Rule 24(A) Intervention of Right: Why the Federal Courts Should Require Standing to Intervene

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RULE 24(A) INTERVENTION OF RIGHT: WHY THE FEDERAL COURTS SHOULD REQUIRE STANDING TO INTERVENE

I. INTRODUCTION

"'Lawsuit mania'... a continual craving to go to law against others, while considering themselves the injured party."¹

The Federal Rules of Civil Procedure are designed to promote speed and efficiency in the administration and just resolution of actions before the federal courts.² Flexible standards for party joinder and consolidation of claims aid the courts in disposing of disputes in their entirety, thereby preventing subsequent reactive claims and duplicative litigation. Although a liberal joinder policy and a broad interpretation of the Federal Rules may conserve judicial resources under a traditional model of litigation, the proliferation of public law litigation³ and the increasingly complex nature of judicial proceedings bring other considerations into play.

Lawsuits are no longer merely "vehicle[s] for settling disputes between private parties about private rights."⁴ Instead, the federal

². See FED. R. CIV. P. 1.

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courts now function as a forum for challenging social and economic public policy and legislative decision-making.\(^5\) As the public law litigation model has embedded itself into our "legal consciousness,"\(^6\) the legislative branch has created additional statutory rights and remedies for protecting social interests.\(^7\) The result, to use Cesare Lombroso's term, is "lawsuit mania."

While the efficiency-driven Federal Rules may be helpful in organizing and disposing of some of this mania, the threat public law litigation poses to the courts is twofold: 1) Once courts are called upon to referee public policy and legislative decision-making, they are inevitably dragged into the role as a super-legislature—"an affirmative, political"\(^8\) lawmaking body. This function is contrary to our constitutional structure of government. 2) The additional number of rights and remedies inherently increases the number of proceedings brought in the federal court system, thereby increasing court clog and congestion in an already overwhelmed system. In order to curb these negative effects of public law litigation, the courts must keep two questions constantly in mind when rendering standards for the application of the Federal Rules: First, is the proposed interpretation of the procedural rule at issue constitutionally permissible? And second, if all parties are allowed to raise all claims related to the subject matter, have we, in fact, created more or less complexity? In other words, has the court gone too far in attempting to resolve all related disputes at once, so that the action itself is now more complex and actually less efficient?\(^9\) The first question should ensure that any

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5. See id. at 1284, 1288-1304. Professor Chayes's discussion on the emergence of public law litigation is responsible for an entire body of legal scholarship. Although some contest the legitimacy of this new phenomenon, his writings have been crucial in addressing the need for judges to take a more active role in this new model of litigation and reexamining the problems of standing and interest representation arising out of these decisions because of their widespread impact. See id. at 1310; see also Chayes, 1981 Supreme Court Foreword, supra note 3, at 8-10; Cindy Vreeland, Public Interest Groups, Public Law Litigation, and Federal Rule 24(a), 57 U. Chi. L. Rev. 279, 280 (1990).


7. See Vreeland, supra note 5, at 280.


9. See Edward J. Brunet, A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria, 12 Ga. L. Rev. 701, 710-20 (1978). Brunet proposes that "input" from joinder mechanisms may only enhance the judicial "output" in terms of efficiency and accuracy up to a
application of the Federal Rules is within the constitutionally-mandated framework of an Article III, Section 2 case or controversy. The second encourages judicial activism in defining and limiting the scope of any matter to those parties and issues within the federal courts' jurisdiction. Now more than ever, the courts must exercise caution in their quest for efficiency not to overlook the serious constitutional concerns—specifically with regard to the Article III, Section 2 requirement of standing.

The issue of whether Rule 24(a) of the Federal Rules should require standing (particularly in public law litigation) implicates both of the questions raised above. Because decisions in public law litigation cases are primarily concerned with prospective, policy-altering relief, the outcome often has a widespread impact on significant numbers of differently situated groups. This means that as lawsuits are filed in the courts, many public interest groups or outside parties rush in to ensure that any decision reached will be tailored with their values and concerns in mind. Absent a requirement of standing, Rule 24(a) is a convenient mechanism for these parties to assert their claims in existing litigation where it would otherwise be constitutionally impermissible because of the jurisdictional limitations placed on the federal courts.

Furthermore, because these parties are asserting interests that are not otherwise represented in the existing action, the parties only add to the number of issues and complexity of the litigation, thereby defeating a large degree of the efficiency gained. For these reasons, among others, this Note argues that the courts should adopt a threshold requirement of standing, not only for the primary parties certain point. Once this optimal point is reached, additional joinder (or input) reduces the quality of the litigation and increases the chance of erroneous judgment. See id.


11. See Chayes, supra note 4, at 1310.

12. See FED. R. CIV. P. 24(a)(2) (allowing intervention only when an applicant has met the specified criteria "unless the applicant's interest is adequately represented by existing parties." (emphasis added)).
initiating the lawsuit, but for parties seeking Intervention as of Right pursuant to Rule 24 of the Federal Rules of Civil Procedure.

Section II of this Note addresses the constitutional requirements of standing and the effect public law litigation has played on this doctrine. Section III provides a brief history of Rule 24 and an overview of modern judicial interpretation of intervention standards by the Supreme Court and lower federal courts. Finally, Section IV articulates specific arguments in favor of adopting a standing requirement for intervention and suggests alternative remedies for those parties unable to seek adjudication of their issues in the federal courts.

II. ARTICLE III, SECTION 2 CASES AND CONTROVERSIES:
THE STANDING DOCTRINE

Standing is not merely a convenient tool to alleviate some of the rush of lawsuit mania. It is, in fact, a constitutionally-mandated requirement to ensure the federal courts are restricted in their exercise of jurisdiction to actual "cases" or "controversies." These two words serve as a limitation on the federal judiciary and define its role "in [the] tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." Standing, as one element of the doctrine of justiciability, is therefore a cornerstone in the system of checks and balances which comprise our federal government.

Generally speaking, standing requires that a party assert an injury in fact resulting from some illegal action on the part of the defendant; that such injury is fairly traceable to the actions of the named defendant(s); and that the injury is likely to be redressable by the court. The Supreme Court has also stressed that a party must be

13. See Flast, 392 U.S. at 94 (stating "[t]he jurisdiction of the federal courts is defined and limited by Article III of the Constitution... the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.'").
14. Id. at 95.
15. Justiciability is a term of art used to express the limitations placed on the courts by Article III, Section 2 of the Constitution. As the Court in Flast v. Cohen stated, "no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action." Id. (citations omitted).
asserting their own rights. Unlike other aspects of justiciability—such as the prohibitions on mootness, advisory opinions or political questions—standing focuses on the status of the party rather than on the issues presented. Therefore, the emphasis for standing is on the relationship between the plaintiff and the injury alleged.

Under the traditional litigation model, in order to demonstrate standing, a plaintiff must simply show that he or she may be entitled to some relief from a particular defendant. It follows then, that in cases between private parties about private rights, standing is largely a function of whether a stated cause of action exists on the merits. In public law litigation, however, it is often the case that no specific cause of action has been granted to a group or individual party alleging injury. In such circumstances, the court will look to the nature of the claim to determine whether it is a concrete, particularized grievance that the court is capable of remedying. As stated by the Supreme Court in *Sierra Club v. Morton*:21

Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a “personal stake in the outcome of the controversy,” as to ensure that “the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.”22

In public law litigation, parties often assert too generalized a grievance for a court to conclude that a particular individual or group has any “personal stake” in the outcome beyond that of the public interest in the administration of law.23 Where a party’s alleged injury is a generalized grievance equivalent to the public interest, the Court

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18. See Flast, 392 U.S. at 99.
20. See id.
22. Id. at 732 (citations omitted).
23. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) (holding that the vindication of the public interest cannot be converted into an individual right sufficient to confer standing).
has held the proper method of vindication to be the function of Congress and the President and has denied standing to sue.\textsuperscript{24}

In the 1960s, the Supreme Court gave in to pressures to break from the traditional model of litigation that barred purely public, citizen or taxpayer suits,\textsuperscript{25} and relaxed the doctrinal limits of standing. Originally, courts required that a plaintiff allege an injury to a preexisting legal interest.\textsuperscript{26} However, the Court abandoned this "legal interest" test in favor of a more lenient "zones of interests" or "injury in fact" standard.\textsuperscript{27} Furthermore, the Court "extended legal recognition to a wide array of interests beyond the traditional common law protections of person and property."\textsuperscript{28} In total, this doctrinal shift greatly expanded the scope of standing to sue and gave way to an even greater flood of public law litigation claims.\textsuperscript{29} In a series of cases throughout the 1960s and early 1970s, the Court extended standing to citizens challenging unfavorable apportionment of voting districts,\textsuperscript{30} taxpayers challenging the financing of religious schools with federal funds,\textsuperscript{31} and special interest groups, such as the subsidized farmers, challenging the validity of amendments made to the Food and Agriculture Act of 1965.\textsuperscript{32}

In the early 1970s, the Burger Court reigned in the rapid expansion of public law litigation cases and reaffirmed the doctrinal limitations of standing.\textsuperscript{33} In \textit{Sierra Club v. Morton}, the Sierra Club sought declaratory and injunctive relief against federal officials from issuing permits for commercial exploitation of a national game refuge
adjacent to Sequoia National Park. The group claimed to have standing under the judicial-review provisions of the Administrative Procedure Act, based on a "special interest in the conservation and sound maintenance of the national parks, game refuges and forests of the country. . . ." Rejecting this argument, the Court specified that an "injury in fact" requires the claimant to be among the injured and not just asserting "a mere interest in the problem." Furthermore, the Court cautioned against permitting special interest groups to assert claims in which they had no more interest than the general public.

Two years later, in United States v. Richardson and Schlesinger v. Reservists Committee to Stop the War, the Court closed the door on the idea that its earlier decisions might support taxpayer or citizen suits. In each of these cases, the Court held the generalized grievances of citizens or taxpayers without more of an interest were insufficient to confer standing.

Since Sierra Club, the Court has recommitted itself to upholding the doctrine of standing and the constitutional limitations placed upon the federal courts by Article III. In 1981, the Americans United for Separation of Church and State attempted to challenge the disposal of surplus Army property to the Valley Forge Christian College as a violation of the Establishment Clause, raising a theory of taxpayer standing à la Flast v. Cohen. The Court, however, placed the final nail in the coffin for taxpayer standing, limiting Flast to grant standing only under the specific circumstances of that case—an Establishment Clause challenge to an exercise by Congress pursuant to its Article I, Section 8 power to tax and spend. The Court held that the standing conferred on taxpayers challenging expenditures in violation of the Establishment Clause would not support standing for taxpayers challenging a disposition of property in violation of the

34. See Sierra Club, 405 U.S. at 730.
36. Sierra Club, 405 U.S. at 730.
37. Id. at 734-35, 739.
38. See id. at 739-40.
41. See Schlesinger, 418 U.S. at 217 n.7, Richardson, 418 U.S. at 176-78.
42. See Valley Forge, 454 U.S. at 469.
43. See id. at 479.
Establishment Clause. Although Valley Forge might seem to be an instance of the Court splitting hairs, the intended outcome of reinvigorating the standing doctrine was accomplished. Writing for the majority, Justice Rehnquist summarized the importance of standing, stating:

Article III . . . is not merely a troublesome hurdle to be overcome if possible so as to reach the ‘merits’ of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787, a charter which created a general government, provided for the interaction between that government and the governments of the several States, and was later amended so as to either enhance or limit its authority with respect to both States and individuals.

This summary sends a clear message to the lower courts that they should be especially mindful when evaluating the standing of parties bringing grievances before them. It would seem, then, a logical extension that the courts should be concerned with the standing of all parties—whether they originally filed the suit or are merely seeking to intervene in order to have a court consider their interests in addition to those asserted in the complaint.

III. RULE 24(A): INTERVENTION OF RIGHT

Rule 24(a) allows parties outside an action to intervene upon timely application if such a right is either unconditionally conferred by statute or if the party can demonstrate: 1) an interest relating to the subject of the action; 2) that such interest will be impaired or impeded by the disposition of the action; and 3) that the intervening party’s interests are not sufficiently represented by existing parties.

Although the Supreme Court has, on several occasions, addressed the issue of what constitutes an “interest” in the action, the Court has

44. See id.
45. Id. at 476.
46. See FED. R. Civ. P. 24(a)(1). Although intervention pursuant to Rule 24(a)(1) is an equally important method for party joinder, the scope of this Note is limited to a discussion of intervention pursuant to Rule 24(a)(2).
47. See FED. R. Civ. P. 24(a)(2).
48. See Carl Tobias, Standing to Intervene, 1991 Wis. L. REV. 415, 432-34 for a discussion on the Supreme Court’s various ad hoc attempts to articulate an interest standard. Compare Donaldson v. United States, 400 U.S. 517, 531
repeatedly side-stepped the question of whether a party must demonstrate standing in order to allow intervention. For the most part, this determination has been left for the lower federal courts to resolve.

A. A Brief History of Rule 24

While the scope of this Note is limited to the modern application of Rule 24, the history of the Rule prior to its 1966 amendment, may be helpful in understanding the impact of public law litigation on the jurisprudence of intervention. Furthermore, the development of the rule into its modern form may explain why a few circuits continue to allow intervention without the otherwise seemingly-mandatory requirement of standing.

Prior to 1966, Rule 24(a)(2) allowed intervention when an applicant's interests were inadequately represented and that applicant could demonstrate they would be bound by any judgment rendered. Although some courts only required a showing of potential prejudice if the litigation were to proceed in the party's absence, the majority strictly interpreted Rule 24 only to allow intervention when a party would be bound due to the effects of res judicata. An additional provision provided that intervention would also be proper for those adversely affected by the distribution or disposition of property

(1971) (narrowly holding that "[w]hat is obviously meant there is a significantly protectable interest."), with Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 133-36 (1967) (allowing for a broad interpretation of "interest" in the "transaction which is the subject of the action").

49. See, e.g., Diamond v. Charles, 476 U.S. 54, 68-69 (1985) (stating "[w]e need not decide today whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III.").

50. See discussion infra Parts I.B-C.

51. See Tobias, supra note 48, at 428.

52. See id. at 428-29 (citing Sutphen Estates, Inc. v. Standard Oil Co., 304 F.2d 387, 394 (D.C. Cir. 1962)). Under the doctrine of res judicata, "a final judgment issued by a court of competent jurisdiction is conclusive upon the parties in any subsequent litigation involving the same cause of action." MILTON D. GREEN, BASIC CIVIL PROCEDURE 227 (2d ed. 1979). Only parties actually joined and subjected to the jurisdiction of the court are bound by a judgment. Mere knowledge of, and opportunity to intervene in, a lawsuit that may adversely impact the interests of potential intervening parties is not sufficient to bind or preclude them from litigating their interests in the future. See Martin v. Wilks, 490 U.S. 755, 765 (1989).
within the court's control. This early form of the Rule reflected a narrow approach to intervention, consistent with the nature of the traditional litigation model.

As discussed earlier in this Note, in private disputes between private parties, the question of whether an interest is sufficient to confer standing is virtually non-existent. A plaintiff or intervening party establishes standing simply by demonstrating a legitimate cause of action on the merits. Therefore, under the old rule, if an intervening party was so situated as to be adversely affected by the disposition of the action, or bound by the res judicata effects of a judgment, the party simultaneously met the requirements of Rule 24 interest and Article III standing. While it might be argued the former rule and its narrow construction followed a more constitutionally-sound approach with regard to standing, other contradictions within the Rule's operation created serious doubts about the adequacy of its application, especially in the context of public law litigation, and paved the way for the 1966 amendments.

The fundamental problem with the old Rule 24 arose from the simultaneous requirements in section (a)(2) that a potential intervening party had to demonstrate their interests were not adequately represented, while at the same time demonstrating that res judicata would limit their substantive rights in future litigation. However, a strict reading of the doctrine of res judicata dictates that a party's interests must be adequately represented in an earlier suit to be bound, and therefore precluded from re-litigation in a later action.

54. *See discussion supra Part II; see also Chayes, 1981 Supreme Court Foreword,* *supra* note 3, at 8.
57. *See Figlio,* *supra* note 56, at 1226.
58. *See Hansberry v. Lee,* 311 U.S. 32, 42-43 (1940). Although *Hansberry* dealt with the binding effects of res judicata in Rule 23 class actions, it stands for the overall premise that parties not adequately represented in an action cannot be bound by a judgment in their absence. *See also Restatement (Second) of Judgments § 41 (1982) (providing that nonparties may only be bound if "represented" by a party who is:*)
Furthermore, the courts concluded that where a party’s interest might only be bound insofar as it coincided with the public interest, res judicata did not apply and, accordingly, intervention was not warranted under Rule 24(a). In short, under the narrow construction of old Rule 24(a)(2), a party could only intervene if they could prove their interests were not adequately represented for the purpose of intervention while proving their interests were adequately represented for the purpose of res judicata so that they would be bound by any judgment in their absence. This catch-22 functioned “as a virtual bar on intervention of right.”

In 1961, the apparent catch-22 was reinforced and further complicated by the Supreme Court’s *Sam Fox Publishing Co. v. United States* decision, which all but destroyed the original purpose of old Rule 24. The case arose from an antitrust action by the government against the American Society of Composers, Authors and Publishers (ASCAP), alleging restraint of trade and restraint of competition among the Society’s members. The resulting consent decree contained, among other things, “requirements for Board elections by membership vote and for revenue distributions . . . on a weighted basis relative to the particular member’s contribution to the revenue-producing value of all members’ contribution to the Society’s

59. See, e.g., *Sam Fox Publ’g Co. v. United States*, 366 U.S. 683, 689 (1961) (“We regard it as fully settled that a person whose private interests coincide with the public interest . . . is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it.”).

60. Figlio, *supra* note 56, at 1226.


62. Although the operational catch-22 only functioned to prevent intervention under Rule 24(a)(2), the extremely limited instances whereby a party might intervene under (a)(1)—if conferred by statute, or (a)(3)—when a party would be adversely affected by distribution or disposition of property—left very little, if any, substance to the rule.

63. *See Sam Fox Publ’g Co.*, 366 U.S. at 685-86.
catalogue, all as determined by the Board of Directors." In a subsequent action for court approval of modifications to the consent decree, a few of the less influential members of ASCAP sought to intervene. The intervention was denied by the district court and the issue was appealed to the Supreme Court.

The intervenors argued the consent decree had the effect of a class judgment, and that, while they were bound by its terms because they were members of ASCAP, their interests were not adequately represented by the government in ameliorating their position or breaking up the control of ASCAP held by the larger publishers. Recognizing the appellants would be bound as members of ASCAP, the Court allowed that adequacy of representation against the government as to the antitrust claims was sufficient, while the appellants' interests as against ASCAP did not allow for intervention because their interests would not be bound in the strictest sense of res judicata.

Although it might be argued that under Sam Fox the strict res judicata requirement was properly limited to cases only in which intervenors claimed to be bound as an effective class action, the plain language of the rule was not limited as such. This may have been the motivating factor for the drafters to drop the res judicata language in the 1966 amendments. Unfortunately, as the split in the courts over the interest requirement reveals, the intent of the Advisory Committee "remains unclear and controversial."

In light of the extensive expansion of public law litigation around the time of the amendment, it is important to note that the primary effect of the courts' strict interpretation of Rule 24(a)(2) was to bar public interest litigants and those potential parties who lacked standing from intervening. From this perspective, there is a strong argument that the 1966 amendment was merely an attempt to remedy the catch-22 of the former rule while, at the same time, maintaining the courts' earlier stringent interest requirement which limited

64. Id. at 686.
65. See id. at 688-89.
66. See id. at 693.
67. See Tobias, supra note 48, at 429 (arguing the Sam Fox decision merely "rendered paragraph (a)(2) a nullity in class actions.").
68. Id.
intervention to those parties who could also demonstrate standing. On this point, draftsman of the 1966 amendment, Professor Benjamin Kaplan wrote:

The changed wording of the rule was intended (besides overcoming Sam Fox) to drive beyond the narrow notion of an interest in specific property. But the interest spoken of in the new rule finds its own limits in the historic continuity of the subject of intervention and in the concepts of new rule 19, to which intervention looks for analogy.

This suggestion that the Rule 24 interest requirement should take its meaning from Rule 19 supports a stricter, almost pre-1966 amendment interpretation—one that implicitly includes standing. Accordingly, many courts "have said that the amendment does not

69. See, e.g., Shapiro, supra note 56, at 757-58. In an article written only two years after the amendment, Professor David Shapiro argues Rule 24(a) should extend a right to intervene only to those parties who should be joined under Rule 19 and to class members who can demonstrate their interests are not adequately represented by the class representative in a pending action. His view is premised on the virtually identical language of the amended rule and that of Rule 19(a)(ii). While his argument is not directed toward the issue of standing, it follows that if a party is deemed necessary under Rule 19, their interest is sufficient to meet standing requirements. Shapiro suggests other hopeful intervenors should petition under Rule 24(b) as a matter of discretion left to the judge.


71. Rule 19(a)(2)(i) mandates joinder of parties necessary to an action when a "person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest." FED. R. CIV. P. 19(a)(2)(i). Under Rule 19, courts are far less likely to find parties are necessary parties to an action. See, e.g., Temple v. Synthes Corp., Ltd., 498 U.S. 5, 7 (1990) (holding joint tortfeasors are never necessary parties). Furthermore, courts tend to be even more hesitant in the public law litigation context "on the theory that a 'public interest litigant' must have a forum in which to contest governmental activity and vindicate public rights even though some non-parties might be affected as a result." RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 52 n.6 (3d ed. 1998). Therefore, if courts are to look to Rule 19 for guidance in determining whether a party seeking intervention meets the interest requirement of Rule 24, intervention should only be allowed in the most narrow of circumstances and almost never in public law litigation.
expand the types of interest that will satisfy the [modern] rule." On the other hand, many courts and commentators have interpreted the 1966 amendment as an intentional departure from a narrow interest requirement. The following two subsections address this modern split in interpretation.

**B. The Supreme Court's Interpretation of the Modern Rule 24(a) "Interest" Requirement**

It would be incorrect to say the Supreme Court has not yet defined a standard of interest under Rule 24(a) Intervention of Right. On the contrary, the Court has many times articulated some level of interest a party must demonstrate in order to successfully intervene. Unfortunately, these decisions have ranged from the very broad to the very narrow in defining interest—contradicting one another, and all but disregarding the issue of standing.

In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, the Court made its first attempt at interpreting the newly amended Rule 24 in a public law litigation context. The United States originally brought its case against El Paso Natural Gas Company for alleged violations of Section 7 of the Clayton Act in connection with its acquisition of Pacific Northwest Pipeline Corporation. The Supreme Court remanded the case and directed the district court to order El Paso to divest itself of Pacific Northwest "without delay." The State of California, Southern California Edison, and Cascade Natural Gas all sought intervention in the divestiture proceedings under the old Rule 24(a) and all were unsuccessful. On appeal, the Court

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72. WRIGHT & MILLER, supra note 70.

73. See *Cascade*, 386 U.S. at 134 (reading the Advisory Committee note to inject elasticity into the interest requirement of Rule 24).

74. See *id.* at 135-36 (holding Rule 24(a) is broad enough to allow parties with an economic interest to intervene); *Diamond v. Charles*, 476 U.S. 54, 71 (1985) (requiring standing to intervene on appeal when existing parties have abandoned further appeals); *Donaldson v. United States*, 400 U.S. 517, 531 (1971) (requiring a significantly protectable interest to intervene).

75. 386 U.S. 129 (1967).


77. *Id.* at 662.

78. It is important to note that while these parties sought intervention in order to protect a specific, personal interest, the parties were not protecting a legally cognizable interest or seeking redress for an actual harm. *See id.* Instead, the parties wanted to effect a favorable outcome in the divestiture
allowed that California and Southern California Edison were both parties "adversely affected" within the meaning of Rule 24(a)(3) despite their lack of interest in the property and allowed for their intervention under the old standard.

Cascade's interest, however, was based solely on Pacific Northwest's future ability to perform. The Court cited the Advisory Committee notes of 1966 as injecting elasticity into the rule and allowed Cascade to intervene on an extremely broad reading of the amended rule. Ironically, the factors implicating Cascade's interest were argued to provide "standing to intervene," although the Court never addressed whether Cascade had established standing or whether it was required.

In his dissent, Justice Stewart recognized some of the most problematic aspects of allowing an overly-flexible standard of intervention in the public law litigation context, commenting:

Formulation of effective and consistent government... policy is unlikely to result from "piecemeal intervention of a multitude of individual complainants"... Today the Court ignores all this and grants intervention of right to any volunteer claiming to speak for the public interest whenever he can convince a court that the Government might have used bad judgment in conducting or settling a lawsuit. I think this decision, which undermines the Justice Department in the discharge of its responsibilities, and invites obstruction and delay in the course of public litigation, is unsupported by the provision of old Rule 24, new Rule 24, or any other conceivably tolerable standard governing intervention as of right.

This scathing critique of the Court's decision illustrates two key elements in the standing debate. First, Stewart asserts that allowing intervention of the masses who might wish to challenge government action undermines the function of government. Although Justice

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79. Cascade, 386 U.S. at 135.
80. See id. at 134-35.
81. Id. at 133.
82. Id. at 158-59 (Stewart, J., dissenting) (citation omitted).
83. See id.
Stewart does not go so far, an argument can be made that the democratic process is the appropriate remedy for situations where the "[g]overnment might have used bad judgment"84 but has not caused an actual, redressable harm sufficient to confer standing. Second, Stewart attacks the presumed judicial efficiency of allowing flexible intervention.85 His belief that inviting individuals to speak on behalf of the public interest creates delay and obstruction will be discussed later in this Note.86

Three years later in Donaldson v. United States,87 the Court narrowed the interest requirement to a "significantly protectable interest."88 In this case, Donaldson sought to intervene pursuant to Rule 24(a)(2) in enforcement proceedings instituted by the Internal Revenue Service, ordering the production of records from his former employer, Acme, and Acme's account regarding his employment.89 The Court was not persuaded by the argument that their decision in Reisman v. Caplin90 stood for the proposition that "a taxpayer may intervene as of right simply because it is tax liability that is the subject of the [proceeding]."91 The Court determined that a taxpayer has no proprietary interest in business records which are not afforded privilege and therefore, the taxpayer's interest does not amount to a significantly protectable interest and is not sufficient to allow intervention.92 Expressing concerns similar to those of Justice Stewart in his Cascade dissent, the majority in Donaldson noted that to allow intervention without a greater interest "would unwarrantly cast doubt upon and stultify the Service's every investigatory move."93

Despite the establishment of this seemingly-narrow "significantly protectable interest" standard, and its cautioning against intervention which might unnecessarily interfere with the functioning of

84. Id.
85. See id.
86. See id.
87. 400 U.S. 517 (1971).
88. Id. at 531.
89. See id. at 519-20.
90. 375 U.S. 440 (1964).
91. Donaldson, 400 U.S. at 530.
92. See id. at 530-31.
93. Id. at 531.
government, the Court has failed to provide any further guidance—most notably lacking in the question of standing.\footnote{94 See Vreeland, supra note 5, at 285.}

Following the Donaldson decision, there have been relatively few attempts by the Supreme Court to clearly define the requirement of interest. In Trbovich v. United Mine Workers,\footnote{95 404 U.S. 528 (1972).} the Court seemed to suggest standing might not be required for intervention, but re-focused its Rule 24(a) analysis on the issue of inadequacy of representation.\footnote{96 See id. at 538; see also Tobias, supra note 48, at 433 (discussing the scope of the Trbovich decision).} However, despite the suggestion of a requirement of interest less than standing, the Court allowed only limited intervention in the case,\footnote{97 See Trbovich, 404 U.S. at 539.} arguably restricting its decision to the “facts and peculiar statutory scheme involved.”\footnote{98 Tobias, supra note 48, at 433.} In a footnote to its later Diamond v. Charles\footnote{99 476 U.S. 54 (1986).} decision, the Court acknowledged the emergence of a circuit split on the standing issue but again failed to resolve the inconsistency among the lower federal courts.\footnote{100 See id. at 68-69 n.21. After noting the problem, the Court dismissed the issue, stating “[w]e need not decide today whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III.” Id. at 68-69; see also Hutchings, supra note 3, at 713 (discussing the Court’s recognition and refusal to resolve the issue); Tobias, supra note 48, at 434 (same).}

Diamond did, however, establish that “an intervenor’s right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Article III.”\footnote{101 Diamond, 476 U.S. at 68 (citing Mine Workers v. Eagle-Picher Mining & Smelting Co., 325 U.S. 335, 338 (1945), and Bryant v. Yellen, 447 U.S. 352, 368 (1980)).} In other words, an intervening party must demonstrate standing in order to continue the case once the original Article III party has abandoned appeals. As discussed later in this Note, this black letter rule remains one of the strongest arguments in favor of standing to intervene. To allow
otherwise permits intervening parties into an action without an opportunity to appeal the decision to which they are bound according to the dictates of res judicata unless the original party (who does not represent identical interests) is compelled to pursue appeals related to his own interests.

In sum, the Supreme Court has declined to provide any kind of decisive answer to the question of whether Rule 24(a) Intervention of Right requires standing. While it must be recognized that leaving the interest requirement ambiguous allows for more flexibility and a case-by-case determination of whether an applicant’s intervention promotes efficiency, the outcome has become a “confused body of case law in the circuit courts.”

Accordingly, this Note now turns its attention to the lower federal courts treatment of the issue.

C. The Interest Requirement and the Lower Federal Courts

In their struggle to articulate a standard for Rule 24(a)(2), circuit and district court judges have not exactly split down a clear line of those who require standing and those who do not. Instead, the different interpretations may, at best, be described as a spectrum, ranging from a very flexible, open-ended interest standard to a stringent interest requiring something “greater than the interest sufficient to satisfy the standing requirement.” In fact, one professor has calculated the number of formulations to be somewhere near a half-dozen and further research indicates that figure may be low.

While the concept of intervention would seem to inherently invoke the constitutional question of standing—as both set minimum standards for parties seeking adjudication of their interests—the vast majority of lower federal court judges do not mention standing in their rulings on intervention. This statement should not be construed to imply the vast majority do not require standing. On the contrary, the trend in the lower courts seems to be in favor of the use of standing as an important, if not required, factor in granting

102. Vreeland, supra note 5, at 287.
103. See Hutchings, supra note 3, at 715; see also Tobias, supra note 48, at 434.
104. United States v. 36.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985).
105. See Tobias, supra note 48, at 434-35.
106. See id.
intervention or denying applicants who appear to be "intermeddlers or [who have] asserted interests . . . considered intangible, tenuous or indirectly related to the litigation's subject matter . . . "

It is more likely that standing is often not mentioned because it is simply never raised as an issue. As discussed earlier, under the traditional litigation model, intervening parties generally meet the requirements of Rule 24(a)(2) and Article III standing simultaneously. Only when an applicant is truly peripheral or outside the action standing even an issue the court might need to address.

Of the courts that have addressed the issue, the Seventh and Eighth Circuits, as well as the United States Court of Appeals for the District of Columbia, require standing to intervene. The Eleventh Circuit remains on the fence—explicitly declining to require standing in the proper sense, while at the same time refusing to allow an intervention if a potential litigant is merely seeking to represent a generalized grievance. Rounding out the spectrum, the Second, Sixth and Ninth Circuits utilize a more lenient approach and allow intervention even when a party lacks standing.

1. Liberal intervention

On the most flexible end of the spectrum sits the United States Court of Appeals for the Ninth Circuit. The judges of this circuit

107. Id. at 440.
108. For example, public interest groups or other litigants seeking to affect change in public policy who have not actually been harmed or who do not have a redressable cause of action are peripheral.
109. It is interesting to note that the largest number of cases involving intervention applications of public interest groups have been heard by the Seventh and Ninth Circuits, yet these circuits sit on opposite ends of the spectrum with regard to standing. See Vreeland, supra note 5, at 288.
110. See Hutchings, supra note 3, at 715 (citing Tobias, supra note 48, at 435). Each of these authorities would also include the United States Court of Appeals for the District of Columbia as belonging under the classification of a broad interpretation. However, the Circuit Court for the District of Columbia has since articulated a requirement of standing for all Rule 24(a) intervening parties. See Build. and Const. Trades Dept, AFL-CIO v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994) (stating that "because an intervenor participates on equal footing with the original parties to a suit, a movant for leave to intervene under Rule 24(a)(2) must satisfy the same Article III standing requirements as the original parties."); see also City of Cleveland v. Nuclear Regulatory Comm'n, 17 F.3d 1515 (D.C. Cir. 1994) (per curiam); S. Christian Leadership Conference v. Kelley, 747 F.2d 777, 779 (D.C. Cir. 1984).
tend to regard the 1966 amendment of the Rule as expanding the scope of intervention and rely on practical considerations of efficiency in granting or denying intervention. In all cases, "[t]he rule is construed broadly in favor of applicants for intervention."12

In Greene v. United States,113 the court stated that the determination of whether an applicant demonstrates a sufficient interest is a "practical, threshold inquiry"114 and that "[n]o specific legal or equitable interest need be established."115 This statement remains the general rule for the Ninth Circuit. However, the Greene court did note that a merely economic interest would not be sufficient regardless of how substantial.116

According to the Ninth Circuit's Sierra Club v. EPA117 decision, in order to meet the Supreme Court's "significantly protectable interest" requirement (from Donaldson), an intervenor must establish that his or her "interest is protectable under some law"118 and that a "relationship [exists] between the legally-protected interest and the claims at issue."119 Although the Ninth Circuit certainly remains the most liberal and has declined to adopt a standing requirement, it might be argued that the language of Sierra Club suggests the court must recognize some level of legally cognizable interest before granting intervention—a suggestion closely paralleling the standing requirements of Article III.

Furthermore, it should be noted that even the Ninth Circuit consistently demands a greater showing in the public law litigation context.120 In fact, intervention of public interest groups is only allowed

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111. See Hutchings, supra note 3, at 715-16.
112. Greene v. United States, 996 F.2d 973, 976 (9th Cir. 1993) (citing United States v. Oregon, 913 F.2d 576, 587 (9th Cir. 1990)).
113. 996 F.2d 973 (9th Cir. 1993).
114. Id. at 976.
115. Id.
116. See id. (citing Portland Audubon Soc. v. Hodel, 866 F.2d 302, 308-09 (9th Cir. 1989)).
117. 995 F.2d 1478 (9th Cir. 1993).
118. Id. at 1484.
119. Id.
120. Compare Sierra Club v. EPA, 995 F.2d 1478 (9th Cir. 1993) (allowing liberal intervention of the City of Phoenix to protect its interest in the administration of water quality permits under the Clean Water Act), with Northwest Forest Res. v. Glickman, 82 F.3d 825, 838 (9th Cir. 1996) (denying intervention of a non-profit environmental organization claiming a "longstanding
in cases where the "groups [are] directly involved in the enactment of the law or in the administrative proceedings out of which the litigation arose." Therefore, a public interest or lobbying group might only be permitted to intervene where they had an active role in lobbying for the adoption of the statute at issue. This seeming desire to curb unfettered intervention in public law litigation would be consistent with an argument in favor of adopting a standing requirement for intervention. The Ninth Circuit, however, declines to do so.

2. Standing not required

While the Ninth Circuit maintains a flexible interest requirement—sometimes invoking language similar to standing, sometimes allowing for broad intervention with no mention of the issue—other circuits have clearly articulated a standard for Rule 24(a) interests that specifically excludes any requirement of standing. However, even among the circuits that do not require standing, there is a spectrum of interpretation in the application of Rule 24.

The Second and Sixth Circuits, for example, do not require standing and regard the issue as irrelevant to the Rule 24(a) inquiry. In United States Postal Service v. Brennan, the National Association of Letter Carriers sought to intervene in a suit by the Postal Service to enjoin two private defendants from running a mail delivery service. The district court denied intervention for lack of standing and granted the Postal Service’s motion for summary judgment. Despite dismissal of the case, the Letter Carriers were
allowed to appeal the decision denying them intervention because defendants still had time remaining to petition for *certiorari*. The Second Circuit affirmed the district court, reaching their decision, however, on different grounds. The court went on to disagree with the district court on the issue of standing. According to the Second Circuit, once a case or controversy exists, there is "no need to impose standing upon the proposed intervenor."

Likewise, the Sixth Circuit in *Associated Builders & Contractors v. Perry*, took the opportunity to assert a no-standing requirement for Rule 24 intervention. In the case, Associated Builders & Contractors sought an injunction against the enforcement of a statute requiring apprentice ratios for licensed electricians. The Michigan Chapter of the National Electrical Contractors Association (NECA) was permitted to permissively intervene pursuant to Rule 24(b). After the district court granted the injunction, NECA sought to challenge the decision. The Sixth Circuit, however, dismissed the appeal citing a lack of standing. The court held that an intervening party need not have standing to appeal where an existing party on whose side intervention was sought possessed standing. However, because the original party to the action had not appealed the decision, NECA was unable to maintain the litigation on its own.

In contrast to the Second and Sixth Circuits, the Eleventh Circuit does not require standing in a proper sense but does enforce the requirement that an intervening party assert a particularized interest rather than a general grievance. As the court discussed in *Chiles*

129. See id. at 190.
130. See id. at 191 (holding the Letter Carriers should not be permitted to intervene because of their failure to demonstrate inadequacy of representation). It is interesting to note that the court cited *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972) for the proposition that standing should not be required for intervention. As discussed earlier in this Note, the Supreme Court has clearly stated they have not resolved this issue in favor of or against a standing requirement. See *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986).
132. 16 F.3d 688 (6th Cir. 1994).
133. See id. at 689.
134. See id. at 691.
135. See id. at 690.
136. See id. at 692 (citing *Diamond v. Charles*, 476 U.S. 54 (1986)).
137. See *Chiles*, 865 F.2d at 1212-13 (citing *Howard v. McLucas*, 782 F.2d 956, 959 (11th Cir. 1986)).
v. Thornburgh, the Eleventh Circuit regards the standing cases as relevant to define the type of interest that the intervenor must assert.  

3. Standing required

The Eighth Circuit and the Court of Appeals for the District of Columbia have most often denied Rule 24(a) applicants for their failure to demonstrate standing. It is the opinion of this author that this approach represents the proper level of deference courts should afford constitutional considerations when construing the Federal Rules to maximize efficiency.

In Mausolf v. Babbitt, a group of snowmobilers sought an injunction against prohibitions on snowmobiling in Voyageurs National Park. When a conservation group claiming an interest in the enforcement of the provisions sought intervention, the district court denied their motion, concluding the interests asserted were already adequately represented by the defendant, Secretary of the Interior, Bruce Babbitt. On appeal, the Eighth Circuit reversed, finding the conservation groups' interests were not adequately represented. However, in a lengthy discussion on the issue, the court held that those without standing were not eligible to litigate in the courts of the United States. According to the Eighth Circuit, "an Article III case or controversy, once joined by intervenors who lack standing, is—put bluntly—no longer an Article III case or controversy."

The District of Columbia is the most recent circuit to declare a standing requirement for Rule 24 intervention. In Building and Construction Trades Department v. Reich, the court denied intervention to the National Trade Association of Construction Employers

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138. Chiles, 865 F.2d at 1212.
139. See, e.g., Mausolf v. Babbitt, 85 F.3d 1295 (8th Cir. 1996); Bldg. & Const. Trades Dep’t v. Reich, 40 F.3d 1275 (D.C. Cir. 1994).
140. 85 F.3d 1295 (8th Cir. 1996).
141. See id. at 1297.
142. See id. at 1303-04.
143. See id. at 1300-04.
144. Id. at 1300.
145. See Reich, 40 F.3d at 1282. But see Nuesse v. Camp, 385 F.2d 694, 709 (D.C. Cir. 1967) (allowing permissive intervention of a state banking commissioner despite his acknowledged lack of standing).
146. 40 F.3d 1275 (D.C. Cir. 1994).
because they failed to show that their interests were inadequately represented. In setting forth the standard for the Rule 24(a)(2) interest requirement, the court articulated that because “an intervenor participates on equal footing with the original parties to a suit, a movant . . . must satisfy the same Article III standing requirements as original parties.” The presumption that an intervenor may participate as a fully-recognized party (unless permitted by the court to intervene for a limited purpose) is universally recognized across the circuits. However, this presumption is complicated by the Supreme Court’s decision in Diamond v. Charles—essentially prohibiting intervenors without standing the opportunity to appeal. This issue provides one of the strongest arguments in favor of requiring standing to intervene and will be discussed in further detail later in this Note.

4. More than standing

The Seventh Circuit represents the most extreme standard for would-be intervenors, going so far as to state that Rule 24(a) dictates something more than the Article III “case” or “controversy” requirements for standing. In United States v. 36.96 Acres of Land, the United States instituted a condemnation action to acquire a 36.96 acre tract of the Indian Dunes National Lakeshore, known as Crescent Dune, pursuant to the Indiana Dunes National Lakeshore Act. Four years into the action, the public interest/lobbying group, Save the Dunes Council, moved to intervene, seeking legal protection for the continued public use of the dunes. The Council had lobbied extensively for the national legislation protecting the dunes, and cited its concern for the area as well as its “‘members’ personal aesthetic, conservational and recreational interest in the property.” Although the Supreme Court left the door open for environmental and aesthetic injuries in Sierra Club v. Morton, the Seventh Circuit

147. See id. at 1283.
148. Id. at 1282.
149. 476 U.S. 54 (1986).
150. See infra Part IV.D.
151. See 36.96 Acres of Land, 754 F.2d at 859.
152. See id. at 857.
153. See id.
154. Id. at 859 (citing Appellant’s brief).
was not persuaded that such an interest was sufficient to confer standing and concluded "[t]he interest of a proposed intervenor . . . must be greater than the interest sufficient to satisfy the standing requirement."\footnote{156}

Although the Seventh Circuit remains the most stringent on the Rule 24(a) interest requirement, the 36.96 Acres of Land opinion seems to be the high-watermark. Following Lujan v. Defenders of Wildlife,\footnote{157} in which the Supreme Court declared a standing rule against generalized grievances, the Seventh Circuit backed away from a Rule 24(a) interest requirement \textit{greater} than that of Article III standing, except perhaps in purely "public law" cases.\footnote{158}

In conclusion, this broad spectrum of interpretation among the lower courts with regard to the issue of standing and Rule 24 demonstrates the need for the Supreme Court to resolve the issue. This Note now turns its attention to the specific arguments in favor of adopting some form of standing requirement for intervention—either as a minimum threshold for the interest requirement, or as an additional implied element of Rule 24.

\textbf{IV. Rule 24 in the Context of Modern Litigation: Why Standing Must Be Required}

There are numerous reasons why the federal courts must require standing for Rule 24 intervention. First and foremost, the policies that underlie standing are a product of constitutionally-mandated limitations on the judiciary which preserve our federal system of government. Additionally, there are prudential considerations within the requirements of standing that help to limit the size and structure of any one case to those issues which the federal courts have the authority to resolve. To allow endless numbers of "public policy intervenors" to voice their opinions in any case remotely related to their issue of concern destroys the efficiency the Federal Rules were designed to promote. Finally, the Supreme Court's \textit{Diamond v. Charles}\footnote{159} decision has added a due process dilemma to the standing question, denying intervening parties without standing the ability to

\footnotesize{\footnote{156} 36.96 \textit{Acres of Land}, 754 F.2d at 859. \footnote{157} 504 U.S. 555 (1992). \footnote{158} See Keith v. Daley, 764 F.2d 1265, 1269 (1985) (asserting a less flexible standard of intervention for public law cases). \footnote{159} 476 U.S. 54 (1986).}
appeal judgments to which they are bound. Each of these arguments will be addressed in turn.

A. Rule 24 Absent Standing: A Constitutionally Problematic Approach to Intervention

The standing doctrine "concerns the subject matter jurisdiction of the court... [and] ensures that a justiciable case or controversy exists between the parties." Rule 24(a) intervenors, as dictated by the rule itself, are representing interests that are not otherwise represented in the action at the time of their intervention. Therefore, absent standing, the federal courts are being asked to protect interests and remedy grievances that would otherwise not be permitted in federal court due to prudential and constitutional considerations. In essence, intervening parties who lack standing are making end runs around Article III of the Constitution.

As previously discussed in this Note, in Sierra Club v. Morton the Supreme Court cautioned against allowing lawsuits where a litigant lacked a direct stake in the controversy because of the need to "prevent[] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." While this case did not involve a party seeking intervention, the argument for requiring all parties to an action to demonstrate standing holds true. There is no clear reason why claims which would be an unconstitutional overreaching of the federal judiciary's power if heard independently would be proper if brought by an intervening party.

For example, consider again the facts of United States v. 36.96 Acres of Land. If the United States had successfully concluded the condemnation action for the 36.96 acre tract of Crescent Dune and Save The Dunes Council had then brought suit in federal court, the

161. Rule 24(a) allows intervention "when the applicant claims an interest relating to the property or transaction which is the subject of the action... unless the applicant's interest is adequately represented by existing parties." FED. R. CIV. P. 24(a)(2) (emphasis added).
162. See supra Part II.
165. 754 F.2d 855, 857 (7th Cir. 1985).
second case would be barred for lack of standing.\footnote{166. See id. (having concluded in the first action that the aesthetic, environmental, and personal interest in dunes was insufficient for lack of standing, Save The Dunes Council would not be permitted to litigate these same interests in a later suit).} Without a concrete interest, the Council would merely be asking the federal courts to do, for the benefit of all citizens, what Congress would not do legislatively. In so doing, the federal courts would be encroaching on the powers delegated to the legislative branch if they were to hear the case. Therefore, their suit could not be heard according to the constitutional separation of powers as enforced against the judiciary by Article III, Section 2.

This scenario raises a number of questions if the same parties are alternatively allowed to intervene in the matter raising the same interests. If the Council were granted intervention in the original lawsuit despite their lack of standing, how is the court’s consideration of their grievance now different? If the court designs the outcome to protect the Council’s alleged interests, how is this not a policy/pseudo-legislative decision, or otherwise an overreaching by the court? The courts have a clearly defined role in adjudicating condemnation proceedings of the United States. However, if a public interest group is permitted to intervene without a legally cognizable interest sufficient to confer standing, what function does that party serve, other than to urge the court to engage in public policy or legislative decision-making, rather than legal analysis, in rendering an opinion? The simple answer is that there is no difference. If the federal courts adjudicate the interests of a party, it is of no consequence that the party was permitted into the action by intervention rather than bringing the claim themselves.

Those courts that do not require standing for intervention reason that once a case or controversy is established, the Article III mandate is met and there is no longer a constitutional issue or need to require standing.\footnote{167. See United States Postal Serv. v. Brennan, 579 F.2d 188, 190 (2d Cir. 1978).} However, this logic is flawed in two respects. First, as discussed earlier in this Note,\footnote{168. See infra Part II.} unlike other aspects of justiciability, the doctrine of standing is not determined by looking at the issues of the case—whether the case is moot, ripe, or a political question.
Instead, standing focuses on the party and the party’s relationship to the injury alleged. In other words, the party’s interest in the subject matter. Therefore, whether or not there is an existing case or controversy, the constitutional limitations on the kinds of interests the federal courts can adjudicate still applies. Standing must be determined with respect to each party, not merely as a threshold requirement with respect to each case. The second flaw in this logic is not so much a constitutional concern, but a matter of prudential and practical consideration.

B. Prudential and Practical Concerns

In addition to fulfilling the constitutional mandates of Article III, the standing doctrine assures that prudential limitations will prevent the courts from being overrun by “concerned bystanders” attempting to circumvent the political process. As one commentator discussed, there is a significant difference between the constitutional standing requirements of Article III and prudential standing requirements. While these prudential limitations are judicially constructed, rather than constitutionally imposed, there is no reason they should be ignored in the context of intervention.

In the previous section it was noted that courts not requiring standing to intervene often reason that a case or controversy already exists and, therefore, party-standing is no longer relevant. The underlying argument in support of this position is that the judicial wheels have already been set in motion and, thus, there is little judicial efficiency to be gained by excluding other interests. However, this argument overlooks the fact that the same prudential and practical advantages of the standing requirement for parties initiating a lawsuit would also be advanced by a requirement that all parties to a suit demonstrate standing. Standing provides prudential limitations a court may use to bar groups of plaintiffs or in essence “to lock

170. SCRAP, 412 U.S. at 687.
172. See id.
173. See Brennan, 579 F.2d at 190.
174. See Bullock, supra note 171, at 641.
certain people out of court."175 This is a helpful tool for judges looking to take an active role in narrowing a case down to the real barebones issues at stake. Especially in public law litigation, cases tend to get “blown up” to a point where the issues are virtually unmanageable and the complexity of the decision becomes worthless for future litigants.

Another counterargument put forth by a critic of the standing-to-intervene requirement argues that standing is too confusing to export into the Rule 24 context.176 However, a simple analysis of Rule 24 intervention reveals exactly the same type of inquiry made for Article III standing. As another scholar noted, “[t]he question of the right to intervene is inevitably linked to the question of standing to initiate the litigation in the first place.”177 In essence, the standing doctrine and the interest requirement of Rule 24 each ask the question: Does this party have a sufficiently concrete interest either independently (for standing) or in the existing matter (for intervention) such that the federal court has a role in adjudicating their grievance? If the interest asserted is either a generalized grievance or is not sufficiently framed into an issue the court has the power to resolve, the court is bound by the strictures of Article III, Section 2 of the Constitution and cannot hear the case. Prudentially speaking, the question of Rule 24 interest and the question of standing are virtually the same.

C. The Efficiency Claim

The position that liberalized application of joinder rules will maximize efficiency178 may not necessarily be true in the case of intervention. Liberal joinder policies undoubtedly prevent reactive or duplicitous litigation by allowing all potential future claimants into the initial dispute. These parties are then bound by any judgment and cannot relitigate their interest in the dispute in hopes of a more favorable outcome. However, the efficiency argument breaks down in the context of public law litigation where many parties do not, and

175. Id. at 640.
176. See id. at 641.
177. See Chayes, supra note 4, at 1290.
178. See, e.g., United States v. Stringfellow, 783 F.2d 821, 826 (9th Cir. 1986) (construing Rule 24 broadly in favor of applicant’s intervention and practical considerations).
will not, have standing to litigate their asserted interests regardless of the outcome of the decision. For purely public policy interests, the grievance is too generalized and there is no risk that these parties will bring a later reactive suit to adjudicate their interests. For purposes of this analysis, the range of possible intervening parties can be divided into two categories of interests sought to be protected.

1. Potential future claimants

The first group might best be referred to as “Potential Future Claimants.” This category includes parties claiming intervention of right when their interests are so intertwined with the subject matter of the action that, as a result of a court’s decision, an individual or group may be adversely affected to such an extent that they might later have standing to challenge the outcome of the initial action. These parties represent interests that traditionally would qualify for intervention under Rule 24 as it was originally drafted, prior to the 1966 amendment.

There is a strong efficiency argument that can be made for not requiring standing for these types of intervening parties. Because an unfavorable decision will likely provide the basis for standing, Potential Future Claimants pose the greatest risk of multiplying the amount of litigation in the federal courts due to reactive claims on virtually identical issues. However, because standing itself is a flexible doctrine, it is likely courts could find these Potential Future Interest parties have standing based on a concrete risk of future injury, rendering moot the need for further analysis.

2. Public interest claimants

The second group may appropriately be labeled “Public Interest Claimants.” This group includes those parties invoking Rule 24(a) in

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179. See, e.g., Martin v. Wilkes, 490 U.S. 755 (1989). In this case, a group of white firefighters originally denied intervention in a discrimination action between a group of black firefighters and the City of Birmingham were allowed to collaterally attack the consent decree resulting from the first suit. Because the white firefighters were not parties to the original action, they were not bound by the consent decree and therefore were not precluded from relitigating the matter. The consent decree from the original action actually provided the firefighters the requisite standing to bring the second suit.

180. See Tobias, supra note 48, at 427 (discussing the Supreme Court’s inconsistent application of the standing doctrine).
order to prevent or challenge some public policy or legislative decision that they would otherwise not have standing to challenge. Environmental concerns, abortion rights, and school desegregation have all motivated Public Interest Claimants to seek intervention. This second group represents the most problematic aspects in the rise of public law litigation with respect to the constitutional requirements of Article III.

In terms of efficiency, what is most important to recognize about Public Interest Claimants is that their asserted interest is made no greater or more concrete by the disposition of the litigation. Unlike Potential Future Claimants, these parties will not acquire standing by an unfavorable outcome. For example, environmental activists claiming a "personal aesthetic, conservational and recreational" interest in an area of national parkland will have no less of a generalized grievance if a court grants logging rights in an action in which they were not allowed to intervene. There is no risk of duplicitous litigation because these parties do not represent interests which the federal courts have the power to adjudicate independently. Public policy interests are just that—interests of public interest or concern. The Supreme Court has clearly held that the proper method of vindicating such rights is through the democratic process in the legislative and executive branches, not in the federal courts.

181. See, e.g., Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 838 (9th Cir. 1996) (denying intervention to environmental organization in declaratory judgment action against Secretaries of Agriculture and Interior).
182. See Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Ehlmann, 137 F.3d 573, 578 (8th Cir. 1998) (denying motion to intervene of ten state legislators for lack of standing in suit challenging a Missouri statute prohibiting the use of public funds for abortion related activities); Planned Parenthood of Minnesota, Inc. v. Citizens for Cmty. Action, 558 F.2d 861 (8th Cir. 1977) (granting intervention to local anti-abortion association and local property owners).
183. See United States v. Georgia, 19 F.3d 1388, 1394 (11th Cir. 1994) (upholding a district court finding that intervening parties failed to demonstrate a legally protectable interest; holding that "appellants' only interest in this case is their political disagreement with the Board, which they should not be allowed to advance as intervenors ....").
D. The Diamond v. Charles Dilemma

While the Supreme Court has not required standing for initial intervention, it has held that an appeal by an intervening party requires standing if the original party to the action does not pursue appeals.\textsuperscript{186} Therefore, the disposition of an action is binding on a Rule 24(a) party and may not afford an opportunity for appeal. Furthermore, these parties are subject to res judicata and preclusion of any other claims related to the action, even if at a later time they are able to demonstrate standing. This black letter rule declared in \textit{Diamond v. Charles}\textsuperscript{187} raises serious practical and due process concerns for those parties who are allowed to intervene but lack standing to appeal a final judgment.

In \textit{Diamond}, a group of physicians who provided abortion services brought a class action lawsuit against officials responsible for enforcing Illinois’ newly-amended abortion laws under 42 U.S.C. § 1983, alleging a deprivation of their constitutional rights.\textsuperscript{188} The district court granted a temporary restraining order against the enforcement of the new laws.\textsuperscript{189} Dr. Diamond then filed a motion to intervene based on his “conscientious objection to abortions, and on his status as a pediatrician and as a parent of an unemancipated minor daughter.”\textsuperscript{190} Ultimately, a permanent injunction was granted as to four sections of the Illinois statute and the State did not pursue an appeal.\textsuperscript{191} Dr. Diamond, as the sole appellant, filed a Notice of Appeal with the United States Supreme Court.\textsuperscript{192} The Court held that despite the “sharp and acrimonious” nature of the case as it stood, it was insufficient by Article III standards due to Dr. Diamond’s lack of standing.\textsuperscript{193} The Court recognized the inherent contradiction that

\begin{quotation}
[h]ad the State sought review, . . . Diamond, as an intervening defendant below, also would be entitled to seek review,
\end{quotation}

\textsuperscript{186} See Diamond v. Charles, 476 U.S. 54, 68-69 (1986) (stating “an intervenor’s right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.”).
\textsuperscript{187} 476 U.S. 54 (1986).
\textsuperscript{188} See id. at 57.
\textsuperscript{189} See id.
\textsuperscript{190} id. at 58.
\textsuperscript{191} See id. at 61.
\textsuperscript{192} See id.
\textsuperscript{193} See id. at 62.
enabling him to file a brief on the merits . . . . But this ability to ride ‘piggyback’ on the State’s undoubted standing exists only if the State is in fact an appellant . . . .

In other words, Dr. Diamond’s interests were outside the scope of the Court’s Article III power, but would somehow be drawn inside that power if the State were to pursue appeal of its interest, albeit different from those of Dr. Diamond.

This confused justification aside, the real dilemma created by the Diamond case is that it allows for fully-recognized parties to be bound by a judgment with no avenue to appeal, while other allegedly co-equal parties have that option. This result would seem to be a clear violation of due process. An expanded application of Diamond would also seem to suggest that if original Article III parties settle out of a dispute after other parties without standing have intervened, the case is mooted. Although this is not entirely unfair because an intervenor could not have brought this action alone, their participation in any suit is therefore lesser. However, intervening parties are theoretically afforded the right to participate on an equal footing.

Although the common concern is that intervenors might come in and spoil settlement negotiations, their inability to appeal final judgment lessens their bargaining power in settlement discussions. In essence, because of their inferior bargaining power and the risk of being bound without appeal, the interests of intervenors may be more impaired by their participation in a suit than by a judgment in their absence. This dilemma contradicts the underlying policy of Rule 24—to allow outsiders an opportunity to be heard when their interests might be impaired or impeded by a judgment in their absence.

In order to alleviate the practical and constitutional due process implications of Diamond, as well as the other concerns addressed in this Note, the Supreme Court should take the next step and declare a mandatory standing requirement for all parties to an action.

E. The Necessary Defendant Exception

While it is the position of this Note that the federal courts should adopt a mandatory standing requirement for Rule 24(a) intervenors,

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194. Id. at 64.
195. See Bldg. and Constr. Trades Dep’t v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994).
it is important to recognize one major caveat to this suggested rule. The one group that simply should not and, perhaps, cannot be required to demonstrate standing is defendant intervenors whose interests are so intertwined in the subject matter of the action that they would otherwise subject existing parties to multiple or inconsistent obligations, thereby making them necessary parties to the action.\textsuperscript{197} This exception is similar to the argument against standing for Potential Future Claimants discussed above—in essence, “necessary defendants” are a subsection of that group.\textsuperscript{198} Furthermore, because “[s]tanding is overwhelmingly a plaintiff’s hurdle,”\textsuperscript{199} parties seeking to intervene on the side of the defendant rarely are capable of framing their asserted interests in such a way as to confer standing to sue—this follows logically because such parties are not attempting to sue. Instead, they are merely defending an interest threatened by the existing action. When an intervening defendant is so situated that the defendant has not yet suffered an “actual injury” but where an unfavorable outcome in the action would immediately provide this prerequisite for standing, it is only logical to either require that person’s presence under Rule 19 or allow their intervention under Rule 24(a).

\subsection*{F. Suggested Remedies for Parties Lacking Standing}

It is important to note that, while this Note strongly advocates an intervention standard that includes standing, a number of alternatives exist for parties seeking to have their interests legally protected, but lacking the requisite standing to have the federal courts adjudicate their grievances. Following is a brief list of suggested remedies.

1) \textit{The Democratic Process}: As Justice Stewart’s dissenting opinion in \textit{Cascade Natural Gas Corp. v. El Paso Natural Gas Co.}\textsuperscript{200} made clear, for generalized grievances involving bad legislation or public policy, the appropriate remedy is the

\begin{footnotesize}
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\item[197.] A necessary party is a person who claims an interest relating to the subject of the action and [who] is so situated that the disposition of the action in the person’s absence may . . . leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.
\item[198.] See supra Part IV.C.1.
\item[199.] Bullock, supra note 171, at 641.
\item[200.] 386 U.S. 129, 156-57 (1967).
\end{itemize}
\end{footnotesize}
democratic process, not the courts. Therefore, public interest litigants should direct their resources toward lobbying efforts and grass roots public awareness-raising rather than clogging the courts with grievances that are appropriately delegated to the legislative branch. State and local legislatures are more in tune with such interests and have greater resources to investigate what, if any, action should be taken.

2) State Law/State Court Remedies: Unlike the federal courts, state courts are courts of general jurisdiction. Therefore, they may administer advisory opinions or hear claims that would not meet the "case" or "controversy" requirement of Article III, Section 2 of the Constitution. Once again, these authorities are generally better suited to handle public policy or public interest grievances of the local populations.

3) Amicus Curiae Briefs: Although amicus curiae briefs cannot raise new issues, they afford an opportunity for outsiders to an action who have not suffered a concrete injury to weigh-in or express their interest in the action. This approach might be most useful when a judge feels the need for more input on certain aspects of the case due to the complex nature of the subject matter, but is disinclined to permit the expansion of the case by allowing additional parties into the action.

4) Permissive Intervention Rule 24(b): It has been suggested that permissive intervention pursuant to Rule 24(b) may be proper in cases where an applicant intervenor does not meet the requirements of Rule 24(a) intervention of right. Permissive intervention is left to the sole discretion of the court. Although this alternative is problematic from this Note's perspective because it still defeats the standing mandate of Article III, Section 2 of the Constitution, if combined with some

201. See Bullock, supra note 171, at 640 n.334.
202. Rule 24(b) allows intervention upon timely application "(1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common." FED. R. CIV. P. 24(b).
203. See Nuesse v. Camp, 385 F.2d 694, 706 (D.C. Cir. 1967) (holding that "[w]hile a public official may not intrude in a purely private controversy, permissive intervention is available when sought because an aspect of the public interest with which he is officially concerned is involved in the litigation.").
204. See FED. R. CIV. P. 24(b).
restrictions (e.g., limited intervention), it may be an effective way to maintain the integrity of an Article III case while allowing for slightly more liberal intervention.

5) **Limited Intervention:** The Advisory Committee note to Rule 24 provides that “[a]n intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.”205 This flexibility allows the court to limit participation of intervenors so that they do not “participate[] on an equal footing with the original parties to a suit”206 properly before the court on account of their standing.207 Again, there is an issue whether limited intervention is still allowing an end run around Article III standing, albeit to a lesser extent. It is, however, the position of this Note that granting limited intervention to parties without standing is highly preferable to allowing their full participation.

**V. CONCLUSION**

In light of the public law litigation explosion—or “lawsuit mania”208—of the last half-century, the federal courts must remain diligent in their efforts to uphold the constitutional requirements of Article III. Although the Federal Rules are to be construed in such a manner as to promote the efficient resolution of disputes, this aim cannot excuse the courts from adhering to the constitutional limitations which form and define our tripartite system of government. As one court noted and with whose remarks it seems appropriate to

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207. See Vreeland, supra note 5, at 307-09.
208. LOMBROSO, supra note 1.
conclude, "judicial economy and the Rules of Civil Procedure notwithstanding, Congress cannot circumvent Article III’s limits on the judicial power."\textsuperscript{209}

\textit{Kerry C. White*}

\textsuperscript{209} Mausolf v. Babbitt, 85 F.3d 1295, 1300 (8th Cir. 1996).

* J.D. Candidate, May 2003. I wish to thank the entire Editorial Board and Staff of the \textit{Loyola of Los Angeles Law Review} for their diligence and hard work in making this Issue a reality. I am deeply honored to be part of this remarkable group. This Note is specially dedicated to my parents for their constant love and support throughout my life and to my brother Matt—my hero, always.