IT'S TIME FOR AN INTERVENTION!: RESOLVING THE CONFLICT BETWEEN RULE 24(a)(2) AND ARTICLE III STANDING

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Rule 24(a)(2) of the Federal Rules of Civil Procedure provides an important apparatus by which a nonparty to a dispute may enter by her own initiative to protect an unrepresented interest. Despite the utility and function in balancing the interests of private parties and the effects that their disputes have on third parties, especially in the public law realm, intervention's requirements are unclear. Whether intervenors of right must independently satisfy Article III standing requirements or whether Article III is satisfied by the existence of a case or controversy between the original parties remains unresolved. The courts of appeals are currently split on the issue—seven do not require Rule 24(a)(2) intervenors to show standing and three do. These categorical approaches, however, are both functionally and legally inadequate.

This Note argues that federal courts should employ an approach that is more related to maintaining the benefits of Rule 24 without running afoul of Article III—a task the yes-or-no approach is ill equipped to handle. Ultimately, an approach that is based on employing a standing analysis only where the Case or Controversy Clause is implicated anew allows the greatest access to the intervention device without running the risk of entertaining nonjusticiable disputes.

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INTRODUCTION

Article III of the U.S. Constitution created and vested the power to resolve certain cases and controversies in the federal judiciary.[1] A federal court's power to entertain a dispute turns on whether a party has standing to assert that claim—that is, whether a party alleges that she has suffered an actual, redressable injury that is traceable to the alleged conduct.[2]

Federal Rule of Civil Procedure 24(a)(2) ("the Rule") defines the circumstances under which a nonparty to a dispute has the right to enter the dispute to protect an interest in the outcome.[3] An affected party has the right to intervene when she alleges impairment of an interest and a lack of existing adequate representation for that interest.[4]

However, whether such intervention constitutes a new case or controversy—subject to a separate standing analysis—remains unresolved.[5] This Note seeks to balance constitutional and statutory requirements with judicial efficiency concerns and public interest and policy considerations that influence when a separate standing analysis is appropriate for Rule 24(a)(2) motions.[6]

Accordingly, Part I of this Note examines the requirements and purpose of Rule 24(a)(2) intervention and the Case or Controversy Clause. It also discusses different types of intervenors and their relationship with the intervention of right and Article III standing requirements. Part II discusses the U.S. Supreme Court's lack of guidance on the subject and the opposing views of the federal circuits that have filled this void. Finally, Part III proposes a resolution to this problem. A categorical approach to whether Article III standing is required for Rule 24(a)(2) intervention fails to serve the purposes of the Federal Rules of Civil Procedure and the Case or Controversy Clause. Because intervention itself does not trigger the Case or Controversy Clause's jurisdictional constraints, federal courts should adopt a more nuanced inquiry to determine whether a standing analysis is truly necessary.

I. THE CASE OR CONTROVERSY CLAUSE AND INTERVENTION OF RIGHT

The discordant relationship between the Case or Controversy Clause and Rule 24 intervention of right is long standing and unsettled.[7] Each doctrine

1. *See* U.S. CONST. art. III, § 2, cl. 1.

2. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

3. *See* FED. R. CIV. P. 24(a)(2); *see also infra* Part I.A.

4. FED. R. CIV. P. 24(a)(2); *see also infra* Part I.A.2.

5. *See, e.g.*, Laroe Estates, Inc. v. Town of Chester, 828 F.3d 60, 64 (2d Cir. 2016) (noting that "a circuit split on this issue has persisted for some time"), *cert. granted*, 137 S. Ct. 810 (2017); *see also infra* Part II.

6. *See infra* Parts II–III.

7. The Rule 24 amendment and expansion in 1966 spawned this circuit split. *See infra* note 21. Federal courts have not uniformly resolved the issue of intervenor standing over the subsequent five decades. *See infra* Part II.

alone is the subject of extensive scholarly and judicial interpretation.[8] At the intersection of these two doctrines lies a grey area of grey areas. Must intervenors of right independently satisfy Article III's jurisdictional limitations? What are the purposes of these doctrines, and does requiring or forgoing a standing analysis better serve them? To provide context for answering these questions, Part I.A provides an overview of the history and requirements of intervention of right. Next, Part I.B explains Article III standing's demands and purpose. Part I.C then discusses the different types of intervenors and their relationship with these two doctrines.

A. Rule 24(a)(2) Intervention of Right

Rule 24 of the Federal Rules of Civil Procedure provides the mechanism by which a nonparty to litigation may join in a suit.[9] Intervention may be "permissive"—a court may choose to allow it[10]—or "of right"—a court must allow it.[11] Permissive intervention is possible where a statute gives a *conditional* right[12] or where the would-be intervenor "has a claim or defense that shares with the main action a common question of law or fact."[13] Intervention is a right in two instances: where a federal statute gives such a right[14] and where the would-be intervenor "claims an interest . . . 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."[15] The latter is the primary focus of this Note. To better conceptualize the tension between the Case or Controversy Clause and Rule 24, Part I.A.1 discusses the history and purpose of intervention, Part I.A.2 turns to the specific requirements for intervention of right, and Part I.A.3 explains the rights of intervenors.

8. *See infra* Part I.A–B.
9. *See* FED. R. CIV. P. 24.
10. *See id.* 24(b).
11. *See id.* 24(a).
12. *Id.* 24(b)(1)(A).
13. *Id.* 24(b)(1)(B). Intervention is also permissive where a government agency or official seeks to intervene where one of the party's claims is based on a statute, executive order, regulation, or a requirement or agreement administered by the officer or agency. *Id.* 24(b)(2).
14. *Id.* 24(a)(1). Whether standing is necessary to intervene is an important consideration for whether Congress may be prohibited from creating a statutory right to intervene in some instances due to the limitations on Congress's ability to confer a right of action. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 566–67 (1992).
15. FED. R. CIV. P. 24(a)(2); *see also* Purcell v. BankAtlantic Fin. Corp., 85 F.3d 1508, 1512 (11th Cir. 1996) (noting that an intervenor of right must establish timeliness in addition to interest, impairment, and inadequate representation). *But see* Ross v. Marshall, 426 F.3d 745, 753 (5th Cir. 2005) (asserting that intervention should be allowed where "no one would be hurt and greater justice could be attained" (quoting Sierra Club v. Espy, 18 F.3d 1202, 1205 (5th Cir. 1994))).

1. What Is Intervention?

Intervention is a relatively new phenomenon in American procedure.[16] However, its use and availability have greatly expanded over the last century.[17] Rule 24's predecessor, Equity Rule 37, was adopted in 1912 and provided that "[a]nyone 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."[18] The adoption of the Federal Rules of Civil Procedure gave intervention an even greater role in federal litigation.[19]

Since the inception of the Federal Rules of Civil Procedure, Rule 24 has been amended several times.[20] The most recent change to Rule 24(a) occurred in 1966 when the text was modified to make intervention of right less restrictive.[21] Before this change, a party had to show that she might be bound by the resulting judgment[22] or that she may be "adversely affected by a distribution or other disposition of property."[23] The new Rule incorporated both of these ideas and expanded the requisite effect to encompass impaired interests that were not adequately represented.[24] Thus, the modern Rule 24 allows a nonparty to a dispute to intervene to protect an interest that is unrepresented by the existing parties.[25]

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16. *See* 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1901 (3d ed. 2007) (discussing the historical background of intervention).

17. *See id.*; *see also* James Wm. Moore & Edward H. Levi, *Federal Intervention I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565 (1936).

18. FED. EQUITY R. 37 (1912) (repealed 1938).

19. *See* 7C WRIGHT, MILLER & KANE, *supra* note 16, § 1901; *see also* Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co., 386 U.S. 129, 133 (1967) ("Rule 24(a)(3) was not merely a restatement of existing federal practice at law and in equity.").

20. *See* Tyler R. Stradling & Doyle S. Byers, *Intervening in the Case (or Controversy): Article III Standing, Rule 24 Intervention, and the Conflict in the Federal Courts*, 2003 BYU L. REV. 419, 423. For a brief discussion on how the Federal Rules of Civil Procedure are amended, see *id.* at 423–24.

21. *See id.* at 423; *see also* FED. R. CIV. P. 24 advisory committee's note to 1966 amendment ("The general purpose of original Rule 24(a)(2) was to entitle an absentee, purportedly represented by a party, to intervene in the action if he could establish with fair probability that the representation was inadequate. Thus, where an action is being prosecuted or defended by a trustee, a beneficiary of the trust should have a right to intervene if he can show that the trustee's representation of his interest probably is inadequate; similarly a member of a class should have the right to intervene in a class action if he can show the inadequacy of the representation of his interest by the representative parties before the court.").

22. *See* FED. R. CIV. P. 24(a)(2) (1963) (amended 1966).

23. *Id.* 24(a)(3). Before 1966, however, the property provision was not subject to an adequate representation caveat. *See id.*

24. *See id.* 24(a)(2).

25. *See id.*

Although the Rule's purpose remained substantially the same, the loosening of the interest requirement led to divergence among the circuits regarding what interests are sufficient to merit intervention of right.[26]

2. Intervention of Right Requirements

To intervene under Rule 24(a)(2), a proposed intervenor must demonstrate an interest that is impaired and not adequately represented by the existing parties.[27] This interest must be specific and should represent a "significantly protectable interest."[28]

The Supreme Court has ruled twice on the sufficiency of an interest for the purposes of Rule 24(a)(2). The Court decided *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*[29] in 1967, the year after the Rule 24(a) amendment.[30] In *El Paso*, the Court allowed Cascade Natural Gas Corp., the State of California, and Southern California Edison to intervene in a natural gas antitrust suit to protect their interests in a competitive system.[31] Four years later, in *Donaldson v. United States*,[32] the Court ruled that the proposed intervenor's interest in obtaining records did not afford him a right to intervene in an IRS enforcement proceeding under Rule 24.[33]

With such limited guidance, what constitutes a protectable interest varies substantially among the circuits. Some circuits interpret the interest requirement as a lenient standard.[34] Others construe the standard more narrowly,[35] even tying it to the more onerous Article III standing requirement.[36] Generally, as in the previous iteration of Rule 24, a party may intervene if she would be bound by the judgment in the litigation.[37] Property interests, although sufficient in all circuits, are not necessary as they were in the previous version of the Rule.[38] However, whether a purely

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26. *See* Juliet Johnson Karastelev, Note, *On the Outside Seeking In: Must Intervenors Demonstrate Standing to Join a Lawsuit?*, 52 DUKE L.J. 455, 457 (2002); *see also* Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 432–36 (1991).

27. *See* FED. R. CIV. P. 24(a)(2).

28. Diamond v. Charles, 476 U.S. 54, 68 (1986) (quoting Donaldson v. United States, 400 U.S. 517, 531 (1971)).

29. 386 U.S. 129 (1967).

30. *See id.*

31. *Id.* at 135.

32. 400 U.S. 517 (1971).

33. *Id.* at 531.

34. *See* Grutter v. Bollinger, 188 F.3d 394, 398 (6th Cir. 1999) ("[I]n this circuit we subscribe to a 'rather expansive notion of the interest sufficient to invoke intervention of right.'" (quoting Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997))).

35. For example, recently in *Texas v. United States*, 805 F.3d 653 (5th Cir. 2015), the Fifth Circuit delineated a particularly narrow construction of the interest requirement. The court held that "the inquiry turns on whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out a certain way" and that "an intervenor fails to show a sufficient interest when he seeks to intervene solely for ideological, economic, or precedential reasons." *Id.* at 657.

36. *See, e.g.*, Aurora Loan Servs., Inc. v. Craddieth, 442 F.3d 1018, 1022 (7th Cir. 2006); *see also infra* Part II.C.1.

37. *See, e.g.*, Stauffer v. Brooks Bros., 619 F.3d 1321, 1329 (Fed. Cir. 2010).

38. *See, e.g.*, United States v. Carpenter, 526 F.3d 1237, 1240 (9th Cir. 2008) (discussing that "use and enjoyment of the unique aesthetic environment of [a] wilderness

economic interest constitutes a "significantly protectable interest" varies among the federal circuits.[39]

A Rule 24(a)(2) movant must also show that her interest would be impaired by the litigation.[40] Like in the former version of the Rule, this impairment may be that the party would be bound by the judgment.[41] Unlike with the old Rule, however, a negative stare decisis effect[42] or another form of practical impairment may be sufficient to satisfy this prong.[43]

Even if a proposed intervenor demonstrates the requisite impaired interest, intervention of right will be improper where a party to the action already adequately represents the interest.[44] The bar to establishing lack of adequate representation is relatively low.[45] Showing that existing parties hold different or adverse objectives is typically sufficient to meet this burden.[46] In rare cases, some courts will dismiss an intervenor as a party when her interests become aligned with the original plaintiff over the course of litigation.[47]

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area" was a sufficient interest to intervene); San Juan County v. United States, 503 F.3d 1163, 1201 (10th Cir. 2007) (finding that environmental organizations' interest in the impact of vehicular traffic was sufficient to intervene); *Grutter*, 188 F.3d at 398 (finding that prospective students' interest in protecting educational opportunities was sufficient to intervene); *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 562 (1992) ("[T]he desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest . . . ."); *supra* note 23 and accompanying text.

39. *See* Flying J, Inc. v. Van Hollen, 578 F.3d 569, 572 (7th Cir. 2009) (finding that gas companies that stood to lose business from a challenged state law had an interest on those grounds alone); Utahns for Better Transp. v. U.S. Dep't of Transp., 295 F.3d 1111, 1115 (10th Cir. 2002) ("The threat of economic injury from the outcome of litigation undoubtedly gives a petitioner the requisite [Rule 24(a)(2)] interest."). *But see* Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc., 72 F.3d 361, 366 (3d Cir. 1995) (finding that a "mere economic interest . . . is insufficient to support the right to intervene"); New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 466 (5th Cir. 1984) (finding that "an economic interest alone is insufficient . . . for intervention under Rule 24(a)(2)").

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

41. *See* 7C WRIGHT, MILLER & KANE, *supra* note 16, § 1908.2, at 368.

42. *See id.* § 1908.2, at 369.

43. *See id.* § 1908.2, at 374 n.18 (identifying a broad range of sufficient practical impairments such as environmental impact, access to information, and ability to conduct business).

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

45. *See* Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972) ("The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal.").

46. *See* 7C WRIGHT, MILLER & KANE, *supra* note 16, § 1909, at 440.

47. *See, e.g.*, Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN) v. Regents of the Univ. of Mich., 652 F.3d 607, 633 (6th Cir. 2011).

3. Rights of Intervening Parties

Before the Supreme Court adopted the Federal Rules of Civil Procedure in 1938, Equity Rule 37 gave intervenors a subordinated role.[48] However, in crafting Rule 24, this caveat to intervention was discarded.[49]

Today, Rule 24 is commonly understood as granting an intervening party the same rights as the original party to the dispute.[50] As such, she may take unilateral action such as moving to dismiss without the consent of the original party.[51] Circuits that require intervenors to demonstrate an independent basis for standing typically place intervenors on equal footing with the original parties.[52] However, the inherent equal rights of intervenors in circuits that do not require standing seem to exist only to the extent of the scope of the original case or controversy.[53]

More recently, the Supreme Court has made it clear that an intervenor may not "step into the shoes of the original party" where she has not demonstrated an independent basis for Article III standing.[54] But, what intervening party actions fall within and without the equal-footing framework remains unresolved.[55]

B. The Case or Controversy Clause and the Standing Requirement

The Case or Controversy Clause[56] limits the disputes the federal judiciary may adjudicate.[57] For a dispute to rise to the level of a case or

48. *See* 7C WRIGHT, MILLER & KANE, *supra* note 16, § 1920, at 608.

49. *See id.*; *see also* Daniel C. Hopkinson, *The New Federal Rules of Procedure as Compared with the Former Federal Equity Rules and the Wisconsin Code*, 23 MARQ. L. REV. 159, 170 (1939).

50. *See* 7C WRIGHT, MILLER & KANE, *supra* note 16, § 1920, at 611–12.

51. *See id.*

52. *See, e.g.*, Bldg. & Constr. Trades Dep't v. Reich, 40 F.3d 1275, 1282 (D.C. Cir. 1994).

53. *See, e.g.*, Spangler v. United States, 415 F.2d 1242, 1245 (9th Cir. 1969) ("The whole tenor and frame work of the Rules of Civil Procedure preclude application of a standard which strictly limits the intervenor to those defenses and counterclaims which the original defendant could himself have interposed. Where there exists a sufficiently close relationship between the claims and defenses of the intervenor and those of the original defendant to permit adjudication of all claims in one forum and in one suit without unnecessary delay—and to avoid as well the delay and waste of judicial resources attendant upon requiring separate trials—the district court is without discretion to deny the intervenor the opportunity to advance such claims." (quoting Stewart-Warner Corp. v. Westinghouse Elec. Corp., 325 F.2d 822, 827 (2d Cir. 1963))).

54. Wittman v. Personhuballah, 136 S. Ct. 1732, 1736 (2016) (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997)).

55. *See infra* Part III.C.2.

56. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to *all Cases, in Law and Equity*, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—*to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States*;—between Citizens of the same State claiming Lands under Grants of

controversy, the party bringing it must have Article III standing.[58] The standing inquiry assesses "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[59] Accordingly, Part I.B.1 discusses the history and function of the Case or Controversy Clause, Part I.B.2 defines the requirements to show jurisdictional standing, and Part I.B.3 concludes with the circumstances in which courts typically require a party to show standing.

1. The Purpose of the Case or Controversy Clause and the Standing Requirement

The justiciability requirements imposed by the Case or Controversy Clause have been extrapolated to include both prudential requirements, such as the prohibition on third-party standing and the prohibition of generalized grievances,[60] and jurisdictional requirements:

> [T]he judicial power of federal courts is constitutionally restricted to "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.[61]

To better understand when a standing analysis is appropriate, Part I.B.1.a expands on standing as a protector of the separation of powers and Part I.B.1.b considers how the standing requirement promotes judicial efficiency and issue presentation.

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different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." (emphasis added)).

57. *Id.*; *see also* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.").

58. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004).

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

60. Because prudential standing is not jurisdictional, it is generally accepted that it can be forgone or eliminated by the Court or by Congress. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983). For ease of exposition, this Note examines jurisdictional requirements that cannot be waived.

61. Flast v. Cohen, 392 U.S. 83, 94–95 (1968).

a. Standing as a Jurisdictional Baseline

Standing limits the power of the federal judiciary to infringe on the powers of the other branches of government by permitting it to resolve disputes only where an actual, not potential, controversy exists:

> The legislative and executive departments of the Federal Government, no less than the judicial department, have a duty to defend the Constitution. That shared obligation is incompatible with the suggestion that federal courts might wield an "unconditioned authority to determine the constitutionality of legislative or executive acts." For the federal courts to decide questions of law arising outside of cases and controversies would be inimical to the Constitution's democratic character. And the resulting conflict between the judicial and the political branches would not, "in the long run, be beneficial to either."[62]

If the federal judiciary had the power to interpret any statute regardless of whether its violation or application actually injured someone, in effect it would have the power to legislate.[63] Similarly, the ability to issue advisory opinions could infringe on the legislature's ability to give meaning to laws and the executive's mandate to execute laws.[64] Standing mitigates this conflict by providing the judiciary the power to resolve a dispute only where (1) a determination of the parties' rights is necessary and (2) the dispute can be resolved through the judicial process.[65]

b. Standing as a Facilitator of the Judicial Process

The standing requirement also promotes judicial efficiency.[66] Historically, the federal judiciary's role has been to resolve disputes between individuals rather than to determine the merits of general, unparticularized grievances.[67] The standing requirement ensures that the federal judiciary's resources are spent on the most pressing, actual disputes rather than the public's claims at large.[68]

Similarly, the standing requirement ensures that parties who are best suited to present and litigate an issue have their day in court.[69] Because federal courts do not select the suits brought before them, "the allowance of public actions would produce uneven and sporadic review, the quality of

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62. Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 133 (2011) (first quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982); then quoting United States v. Richardson, 418 U.S. 166, 188–89 (1974)); *see also* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146–47 (2013).

63. *See* Summers v. Earth Island Inst., 555 U.S. 488, 492–93 (2009).

64. *See id.*

65. *See Winn*, 563 U.S. at 133.

66. *See, e.g.*, *Richardson*, 418 U.S. at 192 (Powell, J., concurring) (discussing the negative implications of allowing federal courts to resolve public interest tax suits).

67. *See id.*

68. *See id.*

69. *See* United States v. Windsor, 133 S. Ct. 2675, 2680 (2013) ("[C]oncrete adverseness . . . sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." (quoting Baker v. Carr, 369 U.S. 186, 204 (1962))).

which would be influenced by the resources and skill of the particular plaintiff."[70] Accordingly, a plaintiff with standing is not only better suited to represent the interests at stake but also aids courts in discerning important legal issues and arguments.[71]

2. Jurisdictional Standing Requirements

Although standing jurisprudence is confused and ever changing,[72] the Supreme Court maintains a basic three-part framework for evaluating standing: (1) an injury that is (2) fairly traceable to the alleged conduct and (3) likely to be redressed by the requested relief.[73] Part II.B.1.a gives an overview of the injury requirement, while Part II.B.1.b addresses the causation and redressability requirements.

a. Injury

Two factors determine whether an injury is an "injury in fact" that satisfies the standing requirement: particularization and concreteness.[74]

First, the injury must be particularized.[75] This means that an injury must not be shared by the public at large, although it need not be individual to the party.[76]

Second, the injury must be concrete.[77] Tangible injuries such as physical harm more easily pass the concreteness test than intangible injuries.[78] However, intangible injuries, such as being "deprived of the benefits of interracial association arising from living in an integrated community free of housing discrimination,"[79] may nonetheless be concrete.[80] The concreteness of intangible injuries is informed by two factors: (1) "whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts"[81] and (2) whether Congress has designated such an

70. *Richardson*, 418 U.S. at 190–91 (Powell, J., concurring).

71. *See Baker*, 369 U.S. at 204.

72. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 55 (7th ed. 2016) ("Both justices and commentators have frequently identified standing as one of the most confused areas of the law.").

73. Allen v. Wright, 468 U.S. 737, 751 (1984).

74. *See generally* Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016).

75. *Id.* at 1548 ("Particularization is necessary to establish injury in fact, but it is not sufficient."); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992); Warth v. Seldin, 422 U.S. 490, 508 (1975) (finding that "[a]bsent the necessary allegations of demonstrable, particularized injury, there can be no confidence of 'a real need to exercise the power of judicial review'" (quoting Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 221–22 (1974))).

76. *Spokeo*, 136 S. Ct. at 1548.

77. *Id.* at 1548–49.

78. *See id.* at 1549.

79. Havens Realty Corp. v. Coleman, 455 U.S. 363, 369 (1982).

80. *Spokeo*, 136 S. Ct. at 1549.

81. *Id. Spokeo* made clear that not every statutory violation is a concrete injury. *See id.* at 1549–50. Justice Alito gave the example of a consumer reporting agency filing to give notice to a user of its information in violation of an act of Congress. *See id.* at 1550. If the

intangible injury as legally cognizable.[82] Even if a statutory violation causes no harm, it nonetheless may constitute an injury in fact where the violation presents a "material risk of harm."[83]

b. Causation and Redressability

Causation and redressability are intertwined and often addressed together.[84] They are closely linked because causation itself helps federal courts determine whether granting the plaintiff the requested relief will end or remedy the alleged injury.[85] A plaintiff must allege that "the asserted injury was the consequence of the defendants' actions, or that the prospective relief will remove the harm."[86] A plaintiff must also allege that injury is "fairly traceable to the defendants allegedly unlawful conduct."[87] Finally, she must allege that the injury is "likely to be redressed by the requested relief."[88]

3. Who Needs Standing?

Typically, the plaintiff has the burden of pleading and proving standing.[89] Standing is treated as a question of subject matter jurisdiction[90]: an action where the plaintiff lacks standing may be properly dismissed pursuant to a Rule 12(b)(1) motion[91] or by the court sua sponte.[92] Courts typically require a single plaintiff in a multiplaintiff action to demonstrate standing.[93]

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information were true, there would be no injury in fact to the user, and if some information were inaccurate, such as a zip code, the injury would not necessarily rise to the level of concreteness. *Id.*

82. *Id.* at 1549 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992)).

83. *Id.* at 1550.

84. *See* 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.5, at 389 (3d ed. 2008).

85. *See id.* § 3531.6.

86. Warth v. Seldin, 422 U.S. 490, 505 (1975) (discussing the baseline requirements of Article III standing).

87. Allen v. Wright, 468 U.S. 737, 751 (1984).

88. *Id.*

89. *See* 13B WRIGHT, MILLER & COOPER, *supra* note 84, § 3531.15, at 301.

90. Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 255 (1986).

91. *See* FED. R. CIV. P. 12(b)(1).

92. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 95 (1998) ("[I]f the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it." (quoting United States v. Corrick, 298 U.S. 435, 440 (1936))); Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908).

93. *See* Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."); Bd. of Educ. v. Earls, 536 U.S. 822, 826 n.1 (2002) ("Because we are likewise satisfied that [one plaintiff] has standing, we need not address whether [the other] also has standing."); Clinton v. City of New York, 524 U.S. 417, 431 n.19 (1998) ("Because both the City of New York and the health care appellees have standing, we need not consider whether the appellee unions also have standing to sue."). *But see* FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 483–90 (1985) (addressing the Democratic National Committee's standing, although the coplaintiff FEC

Still, there appear to be two important exceptions to this rule. First, a court may be compelled to reexamine standing when a party who has not demonstrated standing obtains different relief from a party who has.[94] Second, a party must have standing to assert substantive legal theories that would affect a court's consideration of the merits.[95]

C. Different Types of Intervenors

Not all intervenors are created equal. Depending on the circuit, the bar for intervention may vary and the intervenor's ability to influence the course of the suit may diverge. A third party may intervene as a defendant or a plaintiff under Rule 24, and some courts evaluate private and public law intervenors' interests under different standards. A practical approach to intervenor standing should address the confusing aspect of defendant standing while allowing judicial discretion regarding what constitutes a sufficient interest. To that end, Part I.C.1 describes the differences between intervenor-plaintiffs and intervenor-defendants, and Part I.C.2 explores how private law and public law intervenors differ.

1. Plaintiffs v. Defendants

The function of a standing analysis for defendants is not entirely clear. Article III and Supreme Court jurisprudence both indicate that defendants must have standing to satisfy Article III.[96] But because once a plaintiff demonstrates Article III justiciability the defendant's standing follows, this issue is rarely directly addressed. The unusual circumstances in which courts examine defendant standing include "(1) in the trial court, when nonparties seek to be heard through intervention, and (2) on appeal, when parties against whom no relief was ordered seek to overturn the trial court's judgment."[97]

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had standing, because of the potential for interference with the FEC's exclusive jurisdiction to enforce the Presidential Campaign Fund Act); Juidice v. Vail, 430 U.S. 327, 333 (1977) (dismissing some plaintiffs' claims for lack of standing while allowing others to proceed).

94. *See* Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 402 n.22 (1982) (refusing to reexamine Pennsylvania's standing until it "obtains relief different from that sought by plaintiffs whose standing has not been questioned").

95. *See* Hoohuli v. Ariyoshi, 631 F. Supp. 1153, 1157 n.19 (D. Haw. 1986) ("This court, however, does not have to rule on the standing of the [other plaintiffs] unless . . . their claims would materially affect this court's consideration of the merits. For example, only if they claimed different relief or different substantive theories would their status as additional plaintiffs in this suit be important." (citing Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 72 n.16 (1978))). *But see* Ruiz v. Estelle, 161 F.3d 814, 833 (5th Cir. 1998) (holding that a jurisdictional issue does not arise when a party whose standing is unexamined asserts different grounds for granting the same relief requested by the party with standing).

96. *See* Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539, 1550 (2012); *see also* Diamond v. Charles, 476 U.S. 54, 68 (1986) (finding that an intervenor-defendant-appellant could not maintain a suit on his own for lack of standing).

97. Hall, *supra* note 96, at 1542; *see also Diamond*, 476 U.S. at 68.

Indeed, a large number of Rule 24 motions are made by intervening defendants rather than plaintiffs.[98] Because the original plaintiff has not directly asserted claims against the intervenor, the court may not rely on plaintiff's standing to infer the defendant's. Thus, if all intervenor-defendants were required to demonstrate standing, substantial confusion would result because the current tripartite framework is focused on plaintiff standing.

2. Public v. Private Law Litigation

Intervention of right is a popular device used by public law[99] litigants to protect a stake in the outcome of a lawsuit.[100] This is often complicated by public law litigation's "'sprawling and amorphous' party structure."[101] But Rule 24(a)(2) itself is clearly designed with private law litigants in mind.[102] Accordingly, courts have adapted the process to accommodate public law litigation.[103] Courts may scrutinize the Rule 24 interest using a different standard for public law litigants. For example, the Tenth Circuit "follows a very broad interpretation of the interest requirement with respect to public law issues."[104]

If the status of the interest of such public law intervenors is unclear, the standing (especially the injury requirement) of such parties is even less certain.[105] Indeed, the concreteness and particularization requirements often preclude public interest litigants from asserting abstract injuries.[106] Moreover, the distinctness requirement prevents direct public law litigation on issues that affect the public at large.[107] Congress cannot resolve this predicament through legislative action because it cannot confer standing on public law litigants after *Lujan v. Defenders of Wildlife*.[108] However,

98. *See* Hall, *supra* note 96, at 1574.

99. This Note uses the term "public law" to refer to litigation intended to benefit the public at large and "private law" to refer to litigation aimed at resolving a dispute between two private parties. For a more rigorous discussion of the distinctions between public and private law, see Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267 (1986).

100. Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 323 (1989) ("The concept of interest is important to public interest litigants because they represent large numbers of unorganized people, such as the poor, who individually have interests that may appear relatively insubstantial, or they seek to vindicate comparatively intangible interests like that of the general public in clean air.").

101. *Id.* at 280 (quoting Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976)).

102. *See id.* at 323 n.315 (discussing how the "property" or "transaction" language of Rule 24 is private law focused and poses a problem for public law intervenors whose interests are often less tangible than those mentioned in Rule 24's text).

103. *See* Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co., 386 U.S. 129, 135 (1967) (indicating that the interest requirement might be relaxed in situations that involve important issues of public interest).

104. San Juan County v. United States, 503 F.3d 1163, 1201 (10th Cir. 2007).

105. *See* Tobias, *supra* note 100, at 323–26.

106. *See id.*

107. *See id.*

108. 504 U.S. 555 (1992).

Congress can provide a statutory right to intervene.[109] Thus, the power of courts and Congress to create or define an interest is substantially reduced by an intervenor standing requirement: if standing were always required, Congress's and the courts' power would be narrowed to instances in which a potential intervenor has standing but does not have a requisite interest.

II. STANDING ORDERS: THE LOWER COURTS DIVIDE

The Supreme Court has yet to directly address whether a Rule 24(a)(2) intervenor requires independent Article III standing. In 1986, in *Diamond v. Charles*,[110] the Court held that a standingless Rule 24(a)(2) intervenor may not appeal a decision on its own.[111] But the Court also conspicuously declined to resolve whether Article III standing is initially required to intervene.[112] In 2003, the Court faced the same question in *McConnell v. FEC*[113] and again skirted the issue.[114] Part II.A recounts the *Diamond* decision, and Part II.B discusses the *McConnell* decision. Finally, Part II.C discusses how the federal circuits have dealt with this issue absent the Supreme Court's guidance.

A. Diamond v. Charles

Eugene Diamond was a pediatrician in Illinois who intervened as a defendant in a suit against the State of Illinois challenging the constitutionality of the Illinois Abortion Law of 1975.[115] The statute imposed various restrictions on providing abortions in the state.[116] After the district court permanently enjoined enforcement of certain sections of the law, Diamond sought to appeal the injunction.[117] The State of Illinois, however, declined to appeal.[118] The Court ultimately found that Diamond lacked independent standing to defend the statute and that his status as an intervenor did not confer the necessary standing to maintain the litigation on his own.[119]

The Court's analysis in *Diamond* has resulted in conflicting inferences. If jurisdiction were originally improper, the Court would have been fully capable of declaring Diamond's presence in the suit an improper exercise of

109. *See* FED. R. CIV. P. 24(a)(1).
110. 476 U.S. 54 (1986).
111. *Id.* at 68; *see also id.* at 70–71 ("[T]he mere fact that continued adjudication would provide a remedy for an injury that is only a byproduct of the suit itself does not mean that the injury is cognizable under Art. III.").
112. *Id.* at 68–69 ("We need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III.").
113. 540 U.S. 93 (2003), *overruled on other grounds by* Citizens United v. FEC, 558 U.S. 310 (2010).
114. *Id.* at 233.
115. *Diamond*, 476 U.S. at 56.
116. *Id.*
117. *Id.* at 61.
118. *Id.*
119. *Id.* at 64–68.

jurisdiction.[120] Indeed, the Court likely opted to base its decision on the most readily available grounds for dismissal.[121] Thus, *Diamond* only stands for the proposition that intervenors do not automatically have standing to appeal on their own.

B. McConnell v. FEC

The Court again had the opportunity to address this issue in *McConnell*.[122] Like in *Diamond*, intervenor-defendants sought to appeal a circuit court decision.[123] However, unlike in *Diamond*, the original named defendant, the FEC, also appealed.[124] This proved dispositive to the Court's standing inquiry: "[T]he Federal Election Commission (FEC) has standing, and therefore we need not address the standing of the intervenor-defendants, whose position here is identical to the FEC's."[125] Although it did not directly address the question of whether intervenors of right need standing to intervene as a preliminary matter, the Court's invocation of *Bowsher v. Synar*[126] insinuates that the Court has dispensed of the notion that standing might be required for intervenors asserting the same claims and requesting the same relief.[127] However, although the Court appeared to treat intervenors as similarly exempt from standing requirements as coparties,[128] the presence of the intervening party was not the issue at dispute, only the appealability.[129]

Consequently, *McConnell* only stands for the proposition that intervenors do not need to demonstrate standing when appealing a decision with another party who has already demonstrated standing.

C. The Circuit Courts' Categorical Approach

While some circuit courts have extended the Supreme Court's reasoning in *Diamond* to preclude parties without Article III standing from intervening,[130] most have taken the apparent *McConnell* approach and treated the Rule 24(a)(2) requirements as the only barrier to intervention.[131]

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120. *See supra* note 92 and accompanying text.

121. *See Diamond*, 476 U.S. at 64–68; *see also supra* notes 90–92 and accompanying text.

122. *See* McConnell v. FEC, 540 U.S. 93 (2003).

123. *See id.*

124. *See id.* at 233.

125. *Id.*

126. 478 U.S. 714 (1986).

127. *See supra* notes 93–95 and accompanying text; *see also* Elizabeth Zwickert Timmermans, *Has the* Bowsher *Doctrine Solved the Debate?: The Relationship Between Standing and Intervention as of Right*, 84 NOTRE DAME L. REV. 1411, 1449 (2009).

128. *See supra* notes 70–71 and accompanying text.

129. *See McConnell*, 540 U.S. 93.

130. *See* City of Chicago v. FEMA, 660 F.3d 980, 984–85 (7th Cir. 2011); United States v. Metro. St. Louis Sewer Dist., 569 F.3d 829, 833–34 (8th Cir. 2009); United States v. Philip Morris USA Inc., 566 F.3d 1095, 1145–46 (D.C. Cir. 2009).

131. *See* Laroe Estates, Inc. v. Town of Chester, 828 F.3d 60, 64 (2d Cir. 2016), *cert. granted*, 137 S. Ct. 810 (2017); King v. Governor of New Jersey, 767 F.3d 216, 245–46 (3d Cir. 2014); Perry v. Schwarzenegger, 630 F.3d 898, 905–06 (9th Cir. 2011); City of

The Second and Seventh Circuits exemplify these two approaches.[132] While the Seventh Circuit requires standing to intervene,[133] the Second Circuit has held as recently as July 2016 that intervenors do not require Article III standing.[134] To compare these two methodologies, Part II.A.1 examines the Seventh Circuit's categorical standing requirement for intervenors of right and Part II.A.2 discusses the Second Circuit's more lax approach.

1. The Seventh Circuit Approach

In *City of Chicago v. FEMA*,[135] the Seventh Circuit held that "no case can be maintained in a federal court by a party who lacks Article III standing."[136] The court further noted that Article III standing is insufficient to establish a Rule 24(a)(2) interest and vice versa.[137] The court justified this stance with efficiency concerns[138] and noted that "[t]he cases that dispense with the requirement overlook the fact that even if a case is securely within federal jurisdiction by virtue of the stakes of the existing parties, an intervenor may be seeking relief different from that sought by any of the original parties."[139] Nevertheless, the Seventh Circuit did not address why a standing inquiry is still appropriate where the claims and relief requested are substantially the same. Although the court noted that other "limiting principles"[140] were necessary to ascertain the scope of intervention, it failed to delineate these principles, finding them inapplicable to the case at hand to the extent they existed.[141]

2. The Second Circuit Approach

In its most recent decision on intervenor standing, *Laroe Estates, Inc. v. Town of Chester*,[142] the Second Circuit held that standing is not a requirement for intervention.[143] Laroe Estates sought to intervene pursuant to Rule 24 in a takings case under the theory that it held equitable title in the property subject to the original takings case.[144] Laroe Estates's

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Herriman v. Bell, 590 F.3d 1176, 1183–84 (10th Cir. 2010); Dillard v. Chilton Cty. Comm'n, 495 F.3d 1324, 1336–37 (11th Cir. 2007); United States v. Tennessee, 260 F.3d 587, 595 (6th Cir. 2001); Ruiz v. Estelle, 161 F.3d 814, 829–30 (5th Cir. 1998).

132. *See, e.g.*, *Laroe Estates*, 828 F.3d 60; *City of Chicago*, 660 F.3d 980.

133. *See City of Chicago*, 660 F.3d 980.

134. *See Laroe Estates*, 828 F.3d 60.

135. 660 F.3d 980 (7th Cir. 2011).

136. *Id.* at 985.

137. *See id.* at 984–85.

138. *See id.* at 985 ("[S]o little is required for Article III standing that if no more were required for intervention as a matter of right, intervention would be too easy and clutter too many lawsuits with too many parties.").

139. *Id.*

140. *Id.*

141. *See id.*

142. 828 F.3d 60 (2d Cir. 2016), *cert. granted*, 137 S. Ct. 810 (2017).

143. *See id.* at 64.

144. *See* Sherman v. Town of Chester, No. 12 Civ. 647(ER), 2015 WL 1473430, at *15 (S.D.N.Y. Mar. 13, 2015).

proposed complaint asserted only that it was entitled to relief for the taking of its real property.[145]

The Southern District of New York denied Laroe Estates's motion, holding that because only an owner of property may assert a takings claim, a claim of equitable title failed to establish the necessary legal relationship between Laroe Estates and the Town of Chester and thus did not confer the standing required to intervene in the takings claim.[146]

The Second Circuit rejected the district court's reasoning, holding that "'there [is] no need to impose the standing requirement upon [a] proposed intervenor' where '[t]he existence of a case or controversy [has] been established' in the underlying litigation."[147] The court went on to conclude that a party seeking to intervene will survive a motion to dismiss for failure to state a claim so long as it does not assert any further grounds for relief.[148] However, the court failed to address the effect such a request for further or different relief would have on the standing requirement.[149]

III. IF YOU DON'T STAND FOR SOMETHING, YOU'LL FALL FOR ANYTHING

A categorical rule requiring standing does not adequately address the practical and jurisdictional intervention problems. To highlight the insufficiency of such an approach, Part III.A discusses why neither the intervention nor the standing inquiries are suited to address jurisdictional and procedural requirements, Part III.B underlines the problems with applying an unconditional standard, and Part III.C concludes that an intervenor's standing is relevant only in specific circumstances because a standing analysis is necessary only when the Case or Controversy Clause is implicated.

A. Neither the Intervention nor the Standing Inquiry Can Subsume the Other

Even though much of the initial confusion regarding the relationship between standing and intervention of right stems from the varied interpretations of the interest requirement,[150] the focus on the relationship between the standing inquiry and the intervention inquiry is a red herring. Whereas the interest requirement of the intervention inquiry examines the merits, a standing analysis examines "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[151] These two analyses are inherently different because they

145. *See* Proposed Complaint at 16, *Sherman*, 2015 WL 1473430 (No. 12 Civ. 647(ER)).
146. *Sherman*, 2015 WL 1473430, at *15–16.
147. *Laroe Estates*, 828 F.3d at 64 (quoting U.S. Postal Serv. v. Brennan, 579 F.2d 188, 190 (2d Cir. 1978)).
148. *Id.* at 66 (citing Trbovich v. United Mine Workers, 404 U.S. 528 (1972)).
149. *Id.*
150. *See supra* Part I.A.2.
151. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

examine different factors—overlap in the nuclei of facts and law should not be confused with similarity between the standards.

Although a more consistent interest standard should be adopted for the sake of uniformity and procedural efficiency, the interest standard actually has no bearing on the question of whether standing is required. Regardless of whether Article III standing is required to intervene, the lack of a uniform interest requirement will still produce erratic results among the circuits.[152]

B. The Functional Problems with a Categorical Approach

Neither categorically requiring nor disposing of the standing requirement adequately addresses these important distinctions. Part III.B.1 emphasizes why always requiring intervenors to independently satisfy the Article III standing requirements is an undesirable solution, and Part III.B.2 explains why never requiring standing goes beyond federal courts' Article III powers.

1. Why Stand When You Can Sit?

Requiring Article III standing for all intervenors of right presents substantial practical and legal difficulties. Part II.C.1.a considers why this approach is unnecessarily underinclusive, and Part II.C.1.b deals with the conflict between requiring Article III standing and the purpose of Rule 24.

a. Requiring Standing for Rule 24(a)(2) Intervention Is Underinclusive

Requiring Article III standing for all intervenors would exclude many individuals from the litigation process without advancing the standing requirement's goals.[153] For example, many circuits have more lax standards for intervenors in public law disputes.[154] Requiring standing for all intervenors would often exclude public interest intervenors from representing their interests in a suit, especially where they are the beneficiary of the lax standard.[155]

Standing is also underinclusive in terms of judicial efficiency concerns, particularly regarding intervenors who have an interest that is contingent upon the outcome of the suit.[156] If standing were required, such would-be intervenors would neither be bound by the suit nor allowed to participate in it.[157] Thus, they would end up with their interest unrepresented or the court would have another suit to entertain.

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152. *See supra* Part I.A.2.
153. *See supra* Parts I.B.1, II.C.1.
154. *See supra* Part I.C.2.
155. *See supra* Part I.C.2.
156. *See supra* Part I.B.1.b.
157. *See supra* Part I.A.1; *see also* Martin v. Wilks, 490 U.S. 755, 756 (1989) ("Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method

Categorically requiring standing also fails to serve Article III's jurisdictional baseline.[158] Where one party has standing to assert claims in a federal court, the court does not risk infringing on the other branches where the intervention does not widen the scope of issues presented.[159]

Finally, always requiring standing does not advance the standing requirement's issue presentation function.[160] Similar to the jurisdictional baseline, a party with standing should be capable of adequately presenting the issues.[161] As long as the intervenor's claims and requested relief are identical to the original party's, there is no risk of prejudicing other parties not in the suit by allowing an ill-equipped representative to litigate these claims.[162]

b. Requiring Standing for Rule 24(a)(2) Intervenors Unnecessarily Limits the Function of Rule 24

One of the important functions of the intervention device is to allow a party who has an interest that is contingent upon the outcome of the suit to protect that interest.[163] Such interests will often fail to meet the standing injury-in-fact requirement per se because their occurrence is uncertain.[164]

Applying the injury-in-fact standard would greatly limit the role that Rule 24(a)(2) plays in public law litigation.[165] A lax interest requirement is desirable from a public interest perspective because of its importance in protecting third parties from adverse judgments without having to relitigate.[166]

If standing were always required to intervene, either the court-made interest rules regarding public and private law litigation would be effectively overruled, or anomalous standing exceptions of questionable constitutionality would need to be created. Especially with the continual narrowing of standing requirements over the decades since the last substantial Rule 24 amendment,[167] imposing a standing requirement would greatly limit its function relative to when it was last amended fifty years ago.[168]

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by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.").

158. *See supra* Part I.B.1.a.

159. *See supra* Part I.B.1.a.

160. *See supra* notes 69–71 and accompanying text.

161. *See supra* note 93 and accompanying text.

162. *See supra* note 71 and accompanying text.

163. *See supra* note 25 and accompanying text.

164. *See supra* notes 75–83 and accompanying text.

165. *See supra* Part I.C.2.

166. *See supra* notes 100, 106–07 and accompanying text; *see also, e.g.*, Martin v. Wilks, 490 U.S. 755 (1989).

167. *See supra* Part I.B.2.

168. *See supra* notes 21–26 and accompanying text.

2. Not Requiring Standing Is Overinclusive

Categorically permitting intervention based on an interest opens the courthouse doors to too many would-be intervenors. Allowing all intervenors to make new claims and direct the course of the litigation, regardless of their constitutional standing to assert such claims, would put an unfair burden on the original party. An intervenor should be able to piggyback on the justiciability of the original dispute where her intervention falls within that dispute. An intervenor should not be able to piggyback on the original party's standing to assert claims that it could not otherwise bring before a federal court on its own. Intervening parties seeking different or further relief present a separate issue than those protecting an interest. To account for this difference, federal courts should employ a standing analysis when they are faced with a new, discrete case or controversy that flows from the original dispute but does not fall within the court's jurisdiction.

C. A Standing Analysis Is Only Necessary Where the Court Is Faced with a Distinct Case or Controversy

Given the undesirable effects of a categorical approach, a bifurcated test is a better approach to the issue of whether standing should be analyzed for proposed Rule 24(a)(2) intervenors. Under a bifurcated scheme, interest analysis should be employed to see if the proposed intervenor even has a baseline of a protectable interest. Furthermore, courts should assess whether a protectable interest constitutes a new case or controversy under Article III. Standing should not be required where an intervenor simply intervenes to protect an interest. Having a lax interest requirement, combined with a standing requirement that is only triggered in certain instances, addresses the overinclusive/underinclusive issues and also keeps the process straightforward by eliminating the need to draw further distinctions between intervenors for the standing question.[169] These case-or-controversy triggers are finite and easily identified. Accordingly, Part III.C.1 argues that intervention itself does not implicate justiciability concerns, Part III.C.2 discusses case-or-controversy triggers where the party with standing is no longer part of the suit, and Part III.C.3 discusses other intervenor actions that can trigger a standing analysis.

1. Intervention Itself Does Not Require an Independent Jurisdictional Analysis

Based on the Supreme Court's jurisprudence, it is clear that the intervention device itself does not create a new case or controversy.[170] If coparties asserting the same claims and requesting the same relief are not each required to demonstrate standing,[171] intervening parties should not be

169. *See supra* Part I.C.
170. *See supra* notes 93–95, 126–29 and accompanying text.
171. *See* Bowsher v. Synar, 478 U.S. 714, 721 (1986).

required to show independent grounds for Article III jurisdiction, because coparties' and intervenors' positions are analogous. When an intervenor makes the same claims and requests the same relief, she should not have to show standing.[172]

2. Intervenors Must Demonstrate Standing When They Seek to Continue a Suit Without the Original Party's Participation

Where the original party that has shown standing is no longer part of the suit because it has declined to appeal, settled, or withdrawn its claims in another manner, a standing analysis is proper for the remaining party. *Diamond* and *McConnell* establish that this inquiry is necessary in the appellate context.[173] Accordingly, disputes that lose the only party with standing likewise lose justiciability until another party can meet Article III's standards.[174]

3. Discrete Claims or Requests for Separate Relief May Trigger a Standing Analysis

If at any point during the litigation an intervenor amends her complaint to assert different claims or request different or further relief, a standing analysis is appropriate. Such an amendment represents a distinct case or controversy and is therefore subject to constitutional limits on federal jurisdiction.[175] Confusion surrounds this doctrine because circuit courts that require standing allow Rule 24(a)(2) movants to intervene on equal footing with the original parties, whereas circuits that have a more permissive view of intervention have less clearly defined intervenor roles.[176] The better view is that an intervenor should have equal footing only within the confines of the established case or controversy.[177]

Such an approach is proper because federal courts are required to dismiss for lack of subject matter jurisdiction whenever the lack of jurisdiction becomes apparent.[178] Thus, a standing analysis should follow whenever an intervening party amends its pleading to assert new or amended claims even if that party originally intervened asserting the same claims as the original party and the court, properly, did not analyze standing.

Although some authorities recognize supplemental jurisdiction as a justification for allowing intervenors to assert counterclaims,[179] jurisdiction

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172. *See supra* Part III.B.1.
173. *See supra* Part II.A–B.
174. *See supra* Part II.A–B.
175. *See supra* Part I.B.
176. *See supra* Part I.A.3.
177. *See, e.g.*, Gonzales v. North Township, 4 F.3d 1412, 1416 (7th Cir. 1993) ("Although one plaintiff with standing is all that is required to vest the court with jurisdiction, we must consider the other, dismissed, plaintiffs' claims that they have standing. If they do have standing, their presence in the lawsuit may affect issues of damages or equitable relief.").
178. *See supra* note 92.
179. *See* 7C WRIGHT, MILLER & KANE, *supra* note 16, § 1921, at 617–18; Timmermans, *supra* note 127, at 1449.

over such claims is *not* proper because Congress has not created statutory authority to do so and actually does not have the power to under *Lujan*.[180] This interpretation is supported by the Supreme Court in *DaimlerChrysler Corp. v. Cuno*[181]:

> What we have never done is apply [the supplemental jurisdiction] rationale of *Gibbs* to permit a federal court to exercise supplemental jurisdiction over a claim that does not itself satisfy those elements of the Article III inquiry, such as constitutional standing, that "serv[e] to identify those disputes which are appropriately resolved through the judicial process."[182]

Thus, parties seeking to assert independent counterclaims, requesting further relief, or asserting different claims should have to independently demonstrate standing. Those advancing different theories for achieving the same goals as the original parties should not.

CONCLUSION

Although courts and scholars put great emphasis on defining the relationship between the Case or Controversy Clause and Rule 24(a)(2), this emphasis is futile. Intervention requirements are triggered where a proposed party makes a motion to intervene. The standing inquiry is relevant where a new case or controversy is created. Although the two doctrines may be implicated where a proposed intervenor asserts different or further relief, they are, and should remain, separate.

Ultimately, construing intervention as a distinct case or controversy has no basis in constitutional limits or Supreme Court jurisprudence. A standing analysis is necessary for an intervenor where the party whose standing she has piggybacked on is no longer part of the suit or where claims she asserts—asserting different claims or requesting different relief—go beyond the case or controversy on which she has piggybacked. This approach allows an expanded group of individuals to enter a suit to protect their rights without running afoul of Article III's requirements or compromising judicial effectiveness and efficiency.

180. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

181. 547 U.S. 332 (2006).

182. *Id.* at 351–52 (second alteration in original) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).