merits, thus ensuring that the trial court heard anything the putative intervenor could bring to the action. *Id.* at 830 n.7.

460. See SUP. CT. R. 37; FED. R. APP. P. 29.



### CONCLUSION

Although its extent may have waned in recent years, public law litigation has firmly entrenched itself as a significant part of the business of the federal courts. The chief challenge of the defenders of public law litigation is the problem of a court making decisions that affect people not formally appearing before it. Proponents of public law litigation are thus faced with the tension between desiring increased participation and recognizing that the lawsuits they advocate and wish to promote will necessarily affect nonparties, and that involving all nonparties would cripple the litigation going forward at all.

I have focused on the procedural device of intervention, and how parties use it in modern day public law litigation because proponents of public law litigation have hailed it as the solution to the central dilemma. I have shown that it is not a perfect solution. The device has evolved from its ancient roots and has become a more flexible tool in managing litigation. Nevertheless, it has the problems of its past. These problems are now reflected in the limitations courts have placed on it. The limitations, in turn, stem from the inevitable effect that adding parties has on any litigation, namely burdening the parties and the court and slowing down the resolution of the dispute.<sup>461</sup> Despite these problems, courts have attempted to use intervention to accomplish pragmatic accommodation of the interests of the parties and of the outsiders. An actual examination of the jurisprudence shows not hostility to intervention, but an attempt to use it wisely.

I have explored environmental litigation at length because it offers a new perspective on the intervention decision that differs from the civil rights litigation. This new perspective helped crystallize the conclusion that looking at the underlying legal merits of a dispute—moving slightly away from the trans-substantive approach—can justify participation in appropriate cases and exclusion in others. Freeing district courts from the strict supervision of courts of appeals will allow district court judges to examine freely the contours of the dispute before them and use their own abilities to manage complex litigation. Amending the approach that courts have taken by looking at the context of intervention, including the underlying merits of the dispute and what other means the court or the parties have undertaken to hear the views of the outsider, will more realistically identify those individuals or entities that must become parties or quasi-parties to the litigation. These

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461. See Subrin, *supra* note 13, at 1001 (discussing the general burdens that an equity-based system of civil procedure places on operation of the courts).

shifts in emphasis will not do away with intervention in public law litigation. That result is emphatically not the purpose of this article. Rather, I aim to improve the device to ensure that public law cases move efficiently through the judicial system. These cases have been, are, and—barring drastic action by Congress or the judiciary—always will be a significant part of the docket of the federal courts. They can be time-consuming and burdensome, but they are also significant in vindicating public values expressed by the Constitution or statutes. Rethinking intervention from this new perspective will help achieve the salutary ends of this important form of civil litigation.