Dual Standards for Third-Party Intervenors: Distinguishing Between Public-Law and Private-Law Intervention

I. INTRODUCTION

Courts stand as the final arbiters of many important and controversial issues in the United States. While it is the province of the judicial branch to hear "cases" and "controversies" that impact the immediate parties to a suit, many modern suits impact unrepresented parties and thus have policy implications. To describe this phenomenon, scholars use the terms "private law" and "public law."

As public law gained greater prominence, commentators began to realize the need to revise the Federal Rules of Civil Procedure to facilitate this type of litigation. Historically, unrepresented parties who were affected by a suit could use the mechanism of intervention to enter a suit. In 1966, the Federal Rules were modified to allow more liberal intervention than ever before. Many courts cautioned that the expansion of intervention could create complexity and inefficiency in litigation. Although the intervention mechanism is integral to the modern judicial plan for protecting unrepresented parties, over time, some of the courts of appeals have created restrictive standards that significantly frustrate intervention.

This Note attempts to offer a solution to balance the competing interests of representation and efficiency by focusing on the different needs of intervention in public- versus private-law litigation. In private-law litigation, intervention is not as necessary since resolution

of the suit will likely have little impact on third parties. Furthermore, this is where intervention may create the greatest inefficiency. However, in public-law litigation, third parties have a far greater justification for entering the proceedings. After analyzing exactly how the current circuit split impacts both private- and public-law litigation, this Note proposes new standards which take into account the nature of the suit when determining whether to allow intervention. Therefore, the solution is to use a more relaxed standard for intervention in public-law suits and to use limited intervention to allow the public a voice without adding unnecessary complexity in both types of litigation.

Part II explains the background of both intervention and public-law litigation. Part III discusses how the standards for qualifying intervenors may apply differently in public-law litigation and analyzes two areas of disagreement among the courts of appeals. Part IV proposes a solution that protects private plaintiffs while assuring interested parties are able to participate as necessary in public-law cases.

II. BACKGROUND

This Part provides the necessary background to understand why public- and private-law suits may merit different standards for intervention. First, Section A recounts the development of public-law litigation and explains how these cases differ from private-law cases. Second, Section B explains the development and purposes of American intervention practice. Finally, Section C provides a brief overview of intervention under Rule 24 of the Federal Rules of Civil Procedure to facilitate the more in-depth analysis in Part III.

A. The Development of Public Law

To understand why the existing intervention standards are insufficient to meet the needs of the U.S. judicial system, one must first understand the relatively recent development of public-law litigation. Originally, most civil litigation consisted of a dispute between two parties, with the court acting as decisionmaker.[1] In this world, the nature of the suit was largely determined by the parties, especially the plaintiff, and doctrines like the "plaintiff [is] master of

1. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976).

the suit"[2] were common. Most claims were based on common law, as opposed to statutory causes of action.[3] However, these norms began to blur beginning in the nineteenth century as a result of two major changes to the U.S. legal system.

First, legislative expansion brought on by progressivism—a general political movement focused on using new statutory law to accomplish social reform—created a host of new laws, some even with their own private causes of action. These new federal laws greatly expanded the effective jurisdiction of the federal courts.[4] This expansion began after the Civil War with the passing of the Thirteenth, Fourteenth, and Fifteenth Amendments;[5] it was buoyed by important decisions and changing ideas of the judicial process through the New Deal,[6] and it was cemented in the American consciousness by the Civil Rights Acts.[7] These new laws all relied heavily on the judicial system for enforcement of their "social reform" goals.[8]

Second, modifications to the Federal Rules of Civil Procedure altered the essential makeup of the civil suit.[9] Prior to 1966, courts had already begun to incorporate new party structures that allowed for multiple interests; however, the 1966 amendments expanded and solidified these changes by stating new standards for required joinder of parties, class actions, and intervention.[10] These rules facilitated a shift away from the traditional single-plaintiff-versus-single-defendant structure by both requiring and liberally allowing other parties to join the suit.[11]

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2. FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 626 (5th ed. 2001).

3. Chayes, *supra* note 1, at 1284.

4. *See id.* at 1288–89 (discussing the expanding role of federal courts).

5. U.S. CONST. amends. XVIII, XIV, XV.

6. *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (holding that a Washington state minimum wage statute for women was constitutional).

7. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

8. *See* William Burnham, *Aspirational and Existential Interests of Social Reform Organizations: A New Role for the Ideological Plaintiff*, 20 HARV. C.R.-C.L. L. REV. 153, 153 (1985) ("[T]he social reform potential of courts has grown significantly through constitutional changes, passage of legislation facilitating assertion of constitutional rights, and the creation of a wide variety of statutory rights and remedies.").

9. *See* Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215, 215 (2000) ("This growth was due, in no small part, to the 1966 amendments to the Federal Rules of Civil Procedure.").

10. *See infra* notes 32–51 and accompanying text.

11. *See, e.g.*, FED. R. CIV. P. 19 (allowing certain parties to join the suit).

Together, these two developments created a new type of litigation, often relating to issues of public importance, termed "public law" by Professor Abram Chayes.[12] Among these public issues are topics such as legislative districting, civil rights, and environmental concerns.[13] However, merely thinking about this litigation as "public" fails to convey its extensive differences from private litigation. As Professor Chayes articulated, public law has eight main differences:

> (1) The scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties.
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> (2) The party structure is not rigidly bilateral but sprawling and amorphous.
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> (3) The fact inquiry is not historical and adjudicative but predictive and legislative.
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> (4) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.
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> (5) The remedy is not imposed but negotiated.
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> (6) The decree does not terminate judicial involvement in the affair: its administration requires the continuing participation of the court.
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> (7) The judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome.
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> (8) 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.[14]

As Professor Peter Appel has noted, the concept of public law has evolved since Professor Chayes's original definition.[15] The modern idea of public-law litigation usually focuses on cases that will have "important consequences for many persons including absentees,"[16] regardless of whether the case contains all of the factors Professor Chayes identified.[17]

Public law has continued to mature and is now a significant force in the modern legal world. Indeed, a large portion of the modern U.S. legal system now centers around public law.[18] This phenomenon

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12. *See* Chayes, *supra* note 1, at 1284 (introducing the differences between public law and traditional adversary litigation).

13. *See* Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279, 279–80 (1990) (discussing different types of public law litigation).

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

15. *See* Appel, *supra* note 9, at 221 (discussing varying definitions of public law litigation).

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

17. *See* Appel, *supra* note 9, at 221 (discussing modern views of public law).

18. *See id.* at 221–22 (discussing the prevalence of public law in the United States judicial system).

is demonstrated both in modern public-law cases and in the rise of public interest groups that focus their efforts on litigation.

First, modern public-law cases such as *Brown v. Board of Education*[19] and *Roe v. Wade*[20] are by far the most popularly recognized cases in the modern legal system.[21] This is unsurprising since public-law cases implicate public issues that have "high stakes and widespread impacts."[22] Public-law cases are also the frequent subject of professional and academic attention.[23] If cases are studied for their precedential value, it follows that the cases with the most widespread impact—that is, public-law cases—would receive the most attention.[24]

Second, public law has created a new type of legal actor: the public interest group.[25] Based on the wide variety of federal causes of action, these groups—comprised of individuals who seek to advance certain philosophical or policy objectives—often focus on litigation to accomplish their goals.[26] The willingness of individuals to invest both time and capital to form these organizations demonstrates the importance of public-law litigation.

With this history, public law has become a significant part of the judicial system. In Part III, Section A, this Note will further describe why public law merits a different standard of intervention.

B. The Development of American Intervention Practice

Public law implicates multiple procedural aspects of litigation. Indeed, as already noted, several changes in the Federal Rules of Civil Procedure gave rise to public law in its modern form.[27] One of these is the concept of intervention. Intervention recognizes that in a common law system, the adjudication of a dispute between two parties may

19. 347 U.S. 483 (1954).

20. 410 U.S. 113 (1973).

21. *See* Chayes, *supra* note 1, at 1304 (noting how public law cases overwhelmingly receive the most journalistic attention).

22. Vreeland, *supra* note 13, at 280.

23. *See* Chayes, *supra* note 1, at 1304 (noting how public law cases overwhelmingly receive the most professional debate and academic comment).

24. *Accord* Appel, *supra* note 9, at 221 (discussing how the wide precedential impacts of certain cases give them significance).

25. *See generally* Vreeland, *supra* note 13, at 280–81 (discussing the growth and development of public interest groups.

26. *See* ROBERT A. BAUM, PUBLIC INTEREST LAW: WHERE LAW MEETS SOCIAL ACTION 44–60 (1987) (detailing litigation efforts of various public interest groups).

27. *See supra* note 9 and accompanying text.

affect absent third parties.[28] If the absent parties have a sufficient interest, then they should be allowed to enter the litigation to represent their position.[29] This Section recounts the development of intervention practice in U.S. jurisprudence and discusses the guiding principles behind the modern mechanism of intervention.

1. The Development of Modern Intervention

The mechanism of intervention originated in Roman law and involved the practice of allowing a third party to enter litigation in order to protect its interest.[30] Professors James Moore and Edward Levi's scholarship shows that by the 1930s, the concept of intervention was already well rooted in American jurisprudence, although its only statutory basis was the restrictive provisions of Equity Rule 37.[31] In 1937, Federal Rule of Civil Procedure 24 replaced Equity Rule 37.[32] The Advisory Committee responsible for Rule 24 stated that the rule "amplifies and restates the present federal practice at law and in equity."[33]

Despite neither creating a completely new mechanism nor completely overruling common law intervention,[34] Rule 24 did make two notable changes.[35] First, the Rule followed Professors Moore and Levi's suggestion of splitting intervention into two areas: cases

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28. *Federal Civil Procedure: Prejudicial Effects of Stare Decisis Can Compel Intervention of Right Under Rule 24(a)*, 1967 DUKE L.J. 1251, 1251.

29. *See* FED. R. CIV. P. 24(a) (requiring a sufficient interest for intervention).

30. James WM. Moore & Edward H. Levi, *Federal Intervention I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565, 568 (1936). More recent scholarship challenges the Roman origin of this practice. *See* Appel, *supra* note 9, at 241 (challenging Moore and Levi's account of the development of intervention in Roman law).

31. *See generally* Moore & Levi, *supra* note 30, at 578 (detailing the history of Equity Rule 37). Equity Rule 37 read in relevant 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." 7c CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1903 n.2 (3d ed. 2012).

32. FED. R. CIV. P. 24 advisory committee notes on 1937 adoption. The original Rule 24(a) read: "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." FED R. CIV. P. 24(a) (1937) (amended in 1966).

33. FED. R. CIV. P. 24 advisory committee notes on 1937 adoption.

34. True Gun-All Equip. Corp. v. Bishop Int'l Eng'g Co., 26 F.R.D. 150, 151 (E.D. Ky. 1960) ("This rule really introduced no new procedure but merely amplifies and restates the federal practice, both at law and in equity.").

35. *See generally* Hartley Pen Co. v. Lindy Pen Co., 16 F.R.D. 141, 153 (S.D. Cal. 1954) ("[T]he incidence of intervention has been enlarged . . . .").

involving a specific piece of real or personal property and cases where the applicant had an interest in the litigation.[36] Second, the Rule notably did not include Equity Rule 37's requirement that "intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."[37] Thus, Rule 24 expanded the concept of intervention.[38]

Although courts generally recognized that Rule 24 widened intervention beyond the common law standard, early interpretations were still quite restrictive.[39] Especially problematic was the Supreme Court's interpretation in *Sam Fox Publishing Co. v. United States* that a party must be "bound by a judgment" (that is, the party must face *res judicata*) in order to intervene.[40] In response, the Rule was once again amended in 1966 to read:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.[41]

The amendments made two significant changes to the Rule. First, it statutorily overruled the *Sam Fox res judicata* rule by removing the requirement of being legally bound.[42] In doing so, the Rule substituted a requirement that an intervenor must have an "interest" in the litigation. Second, the Rule was amended to remove the property requirement for intervention.[43] The new Rule entitled absentees to intervene, regardless of whether physical property was involved, if they would be "substantially affected in a practical sense by the determination made in an action."[44]

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36. *See* Appel, *supra* note 9, at 246 ("Moreover, the structure of the rule followed Moore and Levi's division of intervention into two types.").

37. WRIGHT & MILLER, *supra* note 31, § 1903.

38. *Hartley Pen*, 16 F.R.D. at 153.

39. *See* Appel, *supra* note 9, at 240 (discussing the inflexible interpretations of Rule 24).

40. Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 689 (1961); *see also* Appel, *supra* note 9, at 240 (discussing the restrictions *Sam Fox* placed on intervention).

41. FED. R. CIV. P. 24(a).

42. WRIGHT & MILLER, *supra* note 31, § 1903.

43. *Id.*

44. FED. R. CIV. P. 24 advisory committee notes on 1966 amendment.

2. Purposes of the Modern Intervention Mechanism

The development of intervention, especially through the 1966 amendments, frames the modern purposes of the mechanism.[45] Specifically, the shift toward the modern, more liberal standard for intervening reflects three policy concerns: practicality over formalism, balancing both inside and outside interests, and efficient suit resolution.

First, the focus on practicality can be seen in the modification of the "interest" and "property" requirements in the 1966 amendments. By removing the requirement of being legally bound in a preclusive sense, the current Rule recognizes that an outside interest may be practically affected so as to warrant intervention even if it is not per se legally bound by the resulting decision.[46] As the Advisory Committee to the 1966 amendments stated, an absentee should normally be entitled to intervene if he "would be substantially affected in a practical sense by the determination made in an action."[47] Furthermore, the lack of a specific definition for what type of "interest" is required evidences a shift toward a more dynamic, practical standard compared with the past requirements of a specific real or personal property interest.[48] Finally, the Rule also notably leaves the requirement of being "affected" undefined, signaling additional reliance on practical judgment over formal standards.

Second, the modern Federal Rules of Civil Procedure evidence a purpose to balance the interests of both absentees attempting to intervene and present parties. In contrast, common law intervention preferenced the original parties.[49] The lack of defined standards in the modern Rule 24 illustrates an effort to allow courts to balance competing interests in reaching intervention decisions.[50] Furthermore, Rule 24 is just one part of the larger federal multiparty scheme

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45. *See* Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH. J. RACE & L. 263, 270 (1999) (discussing how the changing intervention standards reflect gradual shifts in the purpose for intervention).

46. *See id.* (arguing that the changes to intervention evidence a shift toward recognizing the practical consequences of litigation on outsiders).

47. FED. R. CIV. P. 24 advisory committee notes on 1966 amendment.

48. *See id.* (discussing the shift to a practical conception).

49. *See, e.g.*, FED. EQUITY R. 37 (1912), *reprinted in* JAMES HOPKINS, THE NEW FEDERAL EQUITY RULES 167–68 (1913) (stating that intervening parties should be subordinated to the main proceeding).

50. *See The Litigant and the Absentee in Federal Multiparty Practice*, 116 U. PA. L. REV. 531, 532 (1968) ("[A] rigid set of rules will not yield a fair balance in every case . . . .").

created by Rules 19 (required joinder of parties) and 23 (class action litigation) to facilitate greater access and protection for absentees.[51]

The final, and perhaps most significant, purpose of intervention is to achieve judicial efficiency.[52] Instead of focusing primarily on the rights or interests of the individual parties, the purpose of efficiency relates to the "great public interest" of resolving as "much of the controversy to as many of the parties" as is possible in one case.[53] At times, this public interest may conflict with the private interests in the suit.[54] While intervention can achieve efficiency through judicial economies of scale, it also has the possibility of creating inefficiency due to overly complex, duplicitous litigation.[55] Thus, although never explicitly mentioned in Rule 24, the competing balance for efficiency can be seen in the timeliness, interest, and adequacy-of-representation requirements. Put together, these purposes suggest that the standard for intervention in public-law cases should focus on practical realities, consider the interests of the proposed intervenors, and seek to achieve judicial efficiency through economies of scale without creating unnecessary complexity.

C. Elements of Rule 24(a)(2) Intervention of Right

Rule 24 is divided into two types of intervention.[56] The first, outlined in Rule 24(a)(2), is intervention of right.[57] This type of intervention has the most stringent requirements, but it requires courts to allow any absentee who meets the requirements to intervene.[58] The second form of intervention is permissive intervention under Rule 24(b)(2).[59] While permissive intervention has a lower standard for eligibility, it also allows the court discretion on whether or not to grant intervention.[60] The remainder of this Note will focus on

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51. *See* John E. Kennedy, *Let's All Join In: Intervention Under Federal Rule 24*, 57 KY. L.J. 329, 374 (1969) (discussing the federal system of multi-party litigation).

52. *See* Stallworth v. Monsanto Co., 558 F.2d 257, 265 (5th Cir. 1977) (stating that a purpose of intervention is "to foster economy of judicial administration").

53. Atlantis Dev. Corp. v. United States, 379 F.2d 818, 824 (5th Cir. 1967).

54. *See id.* (discussing the competing private and public interests in intervention).

55. *See* Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969) ("The decision whether intervention of right is warranted thus involves an accommodation between two potentially conflicting goals: to achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending.").

56. *See* WRIGHT & MILLER, *supra* note 31, § 1902 (discussing differences between intervention of right and permissive intervention).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

the requirements and application of intervention of right, under Rule 24(a)(2).[61] The requirements for intervention of right are: timeliness, an interest relating to the property or transaction, a practical impairment of the ability to protect the interest, and a lack of adequate representation.[62]

As a threshold issue, many courts have stated that the Rule 24 elements should be interpreted liberally, with doubts resolved in favor of intervention.[63] This interpretive principle harmonizes with the intention to liberalize intervention expressed in the 1966 amendments.[64] However, not all courts accept this interpretation. The Fifth Circuit rejected this interpretation in *United States v. Texas East Transmission Corp.*, reaching back to before 1966 and borrowing the intervention standard of *Stadin v. Union Electric Co.*[65] Although the Fifth Circuit recognized that the 1966 amendments changed certain elements of the Rule, such as the requirement of being bound by a judgment, it did not agree that the 1966 amendments intended to liberalize the general construction of Rule 24 to what the circuit termed "indiscriminate intervention."[66]

1. Timeliness Requirement

Federal Rule of Civil Procedure 24 requires that intervention must be made "on [a] timely motion."[67] Instead of stating a specific, fixed amount of time in which a motion must be made for it to be timely, the timeliness requirement is a flexible inquiry with multiple factors that should be used to accomplish "the just, speedy, and inexpensive determination of every action."[68] Courts often interpret the timeliness requirement especially leniently in motions for

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61. While permissive intervention may be attempted in public law cases, ultimately it's designed to give judges wide discretion to allow or deny intervention. Because of this discretion, permissive intervention is not robust enough to provide a meaningful vehicle for public law intervention.

62. FED. R. CIV. P. 24(a); *see also* WRIGHT & MILLER, *supra* note 31, § 1908 (discussing requirements of intervention of right).

63. *See, e.g.*, South Dakota *ex rel.* Barnett v. U.S. Dep't of Interior, 317 F.3d 783, 785 (8th Cir. 2003) ("Rule 24 should be liberally construed with all doubts resolved in favor of the proposed intervenor.").

64. *See supra* note 45 and accompanying text.

65. *See* United States v. Tex. E. Transmission Corp., 923 F.2d 410, 413 (1991) (citing Stadin v. Union Elec. Co., 309 F.2d 912, 918 (8th Cir. 1962)) (discussing bounds set by Rule 24).

66. *Id.*

67. FED. R. CIV. P. 24.

68. McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1074 (5th Cir. 1970).

intervention of right.[69] This is a sensible result considering a court has less discretion in the context of intervention of right—if an absent party meets the requirements, it must be allowed to intervene.[70] Nonetheless, even in intervention of right, a court does have appreciable discretion in determining whether or not a motion is timely.[71]

While the timeliness requirement is difficult to define, courts consistently look at certain factors. Unsurprisingly, the most recognizable factor is simply the amount of time elapsed since the beginning of the litigation.[72] The Fifth Circuit in *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.* emphasized that the amount of time elapsed was a "relevant" consideration, but not controlling—the decision regarding timeliness should be made based on the totality of the circumstances.[73] The D.C. Circuit has gone so far as to state that while the elapsed time is relevant, it alone cannot make a motion for intervention untimely.[74]

The second factor for deciding timeliness is the delay between when a proposed intervenor learns of the suit and when the intervenor actually files a motion to intervene.[75] Some courts have held this requirement also applies when a group should have known that a suit would affect its interest.[76] Much like the first factor, there is no specific time period that will or will not make a motion timely.[77]

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69. *See* WRIGHT & MILLER, *supra* note 31, § 1916 n.5 ("The timeliness requirement for a motion to intervene is often applied less strictly with respect to intervention of right.").

70. *See id.* (discussing different standards of "timeliness" between intervention of right and permissive intervention).

71. *See* R & G Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 584 F.3d 1, 8 (1st Cir. 2009) ("[E]ven in the case of a motion to intervene as of right, the district court's discretion is appreciable, and the timeliness requirement retains considerable bite.").

72. *See, e.g.*, Smith Petroleum Serv., Inc. v. Monsanto Chem. Co., 420 F.2d 1103, 1115 (5th Cir. 1970) (considering whether a motion filed nineteen months after the litigation commenced was timely).

73. *Id.*

74. *See* United States v. British Am. Tobacco Austl. Servs., Ltd., 437 F.3d 1235, 1239 (D.C. Cir. 2006) ("[E]lapsed time alone may not make a motion for intervention untimely . . . .").

75. *See* WRIGHT & MILLER, *supra* note 31, § 1916 n.9 (citing several cases where parties' motions for intervention were granted when the party moved to intervene promptly after learning of lawsuit); *see also, e.g.*, Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp., 332 F.3d 815 (5th Cir. 2003) (holding a motion filed one and a half years after the absentee was aware of the suit was untimely).

76. *See, e.g.*, Heartwood, Inc. v. U.S. Forest Serv., 316 F.3d 694, 701 (7th Cir. 2003) ("A prospective intervenor must move promptly to intervene as soon as it knows or has reason to know that its interests might be adversely affected.").

77. *See British Am. Tobacco*, 437 F.3d at 1239 (holding no specific amount of elapsed time inherently makes a motion untimely).

Additionally, even a significant delay may be justified by a "satisfactory explanation for the delay."[78]

The final, and most significant, factor in determining timeliness is balancing the prejudice that would result to the parties by granting or denying intervention.[79] This determination considers not only the prejudicial impact of granting intervention to the parties already in the suit, but also the impact on absentees.[80] One of the most common forms of prejudice occurs when an absentee seeks to intervene close to the conclusion of a case, such as during a trial or settlement negotiations.[81]

2. Sufficient-Interest Requirement

In addition to the threshold requirement of timeliness, Rule 24 requires that a proposed intervenor "claim[] an interest relating to the property or transaction that is the subject of the action."[82] Despite being a crucial question, most commentators agree that the Supreme Court has never articulated a clear standard for the sufficient-interest requirement.[83] In *Donaldson v. United States*, the U.S. Supreme Court stated that the sufficient-interest requirement obviously means a "significantly protectable interest";[84] however, the circuits are split on what interests qualify as significantly protectable and whether that definition even helps to clarify the text of Rule 24's sufficient-interest clause.[85]

The Court first considered the revised sufficient-interest requirement in *Cascade Natural Gas Corporation v. El Paso Natural Gas Company*.[86] The Court recognized that the new, post-1966 standard was more liberal than that in the previous Rule and

78. *See* Smith v. Marsh, 194 F.3d 1045, 1051–52 (9th Cir. 1999) (finding no explanation for delay in seeking intervention).

79. *See* McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1073 (5th Cir. 1970) ("In fact, this [prejudice] may well be the only significant consideration when the proposed intervenor seeks intervention of right.").

80. *See, e.g.*, United States v. Jefferson Cnty., 720 F.2d 1511, 1516 (11th Cir. 1983) (holding a district court must consider prejudice to present parties and the absentee).

81. *See, e.g.*, *id.* at 1517 (considering the prejudice resulting from intervening after a trial and a settlement negotiation).

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

83. *See* WRIGHT & MILLER, *supra* note 31, § 1908.1 (arguing there is no clear definition).

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

85. *See* WRIGHT & MILLER, *supra* note 31, § 1908.1 ("[T]here 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.").

86. *See* Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 132–36 (1967) (discussing the sufficient-interest requirement of Rule 24).

concluded that it was "broad enough to include" the proposed intervenor.[87] Apart from this one line, the Court offered no guidance to interpreting the sufficient-interest requirement. However, the nature of the allowed interest in that case is instructive in and of itself: the allowed intervenor, Cascade, did not have an interest under the Rule before the 1966 amendments and did not have an independently sufficient claim.[88] Cascade was an Oregon company that sought to intervene in an antitrust action between two California companies.[89] Cascade regularly purchased natural gas from one of the companies and intervened in the suit only because it thought the suit's resolution could impact its supply and pricing.[90] While the majority easily approved of this interest with virtually no discussion, the dissent referred to this as an "insubstantial" interest.[91] This analysis suggests that, while the *Cascade* Court did not concretely state a test for determining a sufficient interest, its concept of interest was so broad that even this seemingly borderline case was easily accepted.

Four years later, the Supreme Court again addressed the sufficient-interest requirement in *Donaldson v. United States*,[92] this time finding that the proposed intervenor lacked a sufficient interest for intervention.[93] The case involved a summons issued by the IRS to Donaldson's former employer for various financial documents related to Donaldson's employment.[94] To prevent the employer from complying with the IRS by producing the documents, Donaldson moved to intervene in order to oppose the summons.[95] The Court emphasized that the employer had no fiduciary relationship with Donaldson that could prevent it from complying with the IRS.[96] The Court identified Donaldson's interest as "nothing more than a desire by Donaldson to counter and overcome [the employer's] willingness, under summons, to comply and to produce records."[97] Thus, the Court concluded that the nature of Donaldson's interest was insufficient for intervention since it could be thwarted by any number of means even

87. *Id.* at 136.

88. *See id.* at 154 (discussing the nature of Cascade's interest).

89. *Id.* at 132–33.

90. *Id.* at 133.

91. *Compare id.* at 136 (cursorily concluding that the amendments to Rule 24 makes it broad enough to include Cascade), *with id.* at 154 (Stewart, J., dissenting) (discussing Cascade's interest as less substantial than the remote and general concerns of other parties).

92. Donaldson v. United States, 400 U.S. 517 (1971).

93. *Id.*

94. *Id.* at 518–19.

95. *Id.* at 520–21.

96. *Id.* at 523.

97. *Id.* at 531.

if Donaldson successfully defeated the IRS summons in court.[98] The Court explained that the sufficient-interest requirement means a "significantly protectable interest,"[99] a phrase which has created confusion in intervention law.[100] Since the phrase neither qualifies as a term of art nor reflects any clear doctrine from earlier intervention law, lower courts are split on its application.[101]

3. Practical-Effect Requirement

Rule 24 also requires that a proposed intervenor demonstrate "that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest."[102] Unlike the substantial-interest and adequacy-of-representation requirements, the practical-effect requirement has created little debate. Originally, the drafted rule would have required "that the judgment 'substantially' impair or impede the interest"; however, this higher standard was dropped before final approval.[103] Although the *Advisory Committee Notes to the 1966 Amendments* still reference a requirement of being "substantially affected" and "substantially impaired,"[104] courts have not applied a heightened standard.[105]

Ultimately, the goal behind the new practical-effect requirement was to repeal the *res judicata* rule developed in *Sam Fox*.[106] In addition, the amendments seems to have completely shifted the rule to allowing any effect on the intervenor, even if only that of *stare decisis*.[107] This movement was quite likely accomplished by the

98. *See id.* ("The nature of the 'interest' urged by the taxpayer is apparent from the fact that the material in question (once we assume its relevance) would not be subject to suppression if the Government obtained it by other routine means . . . .").

99. *Id.*

100. WRIGHT & MILLER, *supra* note 31, § 1908.1.

101. *See* Appel, *supra* note 9, at 263 ("[T]he 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)."); *infra* Part III.B (discussing the circuit split over conceptions of a sufficient interest).

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

103. Nuesse v. Camp, 385 F.2d 694, 701 (D.C. Cir. 1967) (citing Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1232 (1966)).

104. FED. R. CIV. P. 24 advisory committee notes to the 1966 amendments.

105. *See, e.g.*, *Nuesse*, 385 F.2d at 701 (discussing the phenomena but declining to apply a heightened standard).

106. Atlantis Dev. Co. v. United States, 379 F.2d 818, 823–24 (5th Cir. 1967).

107. *See, e.g.*, Sierra Club v. Espy, 18 F.3d 1202, 1207 (5th Cir. 1994) (concluding that the potential stare decisis effect on the judgment in the case would impair the absentee's interest).

very early case of *Atlantis Development Corp. v. United States*.[108] While *stare decisis* will normally suffice for a finding of practical effect, the requirement is not without some bite, and there must be some connection between the resolution of the case and an impairment of the intervenor's interest.[109]

4. Adequacy-of-Representation Requirement

An absentee that fulfills the first three requirements of Rule 24 is entitled to intervene "unless existing parties adequately represent that interest."[110] This final requirement is arguably the most complex, and only one Supreme Court case, *Trbovich v. United Mine Workers of America*,[111] has addressed the issue. Moreover, this requirement is complicated by two different burden-shifting standards, and the federal courts of appeals are split as to what circumstances trigger such burden shifting.[112]

Although the Supreme Court did not lay out a comprehensive analysis of the adequacy-of-representation requirement in *Trbovich*, it did provide two central principles for this analysis. First, the Court stated that while a proposed intervenor bears the burden of proof, it is sufficient to prove that representation " 'may be' inadequate"—an intervenor does not have to prove that representation will *in fact* be inadequate.[113] Second, the Court established that the burden of showing that representation may be inadequate "should be treated as minimal."[114] While most courts have acknowledged this minimal standard in some form, many have tried to weaken the principle's import by rephrasing the requirement.[115] Instead of requiring a minimal burden of proof that representation *may be* inadequate—the Supreme Court's standard—the courts of appeals usually state that the inadequate representation is already minimal because the

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108. *See generally Federal Civil Procedure: Prejudicial Effects of Stare Decisis Can Compel Intervention of Right Under Rule 24(a)*, *supra* note 28 (arguing for the practical effect of stare decisis based on *Atlantis*).

109. *See* Bethune Plaza, Inc. v. Lumpkin, 863 F.2d 525, 533 (7th Cir. 1988) (limiting a party's ability to intervene as a matter of right based on the claim of stare decisis without close factual connection).

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

111. 404 U.S. 528 (1972).

112. *See infra* note 187–203 and accompanying text (explaining the circuits' different approaches).

113. *Trbovich*, 404 U.S. at 538 n.10 (internal quotation marks omitted).

114. *Id.*

115. *See, e.g.*, Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l Union v. Blackwell, 467 F.3d 999, 1007 (6th Cir. 2006) (rephrasing the Supreme Court's requirement).

intervenor only needs to prove that representation *may be* inadequate, not that it is *in fact* inadequate.[116] While subtle, this phraseology clearly attempts to create a higher standard than the, literally, minimal one established by the Supreme Court.

Beyond the Supreme Court's approach, the courts of appeals use a system of presumptions in analyzing the adequacy-of-representation requirement. If the absent party is either sufficiently represented by a current party or the government is a party to the suit, then the court will presume the absent party is already adequately represented.[117]

III. ANALYSIS OF RULE 24(A)(2) INTERVENTION OF RIGHT

The courts of appeals are split over how to apply Rule 24 in two areas: the sufficient-interest requirement and the adequacy-of-representation requirement. These divergent applications are a product of strained attempts to avoid a lenient standard for intervention in smaller private cases.[118] While these circuit splits create confusion for all litigants, the result is especially problematic for public-law cases.

This Part begins in Section A by providing an analytical framework arguing that the purpose of intervention is different in public-law cases than in private-law cases. Section B then uses this framework to analyze and critique how courts have applied both the sufficient-interest and adequacy-of-representation requirements.

A. The Purpose of Intervention in Public-Law Cases

Despite the broad intervention standard of Rule 24, the courts of appeals often contrive an interpretation that is much more narrow.[119] This departure from the Rule's original purpose is not always without valid cause. Despite the many benefits of intervention, in some private-law cases a broad intervention standard could create inefficiency by overcomplicating a suit with tangentially related issues.[120] This inefficiency provides the rationale for many of the

116. *See, e.g.*, *id.* ("[T]he requirement of impairment of a legally protected interest is a minimal one: the requirement is met if the applicant shows 'that representation of his interest "may be" inadequate.' ").

117. *See* discussion *infra* Parts III.C.1.a–c (explaining the presumption system).

118. *See* discussion *infra* Part III.A (discussing the relevant differences between public law and private law in the context of intervention).

119. *See* discussion *infra* Parts III.B.2, C~~D~~.2 (criticizing this approach).

120. *See* Appel, *supra* note 9, at 301 (advocating for limited intervention rules to prevent burdening the original parties).

circuits' contrived interpretations.[121] The possible inefficiency has also been noted by academics, especially those who argue that the current standard for intervening is appropriately narrow.[122] However, the relevant considerations in balancing the correct level of complexity are markedly different between public- and private-law cases.

First, in a public-law case it may not be appropriate to value the plaintiff's interest in the suit's resolution above that of other parties. As previously discussed, the 1966 amendments to Rule 24 already indicated that this norm of plaintiff primacy was losing importance.[123] This concept has special force in public-law litigation. While the plaintiff may be seeking a specific personal interest, the inherent nature of a public-law suit is that it implicates a wider variety of public interests.[124] Public-law cases in a given area will often involve many similar legal and factual questions; thus, resolution of one suit is more likely to impact the unrepresented parties through *stare decisis*.[125] These factors indicate that in many public-law cases, the absent parties are much more likely to have a sufficient interest that would allow them to "be presumptively entitled to participate in the suit on demand."[126]

Second, public-law litigation can be perceived as undermining the democratic ideal of equal participation in government, since the resolution of public-law litigation inherently has wide societal impacts.[127] These cases, especially those litigated under such broad provisions as the Fourteenth Amendment, often resolve issues that are the subject of wide political discussion.[128] Furthermore, these decisions may often rest less on pure textual analysis and more on weighing competing policies or value judgments.[129] Although much

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121. *See, e.g.*, Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969) (discussing the need to balance intervention with decreased efficiency from complex litigation).

122. *See* Chayes, *supra* note 1, at 1312 (arguing that a party structure must provide adequate representation for public law cases without introducing too much complexity). *See generally* Appel, *supra* note 9, *passim* (defending the current limits on intervention).

123. *See supra* note 9 and accompanying text (describing how the amended Rules recognized a broader range of interests in a given lawsuit).

124. *See* Chayes, *supra* note 1, at 1310 ("Public law litigation, because of its widespread impact, seems to call for adequate representation in the proceedings of the range of interests that will be affected by them.").

125. *See* Jenkins, *supra* note 45, at 292–93 (discussing how the legal holdings and factual findings of a public law case can play a significant negative stare decisis role even if the result of the case is not itself relevant to the absentee's interest).

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

127. *See supra* note 16 and accompanying text.

128. *See* Chayes, *supra* note 1, at 1288–90 (discussing the interaction between political action and intervention).

129. *Id.* at 1288–89.

could be said to critique this situation where "[l]itigation inevitably becomes an explicitly political forum and the court a visible arm of the political process,"[130] allowing intervention can at least ensure full representation in these proceedings. This shift helps return civil litigation to "what it should represent in a modern democratic society."[131] While courts may properly strike down even democratically created laws deemed unconstitutional, in these cases it is important to allow wide public intervention both to ensure the court sees the best possible representation of interests and to defeat the public perception—accurate or not—that the court is undermining the democratic process through limited litigation.

Third, concerns regarding efficiency weigh differently in the public-law context. As Professor Alan Jenkins has noted, the interest in efficiency is forward-looking—how can the resolution of this case prevent unnecessary cases in the future?[132] While adding additional parties to the current litigation may slightly increase the complexity of a current case, it can dramatically assist in reducing future case loads. This is especially significant in the context of public-law litigation because the disputed issues are more likely to turn on similar legal questions than various divergent factual disputes. In *Trbovich*, the Supreme Court highlighted that the similarity of the intervenor's arguments meant that intervention would produce "relatively little additional burden."[133] The various parties to a public-law case are more likely to share common issues than the individuals who may attempt to intervene in a private-law case. Furthermore, grouping multiple suits into one through intervention allows a court to better understand the interests at stake, thus reducing the risk of creating inconsistent judgments.[134]

Fourth, public-law cases receive greater informational benefits from intervenors. The intervenors in public-law litigation are normally public interest groups.[135] These groups are often composed of specialists in the respective areas in which they seek to intervene.[136] This high-quality representation can provide the court with unique

130. *Id.* at 1304.

131. Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, CORNELL L. REV. 270, 329 (1989).

132. Jenkins, *supra* note 45, at 279 (arguing the judicial economy seeks to diminish future litigation by nonparties who have an interest in the current suit).

133. Trbovich v. United Mine Workers, 404 U.S. 528, 536–37 (1972).

134. *See* Vreeland, *supra* note 13, at 295–96 (discussing the importance of providing the court with complete information).

135. *Id.* at 295.

136. *Id.*

evidence and arguments.[137] These contributions preserve the adversarial process by ensuring complete representation.[138]

B. Different Approaches to the Sufficient-Interest Requirement

The first of the two main circuit splits in interpreting the standard for intervention involves the sufficient-interest requirement. This Section analyzes the circuits' conflicting interpretations and critiques them in light of the purpose of intervention in public-law cases.

1. Explanation of the Approaches to the Sufficient-Interest Requirement

The circuits' approaches to the sufficient-interest requirement can be divided into three categories: (1) those requiring a protectable interest;[139] (2) those requiring a direct, substantial, and legally protectable interest;[140] and (3) those relying on policy interests to make the decision.[141] While this breakdown represents the overall landscape, these interpretations often operate more as general guidelines than hard-and-fast rules.[142] In fact, it is not uncommon to find cases within one circuit that seem to apply the requirement more or less stringently based on the policy interests present in the case.[143]

a. Sufficiency of a Protectable Interest

The first group of courts focuses not on whether the intervenor has a specific legal cause of action, but on whether the interest is one recognized by the law.[144] The Ninth Circuit specifically formulates this test by finding that an interest is sufficient when "the interest is

137. Jenkins, *supra* note 45, at 278.

138. *Id.*; *see also* Chayes, *supra* note 1, at 1310–11 (discussing the importance of being able to rely on sufficient party participation for the viability of both affected interests and for the judicial system itself).

139. *See, e.g.*, Sierra Club v. EPA, 995 F.2d 1478, 1484 (9th Cir. 1993) (requiring a significantly protectable interest), *overruled in part by* Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173 (9th Cir. 2011).

140. *See, e.g.*, Diaz v. S. Drilling Corp., 427 F.2d 1118, 1124 (5th Cir. 1970) (requiring a direct, substantial, legally protectable interest in the proceedings).

141. *See, e.g.*, Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967) (holding the sufficient-interest requirement balances policy goals).

142. Harris v. Pernsley, 820 F.2d 592, 596 (3d Cir. 1987).

143. *See, e.g.*, *id.* at 596–97 (holding this analysis often requires pragmatic considerations).

144. *See, e.g.* Wilderness Soc'y v. U.S. Forest Serv., 630 F.3d 1173, 1179 (9th Cir. 2011) (discussing the necessary interest).

protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue."[145] This test does not require that the alleged interest be protected by the statute at issue in the litigation.[146] While not clearly articulated in *Sierra Club v. Equal Protection Agency*, the Ninth Circuit's analysis seems to construe the sufficient-interest requirement not so much as seeking a specific "legal or equitable interest,"[147] but rather as asking whether there is some interest generally recognized by law that bears a relationship to the claims at issue.[148] In *Donnelly v. Glickman*, the court held that this relationship requirement is generally satisfied if the resolution of the claim will actually affect the intervenor.[149] For example, the *Donnelly* court found that the proposed intervenor did not have an interest because the relationship was nonexistent—whether the intervenor was successful or not, the result of the litigation would not affect the intervenor's interest.[150] Thus, the interest requirement is little more than "a practical, threshold inquiry."[151]

b. Sufficiency of a Direct, Substantial, and Legally Protectable Interest

Courts using the second approach require a direct, substantial, and legally protectable interest in the litigation to intervene.[152] This

145. Sierra Club v. EPA, 995 F.2d 1478, 1484 (9th Cir. 1993).

146. *Id.*

147. Cnty. of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980).

148. The crucial elements of *Sierra Club* are not easy to interpret. In the same sentence in which the court specifies that an interest only needs to be "protectable under some law," it also states that there must be "a relationship between the legally protected interest and the claims at issue." *Sierra Club*, 955 F.2d at 1484. The words "legally protected interest" seem to indicate the court is interpreting "significantly protectable interest" as requiring a specific legal claim; however, this interpretation conflicts with the court's later analysis where it finds a sufficient interest without a specific legal cause of action merely because the interest (the ability to discharge pollution) is recognized by the Clean Water Act (meaning it regulates what discharges are permissible). *Id.* at 1485. Based on this analysis the words "legally protected" might better be interpreted to mean "legally recognized." In other words, the question is not whether the intervenor can bring a legal suit to protect the interest, but whether some law has recognized it as an interest. This understanding is most readily reconcilable with the Ninth Circuit's later cases specifying that "Rule 24(a)(2) does not require a specific legal or equitable interest." *Wilderness Soc'y*, 630 F.3d at 1179.

149. Donnelly v. Glickman, 159 F.3d 405, 410 (9th Cir. 1998).

150. *See id.* ("Resolution of plaintiffs' action, therefore, will not affect the proposed intervenors' claims . . . . Thus, the proposed intervenors do not have a 'significant protectable interest' in the liability phase of plaintiffs' action.").

151. Greene v. United States, 996 F.2d 973, 976 (9th Cir. 1993).

152. *See, e.g.*, Diaz v. S. Drilling Corp., 427 F.2d 1118, 1124 (5th Cir. 1970) (citing Hobson v. Hansen, 44 F.R.D. 18, 24 (D.D.C. 1968)). While the D.C. District Court case *Hobson v. Hansen* is

interpretation not only requires that the intervenor's interest be directly and substantially related to the question of the litigation, but also that it has "a right to maintain a claim for the relief sought."[153] Most courts that use this interpretation require the proposed intervenor to be able to bring a suit independently; in other words, the intervenor must have a personal cause of action.[154]

This interpretation of the sufficient-interest requirement creates a notably narrow standard of intervention, which conflicts with the broader standard in other circuits.[155] Courts using this approach have been generally unwilling to deviate, even in public-law cases where a public interest group seeks to represent a public interest in the litigation.[156]

c. The Public-Policy Approach

Courts using the third approach to the sufficient-interest requirement lack a clearly defined test; they look instead to public policy to answer whether the specific interest identified is sufficient to warrant intervention.[157] In using this approach, the D.C. Circuit in *Nuesse v. Camp* stated that "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently

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normally cited as precedent for this view, the standard is clearly derived from a line of cases predating the 1966 amendments. *See Hobson*, 44 F.R.D. at 23 (discussing pre-1966 cases that created this standard). Interesting to note, *Hobson* itself is no longer controlling in the D.C. Circuit. *See* Nuesse v. Camp, 385 F.2d 694, 705 (D.C. Cir. 1967) (holding the sufficient-interest requirement does not require any specific legal interest). Additionally, while many of the cases seem to read this standard as an interpretation of the *Donaldson* "significantly protectable" language, both the tripartite standard and the *Hobson* case pre-date *Donaldson*. *See* New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 464 (5th Cir. 1984) ("It is apparent that the Supreme Court in *Donaldson* used 'protectable' in the sense of legally protectable, and it is difficult to conceive of any other sense in which the Court might have been employing 'protectable' in that context.").

153. Solien v. Miscellaneous Drivers & Helpers Union, 440 F.2d 124, 132 (8th Cir. 1971).

154. This seems to be the requirement of at least the Seventh Circuit. *See e.g.*, Heyman v. Nat'l Bank of Chi., 615 F.2d 1190, 1193 (7th Cir. 1980) (holding there was no interest since the intervenor could not bring suit separately). However, the Fifth Circuit has recognized intervention in cases where the proposed intervenor did not have a legal cause of action to bring a separate claim, but nonetheless did have an interest in property that was the subject of litigation. *See Diaz*, 427 F.2d at 1124 (allowing intervention to place a tax lien on a piece of property involved in the litigation).

155. *See* United States v. Perry Cnty. Bd. of Educ., 567 F.2d 277, 279 (5th Cir. 1978) (noting the Fifth Circuit's narrow reading of the sufficient-interest requirement).

156. *See* Keith v. Daley, 764 F.2d 1265, 1268–69 (7th Cir. 1985) (rejecting public interest organization's argument that the sufficient-interest requirement should be relaxed in public law cases).

157. *See, e.g.*, *Nuesse*, 385 F.2d at 700 (stating a flexible test for intervention).

concerned persons as is compatible with efficiency and due process."[158] Thus, this approach entirely eschews the requirement of any specific legal interest, instead focusing on the relationship element—whether there is a sufficiently close nexus to warrant efficient intervention. Courts following this approach acknowledge that rules are "obviously tailored to fit ordinary civil litigation, these provisions (of Rule 24) require other than literal application in atypical cases."[159] The discretionary nature of this interpretation of the sufficient-interest requirement means that thorough analysis and consistent application is difficult at best.[160]

2. Critique of the Approaches

While none of the interpretations of the sufficient-interest requirement perfectly fulfill the purposes of Rule 24 and the Supreme Court precedent discussed above, the public-policy approach comes the closest.

Courts have critiqued the lack of a definition of the word "interest" in Rule 24;[161] one court commented that "the amendments made the question of what constitutes an 'interest' more visible without contributing an answer."[162] The legislative history of the 1966 amendments does not reveal whether the ambiguity is accidental or if the word "interest" is supposed to have a narrower meaning. Before the 1966 amendments, the Rule included two specific types of interests that were sufficient: an interest in being bound by a suit or an interest in property involved in the suit.[163] The 1966 amendments completely removed the restrictions on a sufficient interest.[164] Furthermore, the interest requirement's objective wording (requiring that a prospective intervenor *is or may be* affected) changed to a subjective wording (requiring that a prospective intervenor *claim* to have an interest). These changes suggest that the 1966 amendments intentionally left the word "interest" undefined. The amended Rule 24 was designed to eliminate the *res judicata* rule established in *Sam*

158. *Id.*

159. *Id.*

160. *See* Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969) (en banc) ("Since this task will depend upon the contours of the particular controversy, general rules and past decisions cannot provide uniformly dependable guides.").

161. *See, e.g.*, *id.* (noting the ambiguity of what constitutes a sufficient interest).

162. *Id.*

163. FED. R. CIV. P. 24 (amended 1966).

164. *Id.*

Fox.[165] Under the modern approach, the focus of the Rule is not whether the intervenor has a specific type of interest, but rather whether the claimed interest "relat[es] to the property or transaction that is the subject of the action."[166]

This view is consistent with Supreme Court precedent. In *Cascade*, the Court did not view the sufficient-interest requirement as a difficult standard to meet. Rather, it noted the clear change from the previous Rule and casually assumed that Cascade had a sufficient interest to intervene under the modern Rule. The case does not indicate that Cascade had any legal claims against the parties to the suit. Rather the court conclusorily allowed intervention on the "unsubstantial" claim that the adjudication of the antitrust suit at issue may tangentially impact the prices Cascade received when purchasing natural gas from one of the parties to the suit. If the sufficient-interest requirement did require a direct, substantial, and legally protectable interest, Cascade should not have been allowed to intervene.

In contrast, proponents of a limited interpretation of Rule 24's sufficient-interest requirement often point to *Donaldson*'s "significantly protectable interest" language to show that the correct standard for intervention is narrow. However, this conclusion is neither necessary nor obvious from the opinion. First, as already mentioned, this phrase is not a term of art, and the Court did not explain what it meant by "significantly protectable." Second, in *Donaldson*, the Court did not discuss whether Donaldson's claimed interest in protecting evidence of tax fraud was a sufficient type of interest. Rather, the Court discussed whether that interest was sufficiently related to the suit. The Court concluded that Donaldson's interest in protecting his record was not sufficiently related to the suit because his interest was not "significantly protectable" through the litigation—even if he was allowed to intervene and won on every issue, the employer could still voluntarily give his records to the IRS.

Under this analysis, both the "substantially protectable interest" and the "direct, substantial, and legally protectable interest" approaches seem incorrect since they require a specific type of interest for intervention. If the drafters intended to impose these requirements, they could have easily required a substantial or significant interest. Rather, the intent of this provision seems to be filtering out interests based on whether they are sufficiently related to

165. *See* FED. R. CIV. P. 24 advisory committee note on the 1966 amendment (outlining the goal of expanding the breadth of a sufficient interest).

166. FED. R. CIV. P. 24.

the suit and whether intervention can "significantly protect" the claimed interest.

C. Different Approaches to the Adequacy-of-Representation Requirement

The second main circuit split in interpreting the standard for intervention focuses on what a proposed intervenor must prove to show that the present parties do not adequately represent its interest. This Section first explains the various approaches to this requirement and then analyzes how these standards deviate from Rule 24's original intent.

1. Explanation of the Approaches to the Adequacy-of-Representation Requirement

The courts of appeals use a system of presumptions in analyzing the adequacy-of-representation requirement: if the absent party is sufficiently represented by a current party or if the government is a party to the suit, then the court will presume the absent party is already adequately represented. Although the courts of appeals consistently use these presumptions, the requirements to trigger and overcome the presumptions vary by circuit.

a. Presumption of Adequate Representation from Similar Interest

Courts are split on the correct standard for establishing the first type of presumption—that of adequate representation from a party already present in the litigation.[167] One group of courts uses a three-part spectrum test; the others use a same-ultimate-objective test.[168]

The three-part spectrum test first categorizes an absentee's interest as adverse, similar, or identical to parties already present in the suit. If a proposed intervenor has an identical interest to a party in the suit, then a presumption of adequate representation arises.[169] However, the opposite is not true—being adverse to both parties in a

167. *Compare* Bottoms v. Dresser Indus., Inc., 797 F.2d 869, 872 (10th Cir. 1986) (asking whether the proposed intervenor has an identical interest), *with* B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc., 440 F.3d 541, 546 (1st Cir. 2006) (asking whether the proposed intervenor shares the same ultimate objective with a party to the suit).

168. *Compare Bottoms*, 797 F.2d at 872 (describing the three spectrum test), *with B. Fernandez*, 440 F.3d at 546 (outlining the same ultimate objective test).

169. *See Bottoms*, 797 F.2d at 872 ("[I]n this type of case, the party's representation is presumptively adequate.").

suit does not mean that a presumption of inadequate representation is created. So, many courts simply ask whether the proposed intervenor has an identical interest to a party already in the litigation.[170]

The same-ultimate-objective test creates a rebuttable presumption of adequate representation whenever an absentee shares the same ultimate objective with a party.[171] This inquiry asks whether parties "seek to achieve the same objectives" as an existing party.[172] The degree of relationship between the two parties is not determinative. For example, two different branches of the same company have been found not to have the same ultimate objective, while a machinists union and the Federal Election Commission ("FEC")—two unrelated parties—were held to have the same objective when they both sought to protect the constitutionality of a statute.[173]

Courts applying the same-ultimate-objective test struggle with defining a party's objective at the correct level of generality. Analyzed under a low view of generality, the parties only need to be pursuing some generally common goal. In contrast, the higher-level analysis takes a closer look to see if the parties really have the same ultimate goal or different goals that simply share some common elements.

For example, in the Eleventh Circuit case *Athens Lumber Company v. Federal Election Commission*, a machinists union attempted to distinguish its ultimate objective from that of the FEC by arguing that its interest was to prevent members from being "financially overwhelmed in federal elections," whereas the FEC was simply seeking to uphold the constitutionality of a law.[174] This argument is strikingly similar to that which the Supreme Court acknowledged in *Trbovich*. In *Trbovich*, the Secretary of Labor asserted an identical interest—at a low level of generality—as a union member because they were both seeking free, democratic union elections.[175] However, the Court—applying a high-level-of-generality analysis—found that the union member was not adequately

170. *See, e.g.*, *id.* (failing to consider whether the interest was adverse or similar).

171. *Fernandez*, 440 F.3d at 546.

172. United States v. City of Miami, 278 F.3d 1174, 1178 (11th Cir. 2002).

173. *Compare Fernandez*, 440 F.3d at 546 (holding Kellogg USA and Kellogg Caribbean did not have the same ultimate objective), *with* Athens Lumber Co., Inc. v. Fed. Election Comm'n, 690 F.2d 1364, 1366 (11th Cir. 1982) (holding machinists union and FEC shared the same ultimate objective).

174. *See Athens Lumber*, 690 F.2d at 1366 (discussing the machinists union's claimed objective).

175. *See* Trbovich v. United Mine Workers, 404 U.S. 528, 538 (1972) ("The Secretary contends that petitioner's only legally cognizable interest is the interest of all union members in democratic elections, and he says that interest is identical with the interest represented by the Secretary in Title IV litigation.").

represented because he had a personal goal separate from the Secretary who was just "performing his duties."[176] Despite this reasoning from *Trbovich,* the Eleventh Circuit in *Athens Lumber* applied a low-level-of-generality analysis and found that the machinists union and the FEC shared the same ultimate objective; thus, it denied intervention.[177]

b. Presumption of Adequate Representation from Government Participation

The second circumstance when a court will find a presumption of adequate representation is when the government is involved to some degree in the litigation.[178] While Professor Appel has argued that the presumption from government intervention is weakening, more recent cases suggest the contrary.[179] Every circuit Professor Appel cited as evidence of this change has since reiterated a strong presumption of adequate representation from government parties.[180]

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176. *Id.* at 538–39.

177. *See Athens Lumber*, 690 F.2d at 1366 (holding the machinists union and FEC had the same ultimate objective).

178. *See*, *e.g.*, Ruthdart v. United States, 303 F.3d 375, 386 (1st Cir. 2002) ("Adequacy is presumed, although rebuttably so, where a government agency is the representative party.").

179. *See* Appel, *supra* note 9, at 274 ("[C]ourts formerly applied a strong presumption that a government adequately represented any party aligned with its interests . . . . More courts now recognize that outsiders may have interests that a government would overlook or fail to emphasize.").

180. *Compare* Appel, *supra* note 9, at 274 & n.317 (citing the Ninth, Fifth, Eighth, and First Circuits as evidence of a shift), *with* Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc., 642 F.3d 728, 740 (9th Cir. 2011) ("[I]t will be presumed that a state adequately represents its citizens . . . ."), *and* Little Rock Sch. Dist. v. North Little Rock Sch. Dist., 378 F.3d 774, 780 (8th Cir. 2004) ("We presume that the government entity adequately represents the public . . . ."), *and Ruthdart*, 303 F.3d at 386 ("Adequacy is presumed, although rebuttably so, where a government agency is the representative party."). For example, the Ninth Circuit formerly dictated a low standard without a presumption stating "where the government was the purported representative, we have held that 'the requirement of inadequacy of representation is satisfied if the applicant shows that representation of its interests "may be" inadequate and . . . the burden of making that showing is minimal.' " United States v. Stringfellow, 783 F.2d 821, 827 (9th Cir. 1986) (alteration in original), *vacated sub nom*., Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987); *see also* Jenkins, *supra* note 45, at 297 (discussing *Stringfellow* as an example of a court that has not followed the higher standard set by other courts of appeals). In reaching this standard, the Court explicitly dismissed the higher standard imposed by other circuits, citing *Trbovich* as authority. *Stringfellow*, 783 F.2d at 827 ("[T]he district court applied the standard of United States v. Hooker Chemicals & Plastics Corp., under which an applicant must make a 'strong showing' of inadequate representation when the purported representative is a state or the federal government. However, this standard clearly conflicts with the law of this circuit. Consistent with Trbovich v. United Mine Workers of America . . . ." (citations omitted)). In contrast to *Stringfellow*, and apparently ignoring the previous interpretation of *Trbovich*, the Ninth Circuit now holds that "[i]n the absence of a 'very compelling showing to the contrary,' it will be presumed that a state adequately represents its citizens . . . ." Arakaki v. Cayetano, 324

These cases lend credence to the argument that the presumption of adequate representation based on government participation is not shrinking, but actually growing.

Although courts universally apply some presumption of adequate representation from a government party, there is no consensus as to exactly what the government must do to create the presumption. The broadest theory of the government presumption assumes that the government—as *parens patriae*—inherently represents the interest of the public.[181] Thus, unless the absentee can assert an interest separate from that of the general public, the presumption of adequacy will apply.[182]

A more moderate theory of the government presumption assumes the government provides adequate representation if the proposed intervenor "shares the same interest" as the state.[183] The results of this test are likely to vary depending on the specific interpretation of "interest" used in sufficient-interest-requirement analysis.[184]

Finally, the most narrow view of the government presumption applies only when the "representative is a governmental body charged by law with protecting the interests of the proposed intervenors."[185] This presumption applies "unless there is a showing of gross negligence or bad faith."[186]

c. Overcoming the Presumption

Once a court finds that a proposed intervenor is presumed to be adequately represented, the intervenor must meet some higher requirement to overcome the presumption. However, the requirement and its operation are unclear. Oftentimes, presumptions shift the burden of proof;[187] however, in intervention practice, the burden of

F.3d 1078, 1086 (9th Cir. 2003) (citing 7C CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1909, at 332 (2d ed.1986)).

181. *See Little Rock Sch. Dist.*, 378 F.3d at 780 ("We presume that the government entity adequately represents the public . . . .").

182. *See id.* ("[W]e require the party seeking to intervene to make a strong showing of inadequate representation; for example, it may show that its interests are distinct and cannot be subsumed within the public interest represented by the government entity.").

183. *See Arakaki*, 324 F.3d at 1086 ("[I]t will be presumed that a state adequately represents its citizens when the applicant shares the same interest.").

184. *See supra* notes 140–42 and accompanying text (describing the various "interest" requirements employed by the circuits).

185. Ligas *ex rel.* Foster v. Maram, 478 F.3d 771, 774 (7th Cir. 2007).

186. *Id.*

187. *See, e.g.*, Basic v. Levinson, 485 U.S. 224, 245 (1988) (noting that presumptions often shift the burden of proof).

proof is already on the proposed intervenor.[188] While the exact theory behind this presumption will be critiqued later in this Note,[189] it is instructive at this point to analyze what will overcome the presumption of adequate representation. The circuits are split, with some applying a weak presumption that can be easily overcome and some applying a strong one that requires a "compelling showing" of inadequate representation.[190] The approaches are hard to categorize, but this Note will group courts into those that apply one of two multifactor tests and those that fail to articulate a clear test.

The first group of courts requires an absentee to prove "adversity of interest, collusion, or nonfeasance on the part of a party to the suit" in order to overcome the presumption of adequate representation.[191] This multifactor test is a relic from pre-1966 cases,[192] normally applied when the presumption was derived from sharing the same ultimate objective with a party already in the litigation.[193] While most courts apply this test strictly, others indicate that the listed factors are merely sufficient examples, but not necessary requirements.[194]

The second group of courts also requires consideration of three factors, which the Ninth Circuit noted in *Perry v. Proposition 8 Official Proponents*:

> (1) [W]hether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.[195]

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188. Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972).

189. *See* discussion *infra* Part III B.2.a (critiquing the presumption system).

190. *Compare* Stone v. First Union Corp., 371 F.3d 1305, 1311 (11th Cir. 2004) ("This presumption is weak . . . ."), *with* Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc., 642 F.3d 728, 740 (9th Cir. 2011) ("In the absence of a very compelling showing to the contrary, it will be presumed that a state adequately represents its citizens . . . .").

191. *E.g.*, *In re* Cmty. Bank of N. Va., 418 F.3d 277, 315 (3d Cir. 2005).

192. *See e.g.*, Stadin v. Union Elec. Co., 309 F.2d 912, 919 (8th Cir. 1962) ("[I]nadequacy of representation is or may be shown by proof of collusion between the representative and an opposing party, by the representative having or representing an interest adverse to the intervener, or by the failure of the representative in the fulfillment of his duty."). *But see* Daggett v. Comm'n on Governmental Ethics & Election Practices, 172 F.3d 104, 111 (1st Cir. 1999) (noting that courts may derive this standard from *Stadin*).

193. *See e.g.*, Virginia. v. Westinghouse Elec. Corp., 542 F.2d 214, 216 (4th Cir. 1976) ("When the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented, against which the petitioner must demonstrate adversity of interest, collusion, or nonfeasance.").

194. *See Daggett*, 172 F.3d at 111 (arguing this is not intended to be an exclusive list).

195. Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 952 (9th Cir. 2009).

While the first factor seems to indicate that a proposed intervenor could defeat the presumption by proving some doubt that a present party will make one of its arguments, courts do not appear to follow this interpretation.[196] For example, in *Perry*, the court first, interpreted the word "arguments" as referring to broad claims—possibly even causes of action—not to specific arguments or legal tactics.[197] Second, the court required a "compelling showing" of the listed factors in order to defeat the presumption and establish inadequate representation.[198] In reconciling the "compelling showing" language (which indicates a higher standard) with the "undoubtedly" language (indicating a lower standard), it appears the court arrived at a standard that asks in effect whether "a present party will make substantially all of a proposed intervenor's significant arguments."

Courts that do not use these two main approaches have employed a variety of requirements, although they have all been applied inconsistently. Some courts have held that an intervenor need only offer an adequate explanation as to why it is not sufficiently represented by the named party in order to defeat the presumption of adequate representation.[199] This requirement seems to barely elevate the requirement at all and is evident of a "weak" presumption. Other courts are only slightly more demanding; they have required only that a proposed intervenor show "some conflict" to defeat the presumption.[200] On the far extreme, other courts have held that "gross negligence or bad faith" is required to defeat the presumption, although only in the case of a presumption arising from government involvement.[201]

d. Eliminating the Presumption

Assuming the presumption is overcome, or if the presumption was never in place to begin with, the question remains: what is sufficient to make the "minimal" showing that representation may be inadequate? Ironically, courts have often used the same tests used to overcome a presumption of adequate representation to analyze whether or not representation is adequate even without the

196. *See id.* (denying intervention even when proposed intervenor provided concrete examples of different arguments it would make).

197. *See id.* (holding that the absentee's arguments amounted to little more than litigation tactics and were not sufficient to rebut presumption).

198. *See id.* (requiring a "compelling showing").

199. B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc., 440 F.3d 541, 546 (1st Cir. 2006).

200. Shea v. Angulo, 19 F.3d 343, 347 (7th Cir. 1994).

201. Ligas *ex rel.* Foster v. Mara, 478 F.3d 771, 774 (7th Cir. 2007).

presumption. This raises questions of whether the presumption itself is significant or whether the normal nonpresumption requirements are higher than they should be. When courts don't borrow these standards from the presumption analysis, they generally apply two guidelines: first, differences in litigation strategy are insufficient to find inadequate representation;[202] and second, a party's inability to appeal an unfavorable judgment is also insufficient.[203]

2. Critique of the Approaches

Both the presumption system applied by the courts of appeals and the tests for applying the adequacy requirement fail to follow the Supreme Court's precedent. As already noted, the Supreme Court has not articulated a comprehensive analysis of the adequacy requirement.[204] However, the Court has applied what it describes as a "minimal" standard.[205] Not only is this minimal standard binding precedent, it is also the best approach for judging the adequacy requirement. Ultimately, the biggest danger to efficiency in intervention is not multiple parties making similar arguments, but multiple parties making different arguments that are not sufficiently related to be efficiently resolved in the same litigation.[206] This is intuitive: while a court might experience a marginal decline in efficiency simply from reading briefs and hearing arguments that contain some overlap, these costs are far less than the costs of parties bringing in new, unrelated arguments for the court to adjudicate.

In contrast, the most efficient use of intervention is to allow intervention for a party that is largely represented by current parties but simply needs to advance one specific argument in order to protect its interest. Again, this is intuitive: allowing intervention to a party that brings multiple unique claims into the litigation may be only moderately more efficient than if those claims were brought separately. However, if a party merely intervenes to advance one

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202. *See, e.g.*, *Perry*, 587 F.3d at 952 (holding that the absentee's arguments amounted to merely "litigation tactics," and were not sufficient to rebut presumption).

203. *See, e.g.*, Freedom from Religion Found., Inc. v. Geithner, 644 F.3d 836, 842 (9th Cir. 2011) (holding the possibility that the government would not appeal an adverse ruling was not sufficient to overcome the presumption of adequate representation).

204. *See* discussion *supra* Part II.C.4 (describing the Supreme Court's adequacy requirement).

205. Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972); *see also* discussion *supra* Part II.C.4 (discussing the Supreme Court's "minimal" standard).

206. *See Trbovich*, 404 U.S. at 538 ("Intervention by union members in a pending enforcement suit, unlike initiation of a reparate suit, subjects the union to relatively little additional burden.").

specific argument and in doing so prevents the need for an entire unique suit in the future, this intervention produces a significant increase in efficiency. Thus, there is little reason for an overly zealous adequacy requirement—allowing intervention to a party that is already represented creates little additional cost.

Furthermore, the market already provides a regulating mechanism to prevent unnecessary intervention. If a party is truly adequately represented in the suit by other parties, then it would not be willing to expend unnecessary resources to enter the litigation.[207]

a. Critique of the Presumption System

The courts of appeals' presumption systems stand in opposition to the Supreme Court's precedent developed in *Trbovich*.[208] This argument is most compelling in relation to the presumption from a government party because that is the specific situation the Supreme Court has addressed.[209] In *Trbovich*, the government was already a party to the suit.[210] Furthermore, the government actor was also legally charged with representing the intervenor.[211] Thus, this case would trigger the government presumption under even the narrowest test that requires the government to be charged with representing the proposed intervenor. However, the Court did not apply a presumption and only required the intervenor to make a minimal showing that the government's representation may be inadequate.[212] To stress the

207. *See* David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 747 (1968) (discussing how the costs of litigation can prevent unnecessary intervention).

208. As previously mentioned, the mere existence of a presumption that triggers the heightened standard inherently means a "minimal" standard is not being applied. *See supra* notes 115–17 and accompanying text (discussing the conflict between the standards of the Supreme Court and courts of appeals). The minimal requirement cannot be reconciled with the "compelling showing" or "bad faith" requirements under many of the circuits' presumptions. *See* Jenkins, *supra* note 45, at 299 (arguing that the Supreme Court's minimal burden cannot be reconciled with the circuits' heightened standards). Although the case has since been overruled, in *Stringfellow* the Ninth Circuit adopted this logic and specifically stated that it could not adopt a heightened standard and still follow the minimal standard required by *Trbovich*. *See* United States v. Stringfellow, 783 F.2d 821, 827 (9th Cir. 1986) (declining to adopt a presumption creating a heightened standard), *vacated sub nom.*, Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987).

209. *See Trbovich*, 404 U.S. at 538 n.10 (applying a minimal standard without a presumption to a proposed intervenor where the government was already a party).

210. *Id.* at 529.

211. *See id.* at 538–39 (noting the government had the duty to represent the proposed intervenor); *see also* Jenkins, *supra* note 45, at 299 (arguing the presumption system contradicts *Trbovich* since the government was charged with representing the proposed intervenor).

212. *Trbovich*, 404 U.S. at 538 & n.10

appropriateness of allowing intervention when a party is represented by the government, the Court likened intervention to a party's right to replace its counsel at will.[213]

While *Trbovich* applies most directly to the government presumption, it is also applicable to refuting the presumption of adequate representation arising from a party with the same ultimate objective. As already discussed, the Supreme Court acknowledged that the Secretary and proposed intervenor had the same general interest: ensuring free union elections.[214] The Court noted this shared objective but still held the Secretary was not an adequate representative.[215] Based on this analysis, both of the presumption standards conflict with the Supreme Court's application of the "minimal" burden of proving lack of adequate representation.

b. Critique of the Adequacy-of-Representation Approaches

While the presumption system may disregard the Supreme Court's precedent, the various approaches used to adjudicate the adequacy requirement also contradict the Court's minimal standard. The most directly contradictory test is the "collusion, adversity, or nonfeasance" test, which derives from cases predating the 1966 amendments.[216] Even before *Cascade* and *Trbovich*, this test was critiqued by lower courts, which realized that many parties not falling into one of these three categories may still not adequately represent the interests of the proposed intervenor.[217] In *Cascade*, the Court arguably ended the viability of this test. While the Court did not explicitly address the adequacy-of-representation standard, it allowed intervention without proof of collusion, adversity, or nonfeasance.[218] Two Justices dissented from the majority's abandonment of the traditional test,[219] arguing that under the majority opinion even "tactical disagreement over how litigation should be conducted" could

213. *See id.* at 539 ("[A] union member may have a valid complaint about the performance of 'his lawyer.' ").

214. *See supra* note 176 and accompanying text; *see also Trbovich*, 404 U.S. at 538 (not denying Secretary's claim that the government and proposed intervenor had identical interests).

215. *See Trbovich*, 404 U.S. at 538–39 (arguing that despite having the same interest and objective, the party's differing motivations may create divergent approaches to litigation).

216. *See supra* notes 192–94 and accompanying text (discussing the test of collusion, adversity, or nonfeasance).

217. *See* Atl. Ref. Co. v. Standard Oil Co., 304 F.2d 387, 392 (D.C. Cir. 1962) (arguing that a proposed intervenor should only need to show that representation may be inadequate and need not prove lack of good faith or improper discharge of duties).

218. Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 131–37 (1967).

219. *Id.* at 155–56 (Stewart, J., dissenting).

be sufficient to show inadequate representation.[220] In *Trbovich*, just like in *Cascade*, there was no indication of collusion, bad faith, or nonfeasance.[221] The Court allowed an absentee to intervene because it had "a valid complaint about the performance of 'his lawyer' "[222]—in other words, a disagreement about litigation strategy is sufficient.

The Ninth Circuit's standard[223] may be a fair interpretation of *Trbovich*.[224] In some past cases, this standard has been applied in accordance with *Trbovich* to allow intervention when there is reason to doubt that the party already in the case will make the same arguments as the proposed intervenor.[225] However, as already discussed, recent decisions effectively nullified the liberal "undoubtedly make all of a proposed intervenor's argument" standard by requiring a "compelling" evidentiary showing of the elements.[226] Most notably, the recent line of cases has consistently held that even if a party already in the case has a different litigation strategy and makes factual stipulations that the proposed intervenor believes are incorrect, this is insufficient to prove that the current party will fail to "make all of a proposed intervenor's arguments."[227] This result conflicts indirectly with *Cascade* where, at least according to the dissent, "tactical disagreement" was sufficient to show inadequate

220. *Id.* at 156 (suggesting that though "[m]ere tactical disagreement over how litigation should be conducted is obviously insufficient," the majority might hold otherwise).

221. *See* Trbovich v. United Mine Workers, 404 U.S. 528, 539 (1972) (permitting limited intervention based on valid complaint about lawyer performance); *Cascade*, 386 U.S. at 155–56.

222. *Trbovich*, 404 U.S. at 539.

223. The standard analyzes "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 952 (9th Cir. 2009).

224. *See* Vreeland, *supra* note 13, at 293 (arguing that the Ninth Circuit's test is an acceptable reading of *Trbovich* if it allows for intervention when the current party may not prosecute the case as vigorously or has a different perspective than that of the proposed intervenor).

225. *See, e.g.*, Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 529 (9th Cir. 1983) (holding that representation may be inadequate since the proposed intervenor has special expertise and a different perspective than the current parties). Notably in *Sagebrush*, the Secretary of the Interior was the former president of the Mountain States Legal Foundation, the representative of the plaintiff Sagebrush. *Id.* The proposed intervenor argued that based on this conflict of interest the Secretary may use the United States Attorney to only provide a partial defense. *Id.* However, the court specifically disclaimed any "collusion or of any other conduct detrimental to the applicant's interest." *Id.* Thus, at least based on the text of the case, the result would be the same whether or not this possible conflict existed.

226. *See supra* notes 192–200 and accompanying text (explaining that some courts require a "compelling showing" of inadequate representation).

227. *See, e.g.*, *Perry*, 587 F.3d at 952 (holding differences in litigation strategy are not sufficient to justify intervention).

representation[228] and with *Trbovich* where the Court's main proof of inadequate representation was that the proposed intervenor did not approve of the current party's representation. [229] Specifically in *Trbovich*, the Court limited the intervenor's arguments to those "claims of illegality presented by the [the current party's] complaint."[230] Essentially, the only intervention allowed in *Trbovich* was for differences in factual disputes and litigation strategies—the intervenor was not allowed to bring any new arguments.[231]

The most effective standard for judging adequacy of representation is requiring a proposed intervenor to offer an adequate explanation for the lack of sufficient representation or to show "some conflict."[232] While this standard may be fairly critiqued for not giving lower courts much guidance on what claims should prove inadequate representation, this may in fact be its greatest strength. The Court has never presented scenarios of situations that do or do not meet the requirement, instead only asking that the proposed intervenor demonstrate that representation "may be" inadequate.[233] This broad requirement does not lend itself to a complex multipart test and should be fulfilled when a court finds some divergence or conflict between the parties.

IV. SOLUTION

In sum, the circuits have not followed the liberal intervention standard suggested by the 1966 amendments and required by the Supreme Court. While this application has reduced the amount of valuable public-law intervention, the requirements created by the courts of appeals are not inherently flawed. Rather, they reflect two different approaches to two different intervention situations. In order to solve these circuit splits while promoting intervention, three actions

228. Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 156 (1967) (Stewart, J., dissenting).

229. *See* Trbovich v. United Mine Workers, 404 U.S. 528, 539 (1972) (arguing intervention should be allowed if the party has a complaint about his representation).

230. *Id.* at 537.

231. *See id.* at 537, 539 (limiting intervention to already existent arguments, but permitting intervention for different litigation strategy).

232. *See, e.g.*, B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc., 440 F.3d 541, 546 (1st Cir. 2006) ("[T]he intervenor need only offer 'an adequate explanation as to why' it is not sufficiently represented by the named party."); Shea v. Angulo, 19 F.3d 343, 347 (7th Cir. 1994) ("[T]he proposed intervenor 'must demonstrate, at the very least, that some conflict exists.' ").

233. *See* Jenkins, *supra* note 45, at 271 (arguing that other standards are inappropriately high since the Supreme Court only requires that representation "may be inadequate," a requirement fulfilled when the supposed representative's interests diverge from, or conflict with, those of the movant).

need to be taken—two minor changes and one significant alteration. First, the standard of review for intervention of right should be *de novo* review. Second, courts should increase the use of limited intervention. Third, a separate standard should exist for private- and public-law intervention.

A. Minor Changes to Intervention Procedures

First, the standard of review for intervention of right should be *de novo*. Although other scholarship has disagreed with this position,[234] only a *de novo* standard allows the appellate courts the necessary authority to review and police the intervention standards. Without this standard of review, it will not be possible to eliminate the divergent results—often from courts claiming to apply the same standards—in intervention practice.

The necessity of the *de novo* standard is illustrated by the very design of Rule 24. Permissive intervention, as opposed to intervention of right, requires a low standard to meet the eligibility requirements but is designed to allow the district court discretion in whether to ultimately grant or deny intervention.[235] In contrast, intervention of right requires a higher standard, but it guarantees intervention if the requirements are met. The design of Rule 24 represents a judgment that any absentee that meets these requirements must be allowed to intervene whether the district court judge agrees or not. No discretion is intended. Furthermore, having a *de novo* standard of review also encourages the appellate courts to adopt clear, easy-to-apply standards. This helps prevent the current situation where the courts of appeals often set "standards" but do not intend them to be consistently applied.[236]

Second, courts should expand the use of limited intervention, and Rule 24 should be amended to expressly provide for limited intervention.[237] Limited-intervention practice allows a party to intervene, but limits its participation to the specific issue that implicates its unrepresented interest. While this process is not expressly provided for in Rule 24, it was recommended by the

234. *See* Appel, *supra* note 9, at 304 ("[T]he courts of appeals should review all decisions for abuse of discretion.").

235. *See* FED. R. CIV. P. 24(b) (stating that "the court may permit anyone to intervene who" meets certain criteria).

236. *See, e.g.*, Sierra Club v. EPA, 995 F.2d 1478, 1482–83 (9th Cir. 1993) (noting courts often apply a more lenient analysis to public interest intervention).

237. *See, e.g.*, Kennedy, *supra* note 51, at 375.

Advisory Committee.[238] Although not explicitly expounded, this approach was indirectly approved of in *Trbovich* when the Supreme Court allowed intervention but confined the intervenor to promoting the arguments already made by current parties.[239]

Limited intervention is most appropriate in two circumstances: when a party has a limited interest related to, but distinct from, the suit as a whole and when the proposed intervenor is adequately represented by additional parties except for in specific arguments. This approach moderates the seemingly conflicting goals of allowing wide representation of any asserted interests while also preventing overly duplicative or complex litigation, thereby optimizing the efficiency created by the intervention process. It preserves the efficiency boost of resolving multiple issues at one time and in one suit without the cost of dramatically increasing the complexity of the litigation. For instance, if a party is adequately represented in a suit except for one specific factual contest, the absentee could be allowed to intervene solely to dispute that one fact.

B. Implementing the Dual Standards for Public Law and Private Law

While the aforementioned minor changes will help to fix the current intervention practice, ultimately, courts should create two separate standards for public-law and private-law cases. The liberal standard created by the Supreme Court works well for public-law intervention where the concerns of the private parties are less troubling, complex litigation is more efficient, and wide intervention is necessary to protect democratic interests. In contrast, the courts of appeals' more narrow approaches are a better fit in private-law litigation where there is a nonfrivolous concern that widespread intervention could allow parties to needlessly complicate private disputes. Ultimately, the best solution is to create a world where these two regimes can coexist.

The new system of dual standards could be accomplished most directly by amending Rule 24, but could also be accomplished through an interpretive ruling by the Supreme Court. Since the Federal Rules of Civil Procedure are already supposed to be interpreted to meet practical goals, this interpretation would not impermissibly diverge

238. FED. R. CIV. P. 24 advisory committee note on the 1966 amendment ("An 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.").

239. *See* Trbovich v. United Mine Workers, 404 U.S. 528, 537 (1972) (limiting intervention to arguments already brought by the current party).

from the text.[240] Furthermore, recent Supreme Court cases demonstrate a willingness to go far beyond the plain text of a rule when necessary to achieve practical benefits.[241]

The threshold difficulty under this mode of analysis is distinguishing public- and private-law cases. While the nature of public-law litigation is both common and fairly identifiable, borderline cases exist that could be construed as either private or public. Although it is fairly easy to identify common characteristics of public-law litigation, the term itself "defies crisp definition" that would be necessary in using any bright-line test.[242] Based on these definitional hurdles, the best approach would be to acknowledge and embrace a sliding scale where the more public a case is, the more liberal the standard for intervention. Although this approach is disappointing in that it does not provide an absolute answer in every case, it does make intuitive sense. The more a case involves a public interest, the more it should be considered under a standard adjusted for public-law litigation. In applying this sliding scale, courts can best achieve the efficiency that results from having separate standards.

Moreover, the specific requirements for intervention need to be changed. First, in analyzing the sufficient-interest requirement, courts should focus on whether the intervenor's interest is closely related to the litigation instead of whether it is separately a legally sufficient claim. Under this standard, the appropriate question is whether the claimed interest has significant relevance to the litigation. Under this standard, the division between public- and private-law litigation partially occurs automatically—public-law litigation will inherently implicate a far larger number of interests than the average private-law suit. However, even with this automatic protection, courts should still require intervenors to have closer relationships in private-law suits than in public-law suits. In a private-law suit, it is important to prevent intervention when the intervenor's claims are only tangentially related to the "property or transaction of the suit."[243] This both promotes efficiency by reducing complexity and protects the individual interest of the private plaintiff. However, in the public-law sphere, it is far more appropriate to allow intervention on a less related interest; in public-law suits, the plaintiff has already to some

240. *See* FED. R. CIV. P. 1 (stating the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action").

241. *See, e.g.*, Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007) (applying a higher standard to Federal Rule of Civil Procedure 8 in order to prevent frivolous litigation).

242. Appel, *supra* note 9, at 221.

243. *See* JAMES, HAZARD & LEUBSDORF, *supra* note 2, at 626 (discussing the importance of plaintiff primacy in intervention practice).

degree created a matter of public dispute. This approach notably mirrors the unwritten behavior of some courts.[244]

Second, the adequacy-of-representation requirement should be significantly reworked. The courts of appeals' presumption analysis is unnecessary and overly complex. This is not to say the relationship to extant parties or government representation is irrelevant, but it does not warrant a higher standard. If a party can prove inadequacy of representation, it makes little difference whether this inadequacy occurs with a party who otherwise agrees with the proposed intervenor or the government. Ultimately, the Ninth Circuit's tripartite test provides a convenient guide for adequacy in both the public- and private-law arenas. The only difference should focus on the term "argument." In a private-law suit, it makes sense that this requirement should be interpreted as a moderate barrier. A private party generally will have little interest in exactly how another private party chooses to litigate a case. However, in the public-law arena, there is sufficient reason to allow intervention, even on such small issues as changes in litigation tactics or factual concessions. In this environment, an absentee may have a significant interest in ensuring another party provides the most aggressive defense or complaint possible. Furthermore, in unsettled areas of law, especially those that are widely and publicly disputed, factual issues and litigation strategy may make a far greater difference in the outcome. In these circumstances, it is appropriate to use conditional intervention.

V. CONCLUSION

The emergence of public-law litigation has put new pressures on the traditional system of litigation. Thankfully, the system has matured under this load by reinventing and expanding different mechanisms to compensate victims. Intervention is one of these mechanisms. Because public-law litigation controls so many instrumental areas of law, it is essential that the mechanism works well. This Note discussed how intervention has the potential to meet the needs of public-law cases and how recent innovations dramatically increased the effectiveness of intervention in the public-law sphere. However, this Note also showed how current precedents created by the courts of appeals have created a fractured system that is not sufficiently protective of public-law interests. These approaches, most

244. *See supra* notes 125–27 and accompanying text (explaining that public law litigation calls for adequate representation in the proceedings of the range of interests that will be affected).

of which have their own benefits, illustrate the problem created by trying to make one mechanism fit the needs of both private- and public-law litigation. Finally, this Note proposed a solution that both preserves protection for private plaintiffs and expands intervention to increase representation in public-law cases.

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