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The Timeliness Threat to Intervention of Right

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It is widely recognized that litigation can adversely affect the interests of parties not involved in a particular dispute.[1] Concerned with this problem, federal courts long have sought to mitigate the possibly unfair impact of their processes through the doctrine of intervention.[2] The courts cannot allow all affected nonparties to participate, however, because expanding the size of the litigation will often prejudice the parties already before the court and interfere with the efficient conduct of court proceedings. The compromise adopted by the federal courts has been to evolve a set of conditions which, when met, establish a nonparty's right to intervene.[3] One of these conditions is that the application for intervention must be timely.

This Note argues that federal trial courts presently enjoy undue discretion in determining whether a nonparty's application for intervention of right is timely. This excessive discretion produces two unfortunate results. First, the discretion virtually collapses the concept of a right to intervene into the category of permissive intervention,[4] even

1. *See, e.g.*, Preston v. Thompson, 589 F.2d 300 (7th Cir. 1978) (preliminary injunction granted prisoners against prison administration may affect interest of prison guards in security); Sohappy v. Smith, 529 F.2d 570 (9th Cir. 1976) (court allocation of fishing rights between States and Indians may affect interests of non-Indian commercial fishermen).

2. *See, e.g.*, Gumbel v. Pitkin, 113 U.S. 545 (1885) (approving of intervention by nonparty who claimed priority of lien on goods in custody of court); Freeman v. Howe, 65 U.S. 450 (1860) (recognizing principle that in proceeding *in rem* any person claiming interest in property paramount to that of libellant may intervene to protect his interest; similar principle in proceedings by attachment in court of common law). Intervention is the procedural device enabling a nonparty to present a claim or defense in a pending action and become a party for the purpose of the claim or defense presented. Moore & Levi, *Federal Intervention: I. The Right to Intervene and Reorganization*, 45 YALE L.J. 565, 565 (1936).

3. The original Federal Rule of Civil Procedure 24(a) was intended to codify the general doctrines of intervention as they existed in 1938 and was not regarded as a comprehensive inventory of the allowable instances for intervention. Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 505-06, 508 (1941); 3B MOORE'S FEDERAL PRACTICE ¶ 24.07[2], at 24-154 (2d ed. 1979); Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1231 & n.111 (1966). Some undetermined expansion of the doctrine was envisioned by the authors of the Rule. Advisory Note to original Rule 24, 28 U.S.C. app. FED. R. CIV. P. 24, at 432 (1976).

4. FED. R. CIV. P. 24 distinguishes a right to intervene from permissive intervention; it reads:

> *(a) Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability

though the latter is oriented toward different goals, is more vague, and is less reviewable.[5] This collapse undermines any meaningful right to intervene. Second, principled evolution of the criteria defining a right to intervene is frustrated. Together these consequences mark a retreat in judicial concern for fairness to adversely affected nonparties. These consequences may be avoided, this Note argues, if Rule 24(a)(2) of the Federal Rules of Civil Procedure is restructured using the device of serial ordering.

I. The Right to Intervene

The desire of federal courts to minimize the injustice their processes work on nonparties motivated them early to originate and develop a right to intervene.[6] This desire led the drafters of the Federal Rules of Civil Procedure to distinguish between intervention of right and permissive intervention.[7] Intervention of right served the policy of minimizing injustice to nonparties.[8] Third parties had a right to intervene

to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

5. Intervention of right is a procedural device primarily designed to minimize judicially caused harm to nonparties, *see* pp. 587-88 *infra*, and an application for intervention of right seems to pose only a question of law, 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 466 (1972). An applicant possessing a right to intervene need not show an independent ground of federal jurisdiction, 3B MOORE'S FEDERAL PRACTICE, *supra* note 3, ¶ 24.07[1], at 24-153, and an appeal will more automatically lie from an order refusing intervention of right, *id.* Permissive intervention, on the other hand, is designed to promote court efficiency, *see* pp. 587-88 *infra*, and it is "discretionary by definition," Hodgson v. UMW, 473 F.2d 118, 125 n.36 (D.C. Cir. 1972). It requires an independent jurisdictional ground, Clanton v. Orleans Parish School Bd., 72 F.R.D. 164, 169-70 (E.D. La. 1976), and an appeal will less automatically lie from a denial of permissive intervention, 3B MOORE'S FEDERAL PRACTICE, *supra* note 3, ¶ 24.07[1], at 24-153.

6. *See* Eliot, *Interventions in the Federal Courts*, 31 AM. L. REV. 377, 377, 380, 392 (1897) (early practice of intervention). Commentators explained early intervention practice by the principle that no court should permit its judgment, decree, or process to work injustice. *Id.* at 378; Moore & Levi, *supra* note 2, at 573.

7. *See* Levi & Moore, *Federal Intervention: II. The Procedure, Status, and Federal Jurisdictional Requirements*, 47 YALE L.J. 898, 899-900 (1938). This Note will avoid the older terminology of Levi and Moore distinguishing an "absolute right to intervene" from a "discretionary right to intervene." Instead it will denote the two categories of intervention delineated in Rule 24 by the presently more common terms, "intervention of right" and "permissive intervention."

8. Levi & Moore, *supra* note 7, at 902-03; Moore & Levi, *supra* note 2, at 581, 607; *see* Hodgson v. UMW, 473 F.2d 118, 130 (D.C. Cir. 1972) (Rule 24 right to intervene implements basic jurisprudential assumption that interest of justice best served when all parties with real stake in controversy afforded opportunity to be heard).

when a judgment might either bind them personally, even though they were inadequately represented, or dispose of property in which they had an interest.[9] By contrast, permissive intervention under the Rules was a device aimed at promoting court convenience and efficiency,[10] predicated on a desire to avoid a multiplicity of actions where possible.[11] Although in particular cases these two goals may coincide, they are conceptually distinct.[12] The courts have not followed the suggestion that the distinction between intervention of right and permissive intervention be eliminated,[13] and indeed have continued to develop a strong concept of intervention of right quite distinct from the device of permissive intervention.[14]

The 1966 Amendments to the Federal Rules, which liberalized the

9. 3B MOORE'S FEDERAL PRACTICE, *supra* note 3, ¶ 24.01[1.-1], at 24-12.

10. Moore & Levi, *supra* note 2, at 581, 607.

11. 3B MOORE'S FEDERAL PRACTICE, *supra* note 3, ¶ 24.10[1], at 24-351 to 24-352 (permissive intervention akin to permissive joinder, class suit, and consolidation in efficiency orientation).

12. The primary purpose of intervention of right to secure justice to nonparties, in contrast to the efficiency purpose of permissive intervention, is illustrated by the fact that there are cases in which the applicant possesses a right to intervene yet cannot sue independently if intervention is denied. Subsequent suit may be barred because the applicant lacks either standing or a right of action, as when the intervenor seeks to participate to influence the framing of an equitable remedy. *See, e.g.*, Preston v. Thompson, 589 F.2d 300 (7th Cir. 1978) (denying intervention to prison guards who wished to influence preliminary injunctive relief to prisoners). In such cases, allowing intervention cannot serve efficiency, and to some extent must sacrifice it, because the would-be intervenor is seldom in a position to bring suit later if intervention is denied. There is thus little possibility of multiple suits if intervention is denied. This central fact indicating the basic orientation of intervention of right has sometimes been overlooked. *See* Brunet, *A Study in the Allocation of Scarce Judicial Resources*, 12 GA. L. REV. 701, 734 (1978) (stating that any intervention petition meeting interest and impairment requirements of 24(a)(2) is likely to promote efficiency by avoiding multiple trials). Despite the primary concern of intervention of right with justice to nonparties, Rule 24(a)(2) may nevertheless produce some efficiencies. For example, the representation and impaired interest requirements promote efficiency by reducing duplication of informational input and by helping to ensure adversarial incentive. *Id.* at 720-46. For a discussion of efficiency concerns in the 1966 Amendments to the Rule, see pp. 590-91 *infra*.

13. Kennedy, *Let's All Join In: Intervention under Federal Rule 24*, 57 KY. L.J. 329, 375-78 (1969) (Rule 24 should relegate all intervention to discretion of trial judge and should elaborate factors to be weighed in making the decision).

14. The courts have reasserted the traditional rationale for establishing a right to intervene, that justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard, Hodgson v. UMW, 473 F.2d 118, 130 (D.C. Cir. 1972), and have emphasized the distinction between intervention of right and permissive intervention, *see, e.g.*, Alaniz v. Tillie Lewis Foods, 572 F.2d 657, 659 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978) (intervention of right motions should be treated more leniently than permissive intervention motions because serious harm more likely with former). Extensive development of the three conditions that distinguish intervention of right from permissive intervention also testifies to the judicial intention to preserve the former as sui generis. *See* notes 17-19 *infra* (development of interest requirement); note 21 *infra* (development of practical impairment requirement); note 23 *infra* (development of representation requirement).

doctrine of intervention of right, premised possession of the right on four conditions. First, the application for intervention must be timely.[15] Second, the applicant must have an interest in the subject of the action;[16] traditionally this requirement has been met by showing a property or contractual interest,[17] but more generalized "economic interests" are now sufficient[18] and even noneconomic interests may be enough.[19] Third, the applicant must be so situated that disposition of the action may adversely affect his interest;[20] this "practical impair-

15. FED. R. CIV. P. 24(a). The timeliness requirement has been carried through from the original Rule. The Advisory Committee's Note to the 1966 Amendment of Rule 24 makes no mention of the timeliness provision, *see* 28 U.S.C. app. FED. R. CIV. P. 24, at 432-33 (1976), nor did any Advisory Committee Note in the history of the Rule, *see id.* The Rule has never provided guidelines as to the meaning of timeliness. *See* Black v. Central Motor Lines, Inc., 500 F.2d 407, 408 (4th Cir. 1974) (because Rule 24 silent on what constitutes timeliness, question must be answered in each case by discretion of court); Simms v. Andrews, 118 F.2d 803, 805-06 (10th Cir. 1941) (same).

16. FED. R. CIV. P. 24(a)(2). The 1966 Amendment eliminated the former distinction between property and nonproperty cases and substituted the interest requirement. *Compare* original Rule 24(a), 28 U.S.C. § 723c app. (1940), *with* FED. R. CIV. P. 24(a).

17. *See, e.g.*, Penick v. Columbus Educ. Ass'n, 574 F.2d 889, 890 (6th Cir. 1978) (employment contracts of teachers provide requisite interest in school desegregation suit).

18. Prior to the 1966 Amendment, a very narrow concept of interest was often employed. *See, e.g.*, Kelley v. Summers, 210 F.2d 665, 673 (10th Cir. 1954) (intervention of right requires interest of such nature that applicant will gain or lose by direct legal operation of the judgment); Gross v. Missouri & A. Ry., 74 F. Supp. 242, 249 (W.D. Ark. 1947) (intervention of right requires that interest in property be known and protected by law, sufficient to be denominated a lien, legal or equitable). Since the 1966 Amendment, property interests not secured by contract have been held to meet the interest requirement. *See, e.g.*, Fleming v. Citizens for Albemarle, Inc., 577 F.2d 236, 238 (4th Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979) (finding requisite interest when property owners feared that planned community would endanger purity and potability of reservoir water); Planned Parenthood of Minn., Inc. v. Citizens for Community Action, 558 F.2d 861, 869 (8th Cir. 1977) (finding requisite interest when applicants sought to defend city moratorium on construction of abortion clinics out of fear clinics would have adverse effect on property values).

19. Parents have an interest in a desegregated school system, for example, that can support a right to intervene. Liddell v. Caldwell, 546 F.2d 768, 770 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977) (all parents and students, whether minority or not, have interest in desegregated school system that justifies intervention in desegregation suit); Johnson v. San Francisco Unified School Dist., 500 F.2d 349, 352-53 (9th Cir. 1974) (parents of students of Chinese ancestry had right to intervene in school desegregation suit brought by black plaintiffs). The interest of parents merely in the education of their children may in certain circumstances support a right to intervene. *See* Smuck v. Hobson, 408 F.2d 175, 179-80 (D.C. Cir. 1969) (parents had requisite interest to intervene to appeal decree they thought curtailed defendant school board's discretion over educational policy). For a survey of the types of interest that may be sufficient to ground a right to intervene, see Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 729-40 (1968).

20. FED. R. CIV. P. 24(a)(2). The Amendment relaxed the requirement of the pre-1966 Rule that, to intervene as of right, an unrepresented applicant must show he is or may be bound by the judgment. Advisory Committee's Note to amended Rule 24, 28 U.S.C. app. FED. R. CIV. P. 24, at 433 (1976); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 401-03 (1967).

ment" can be established in a wide variety of relationships.[21] Fourth, the applicant's interest must be inadequately represented by existing parties.[22] Courts have tended to find representation inadequate in an increasing number of situations.[23] In keeping with the general emphasis of the 1966 Amendments on flexibility over formalism,[24] amended Rule 24(a) abandoned several arbitrary constraints on the requirements of "impairment" and "inadequate representation."[25] The amended Rule thus prepared a foundation for further judicial expansion of the right to intervene.

Although the Amendment expanded the types of situation that could trigger the intervention right, the authors of the amended Rule recognized that expanded intervention could obstruct orderly court procedure. The Advisory Committee attempted to limit the impact of the new Rule on court procedures by relying upon the old distinction

21. Practical impairment may result from a variety of litigation outcomes, including the stare decisis effect of a judgment, *see, e.g.*, Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 578 F.2d 1341, 1345 (10th Cir. 1978), an adverse economic effect, *see, e.g.*, Fleming v. Citizens for Albemarle, Inc., 577 F.2d 236, 238 (4th Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979) (finding impairment when property owners feared planned community would endanger purity and potability of reservoir water), or the possibility of conflicting injunctions, *see, e.g.*, Stallworth v. Monsanto Co., 558 F.2d 257, 268 (5th Cir. 1977) (finding impairment when, if applicants' contentions found meritorious in separate proceeding, they would be unable to secure effective relief without injunction conflicting with consent order in present case). Practical impairment may even result when the remedy would divert an undue share of the resources of a government agency. *See* Adams v. Mathews, 536 F.2d 417, 418 (D.C. Cir. 1976) (plaintiffs in suit against HEW to obtain enforcement of one statute had right to intervene in another suit against HEW in which plaintiffs sought enforcement of another statute).

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

23. This expansion can be seen clearly from the cases in which the government is representing private interests. Although some courts have presumed that governmental representation is adequate when the representative is charged by law with representing the interests of the nonparty, *see, e.g.*, Pennsylvania v. Rizzo, 530 F.2d 501, 505 (3d Cir.), *cert. denied*, 426 U.S. 921 (1976), an increasing number of courts presume that the representative of the public interest is an inadequate representative of special interests, even of those special interests the government intends to protect, *see, e.g.*, National Farm Lines v. ICC, 564 F.2d 381, 384 (10th Cir. 1977) (labeling government agency task of protecting not only public interest but also private interest of petitioners in intervention "impossible"). This is particularly true when damages are sought only by the applicant. SEC v. Everest Management Corp., 475 F.2d 1236, 1239 (2d Cir. 1972). The fact that the applicant's case may be heard and accommodated by a party, without the direct involvement of the court, may provide an additional reason for holding that representation is adequate. *See* Penick v. Columbus Educ. Ass'n, 574 F.2d 889, 890 (6th Cir. 1978).

24. *See* Cohn, *supra* note 3, at 1229.

25. *See id.* at 1232. Cohn notes, for example, that a preliminary draft permitted intervention only if pending litigation may "as a practical matter *substantially* impair or impede" the applicant's protection of his interest. *Id.* The word "substantially" was deleted in the final draft, apparently for fear that its inclusion would lead courts to deny intervention in meritorious cases. *Id.* Similarly, representation is not to be confined to "formal representation"; the court should also consider whether an existing party provides "practical representation" of an applicant's interest. Advisory Committee's Note to amended Rule 24, 28 U.S.C. app. FED. R. CIV. P. 24, at 433 (1976).

between the right to intervene and the mode of intervention,[26] and suggested that the difficulty of integrating intervention of right with ongoing proceedings might be overcome by limiting the character or mode of intervention.[27] Despite this suggestion, however, commentators have feared that the impact on court efficiency might be significant.[28]

Throughout the history of the intervention doctrine, the traditional raison d'être of intervention of right—minimizing the injury to third parties caused by judicial processes—has conflicted with court concern about prejudice to existing parties and impairment of orderly judicial processes. This central conflict has heightened steadily as the right to intervene has been liberalized[29] and the extent of public law litigation has grown.[30] The conflict has become localized in the requirement

26. Moore & Levi, *supra* note 2, speak of the right to intervene and the rights of the intervenor to distinguish between when intervention is allowable and what the intervenor can do after he has intervened. *Id.* at 580. This distinction was apparently referred to in the Advisory Committee's Note to amended Rule 24, 28 U.S.C. app. FED. R. CIV. P. 24, at 433 (1976): "An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." *Id.* at 433. Although the Advisory Committee's use of the phrase "an intervention of right" is ambiguous as between the right to intervene at all and the mode or degree of intervention, apparently the latter was meant. *See* Kaplan, *supra* note 20, at 403 n.178 (Advisory Committee's Note suggests that character of intervention itself may be shaped to circumstances); Shapiro, *supra* note 19, at 752 (Advisory Committee's Note provokes question of what conditions on intervenor of right are appropriate).

27. For a discussion of possible limitations on the mode of intervention, see Shapiro, *supra* note 19, at 752-56. For example, one entitled to become a party for a given purpose or on a given issue does not necessarily become a party for every purpose or on every issue. *Id.* at 754-55. Tailoring intervention to minimize the impact on orderly court procedure has long been a concern. *See* Eliot, *supra* note 6, at 389-90 (describing nineteenth century procedures for disposing of actions while providing for subsequent adjudication of rights of intervenors).

28. *See* Brunet, *supra* note 12, at 741-46; Shapiro, *supra* note 19, at 757-59.

29. *See* pp. 588-90 *supra*. This liberalization has complemented the general advantages of intervening. One such advantage, for example, is that if the applicant has a right to intervene, he does not need an independent ground of federal jurisdiction. 3B MOORE'S FEDERAL PRACTICE, *supra* note 3, ¶ 24.07[1], at 24-153; F. JAMES & G. HAZARD, CIVIL PROCEDURE § 10.19, at 515 (2d ed. 1977). By contrast, one seeking permissive intervention must establish independent grounds for federal jurisdiction. Clanton v. Orleans Parish School Bd., 72 F.R.D. 164, 169-70 (E.D. La. 1976). Moreover, the applicant for intervention as of right does not need the standing required to initiate the suit. United States Postal Serv. v. Brennan, 579 F.2d 188, 190 (2d Cir. 1978).

An intervenor, whether of right or merely by permission, may also enjoy more control over the proceedings than he would as an amicus curiae. *See* Nuesse v. Camp, 385 F.2d 694, 704 n.10 (D.C. Cir. 1967) (noting reasons why amicus curiae status inadequate substitute for participation as party).

30. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281-84 (1976) (new model of civil litigation emerging). The demand by third parties for intervention in the expanding area of public law litigation has placed still further pressure on the courts to develop the doctrine of intervention of right. In public law litigation the party structure is "sprawling and amorphous" and "the effects of the litigation [are] not really confined to the persons at either end of the right-remedy axis." *Id.*

of Rule 24(a)(2) that a party's application for intervention of right must be timely.[31]

II. The Obfuscations of Timeliness

Although trial courts apply many procedural rules at their discretion without significant appellate review,[32] appellate courts have closely scrutinized trial court rulings under the interest, impairment, and representation conditions of Rule 24(a)(2).[33] The timeliness requirement, however, continues to confer on the trial court a great deal of discretion. Because the timeliness rule is unnecessarily discretionary, it creates the potential for injustice and threatens to erode the right to intervene.

at 1284, 1289. Complex structural relief makes impact on nonparties more likely. *See id.* at 1292-94; Yeazell, *Intervention and the Idea of Litigation*, 25 U.C.L.A. L. REV. 244, 256-57 (1977). In addition, the litigation is often extremely protracted, "with a continuous and intricate interplay between factual and legal elements," Chayes, *supra* at 1298, and court involvement in such litigation extends far beyond the initial judgment, as the judge adopts the role of policy planner and manager, *id.* at 1298-1302.

31. The timeliness requirement has always been a likely rubric under which to balance the interests of applicants, parties, and court. *See* Note, *The Requirement of Timeliness Under Rule 24 of the Federal Rules of Civil Procedure*, 37 VA. L. REV. 863, 867 (1951) (timeliness requirement an elemental form of laches or estoppel, designed to protect original parties from prejudice due to intervenor's failure to apply sooner).

32. *E.g.*, American Employers' Ins. Co. v. King Resources Co., 545 F.2d 1265, 1269 (10th Cir. 1976) (denial of motion to consolidate discretionary and will not be reversed absent clear error or exigent circumstances); Garber v. Randell, 477 F.2d 711, 714 (2d Cir. 1973) (denial of motion for severance not usually set aside without clear showing of abuse of discretion).

The standard of review for an abuse of discretion is extremely weak. *See* Premium Serv. Corp. v. Sperry & Hutchinson Co., 511 F.2d 225, 229 (9th Cir. 1975) (trial judge abuses discretion only when decision based on erroneous conclusion of law or when record contains no evidence on which decision rationally could have been based); Beshear v. Weinzapfel, 474 F.2d 127, 134 (7th Cir. 1973) (discretion abused only when no reasonable person would accept view adopted by trial court; no abuse of discretion if reasonable persons could differ on propriety of trial court action).

33. For example, some circuit courts have established clear standards that trial courts must follow in determining whether majority-race parents and teachers have the requisite interest to intervene in school desegregation cases. *See* note 19 *supra*. Appellate courts have also defined when practical impairment results. *See* note 21 *supra*. Similarly, trial court discretion on representation rulings has been restrained by the Supreme Court's holding that the burden of proving the inadequacy of representation is "minimal." Trbovich v. UMW, 404 U.S. 528, 538 n.10 (1972); *see* Hodgson v. UMW, 473 F.2d 118, 130 (D.C. Cir. 1972) (applicants need only show that representation *may* be inadequate). Under the scrutiny of the appellate courts, specific tests for when representation is inadequate have begun to emerge. *E.g.*, Planned Parenthood of Minn., Inc. v. Citizens for Community Action, 558 F.2d 861, 870 (8th Cir. 1977) (representation inadequate when interests merely disparate, not adverse); Smuck v. Hobson, 408 F.2d 175, 181 (D.C. Cir. 1969) (representation inadequate when interests do not coincide).

A. *The Rule of* NAACP v. New York

Prior to 1973, appellate courts had established the practice of deferring to trial court rulings on timeliness.[34] That year, however, the Supreme Court explicitly mandated a deferential approach in *NAACP v. New York*,[35] a case involving review of a district court order denying the NAACP's motion to intervene either of right or permissively. The Court held that timeliness is the first condition that must be satisfied in order to intervene.[36] If on review the lower court's order denying intervention is upheld on the basis of timeliness, there is no need for the reviewing court even to consider whether the applicant has the requisite interest, whether the interest is impaired, or whether the applicant is in any way represented.[37] Furthermore, the Court sanctioned use of a very weak standard when reviewing trial court decisions on timeliness: there is to be no reversal unless the trial court abused its discretion.[38]

In discussing determinations of timeliness, the Supreme Court established the general rule that the trial court is to take into account "all the circumstances."[39] The Court probably believed that, in view of the wide variety of factors courts have considered relevant to timeliness,[40]

34. *See, e.g.*, McDonald v. E. J. Lavino Co., 430 F.2d 1065, 1071 (5th Cir. 1970); United States v. Carroll County Bd. of Educ., 427 F.2d 141, 142 (5th Cir. 1970).

35. 413 U.S. 345 (1973).

36. 413 U.S. at 365. This ranking of the timeliness determination has been accepted by lower courts. *See, e.g.*, Nevilles v. EEOC, 511 F.2d 303, 305 (8th Cir. 1975) (timeliness "condition precedent" for right to intervene); Clanton v. Orleans Parish School Bd., 72 F.R.D. 164, 168 (E.D. La. 1976) (timeliness "threshold requirement" for intervention).

37. 413 U.S. at 369.

38. *Id.* at 366; *see* note 32 *supra* (explaining abuse of discretion standard). Without even the benefit of a lower court opinion, the Court surmised, as one factor in its decision to affirm denial of intervention, that the trial court "could reasonably have concluded" that NAACP knew or should have known of the pendency of the original action earlier than NAACP allegedly was first informed of the action. 413 U.S. at 366-67.

39. 413 U.S. at 366.

40. Such factors include:

(1) the amount of time that has elapsed since the suit was initiated, or the stage to which the suit has progressed, *e.g.*, Alaniz v. Tillie Lewis Foods, 572 F.2d 657, 659 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978) (stage of proceeding);

(2) the amount of time during which the applicant knew of the suit, *e.g.*, NAACP v. New York, 413 U.S. 345, 366-67 (1973);

(3) the amount of time during which the applicant knew that his interests were not protected in the suit, *e.g.*, United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 (1977);

(4) the reasons for any delay on the part of the applicant, *e.g.*, NAACP v. New York, 413 U.S. 345, 367-68 (1973);

(5) whether the applicant claims a right to intervene or merely seeks permission to intervene, *e.g.*, EEOC v. United Air Lines, Inc., 515 F.2d 946, 949 (7th Cir. 1975) (intervenor of right far more seriously impaired than permissive intervenor if application denied as untimely);

(6) the interests of the applicant, Romasanta v. United Airlines, Inc., 537 F.2d 915, 918

a flexible and pragmatic standard requires broad discretion below and generous treatment on review. The Court provided examples of factors relevant to a timeliness determination, including factors that are also clearly relevant in deciding whether the interest, impairment, and representation conditions are met.[41]

B. *The Primacy of Timeliness*

By requiring a trial court presented with an application for intervention first to determine whether the application is timely, and by mandating appellate court deference on review, the Supreme Court in *NAACP* entrenched timeliness in a position of primacy.[42] This approach, however, enables a trial court judge to ignore altogether the issues of interest, impairment, and representation—arguably the essential aspects of the applicant's petition—provided the judge rules that

(7th Cir. 1976), *aff'd sub nom.* United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977);

(7) the extent of prejudice to the applicant should intervention be denied, Stallworth v. Monsanto Co., 558 F.2d 257, 265-66 (5th Cir. 1977);

(8) whether the applicant seeks to relitigate issues already decided, Liddell v. Caldwell, 546 F.2d 768, 770 (8th Cir. 1976), *cert. denied,* 433 U.S. 914 (1977);

(9) prejudice to existing parties that would result from the intervention, *e.g.,* NAACP v. New York, 413 U.S. 345, 369 (1973);

(10) prejudice to existing parties resulting from the delay of the applicant in intervening, Stallworth v. Monsanto Co., 558 F.2d 257, 265 (5th Cir. 1977);

(11) the disruption of the orderly processes of the court, *e.g.,* United States v. Allegheny-Ludlum Indus., Inc., 553 F.2d 451, 453 (5th Cir. 1977), *cert. denied,* 435 U.S. 914 (1978);

(12) unusual circumstances warranting intervention, *e.g.,* NAACP v. New York, 413 U.S. 345, 368-69 (1973).

41. At issue in *NAACP* was whether, during the ten years preceding the filing of the suit, voter qualifications prescribed by New York had been used by the counties of New York, Bronx, and Kings for the purpose or with the effect of denying or abridging voting rights on the basis of race. The Court considered relevant to timeliness: that the applicants did not allege personal injuries resulting from the discriminatory use of a literacy test, a matter of the applicants' interest; that the applicants would not be foreclosed from challenging redistricting plans on the grounds of improper racial gerrymandering, a matter of practical impairment of interests; and that the applicants' claim of inadequate representation by the United States was unsubstantiated, a matter of adequacy of representation. *See* 413 U.S. at 368-69.

42. Preston v. Thompson, 589 F.2d 300 (7th Cir. 1978), illustrates the present primacy of timeliness and the adverse consequences of this primacy on the right to intervene. Prisoners incarcerated at Pontiac prison brought an action for injunctive relief from the control measures instituted by prison authorities following a prison riot. The prison guards' union moved to intervene, apparently to express concern over security at the prison as a consequence of the court's preliminary injunction. *See id.* at 306 (Pell, J., dissenting in part and concurring in part). In affirming the lower court's denial of intervention, the appellate court merely noted that the prison guards had been aware of the litigation and that, although the guards had known that the relief sought could impinge on their interests, their union did nothing until three weeks after the adverse decision. *Id.* at 304 (majority opinion). The court's opinion failed to consider whether the interests asserted by the union normally justify intervention or whether existing parties adequately represented these interests. Furthermore, the court did not discuss whether

the application to intervene is untimely.[43] Even if the trial court judge takes these essential issues into account in some vague fashion, it is likely that his reasoning on interest, impairment, and representation will be less closely reviewed than if he had ruled on these conditions directly.[44] The amount of discretion the trial court enjoys when the application is not clearly timely thus approaches that enjoyed by the court when the application is merely for permission to intervene.[45]

The present standard for appellate review of trial court discretion on timeliness is that authorized by *NAACP*.[46] When reviewing a ruling on timeliness, appellate courts are restricted to reversing abuses of trial court discretion and to prescribing factors that the lower court should consider when making its determination on timeliness.[47] Appellate courts generally do not rule on the balance of factors that presumptively should govern in particular classes of cases.

Despite the instruction of *NAACP* to consider *all* the circumstances,[48] the practice of the Supreme Court in that case, and of other appellate courts in subsequent cases,[49] shows that trial courts are under

the intervention would disrupt orderly court proceedings or prejudice existing parties. This reticence was particularly inappropriate because the court order was for preliminary relief only; further proceedings in the action and reconsideration of the preliminary order were clearly envisioned. *Id.* at 302-03.

43. *See, e.g.*, Sohappy v. Smith, 529 F.2d 570, 574 (9th Cir. 1976) (affirming ruling of untimeliness with sole remark that applicants had not shown any "extraordinary or unusual circumstances" justifying "late intrusion" into suit); Clanton v. Orleans Parish School Bd., 72 F.R.D. 164, 168-70 (E.D. La. 1976) (ruling application untimely without considering stare decisis effect of suit on applicant's later challenges or adequacy of existing representation).

44. For example, it is authoritatively settled that applicants bear only a minimal burden of showing inadequacy of representation when establishing their right to intervene. *See* Trbovich v. UMW, 404 U.S. 528, 538 n.10 (1972). But under current practice, a lower court's ruling on the adequacy of representation would be accorded more deference on review if the court considers representation not as a separate issue, but merely as a factor in its ruling on timeliness. *See, e.g.*, United States v. Marion County School Dist., 590 F.2d 146, 148 (5th Cir. 1979) (ruling that district court, in exercising its discretion on timeliness, must weigh against applicant the protection afforded through representation by existing parties).

45. Permissive intervention under Rule 24(b) is "discretionary by definition." Hodgson v. UMW, 473 F.2d 118, 125 n.36 (D.C. Cir. 1972).

46. *See, e.g.*, Preston v. Thompson, 589 F.2d 300, 304 (7th Cir. 1978) (citing *NAACP* for principle that trial court ruling on timeliness will not be disturbed on review unless discretion abused); United States v. Allegheny-Ludlum Indus., Inc., 553 F.2d 451, 453 (5th Cir. 1977), *cert. denied*, 435 U.S. 914 (1978) (same).

47. *See, e.g.*, Stallworth v. Monsanto Co., 558 F.2d 257, 263-66 (5th Cir. 1977) (court considered itself confined to mandating that trial courts consider certain factors and ignore others). Even when an abuse of discretion is found in a particular case, an indefinitely broad range of factors is still considered relevant to timeliness. *See, e.g.*, United Airlines, Inc. v. McDonald, 432 U.S. 385, 395-96 (1977); *id.* at 402-03 (Powell, J., dissenting).

48. 413 U.S. at 366.

49. *See* notes 42 & 43 *supra* (citing examples); note 40 *supra* (surveying wide range of factors encompassed by "all the circumstances").

little obligation to justify their timeliness rulings.[50] Otherwise deserving applicants may be denied participation for many reasons, ranging from a judge's mere inadvertence to the merits of an applicant's petition to the judge's inclination to keep the litigation narrow. If the ruling is couched as a denial on the basis that the application to intervene was not timely, there is little likelihood that an appellate court will reverse.

This approach to intervention allows the trial court, as well as the appellate court, to avoid addressing the difficult but central issue posed by intervention of right: when should unrepresented and adversely affected nonparties be allowed to participate in litigation, despite some detriment to existing parties and some disruption of orderly court calendars? If any presumptions or rules of law are appropriate for striking a systematic and principled balance among an applicant, the parties, and the court, they are unlikely to arise from a practice that treats every case as peculiarly different.[51] The exacting appellate scrutiny that could evaluate trial court practices and render them consistent is lacking under the case-by-case balancing paradigm fostered by *NAACP*, and thus there is no mechanism to channel judicial experience into the development of principles that would give meaning to "timeliness."

Far from evolving principles to govern the timeliness of a motion to intervene as of right, current practice is more likely to undermine the right itself. If a trial court is permitted to dispose of many applications solely on its discretionary and lightly reviewed timeliness ruling, while weighing the interest,[52] impairment,[53] and representation[54] issues in only some vague way if at all, then little remains to distinguish inter-

50. *Cf.* note 15 *supra* (neither Rule nor Advisory Committee Notes offer guidelines on timeliness); F. JAMES & G. HAZARD, *supra* note 29, § 10.19, at 516 (detail avoided in rule in order to provide more room for judicial discretion).

51. *See* Liddell v. Caldwell, 546 F.2d 768, 770 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977) ("Although precedents under Rule 24(a)(2) are helpful, each case must rise and fall on its own peculiar facts and circumstances."); Black v. Central Motor Lines, Inc., 500 F.2d 407, 408 (4th Cir. 1974) (because Rule 24 silent on what constitutes timeliness, question must be answered in each case by discretion of court).

52. *See, e.g.*, Romasanta v. United Airlines, Inc., 537 F.2d 915, 918 (7th Cir. 1976), *aff'd sub nom.* United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) (considering interest of intervenors as factor relevant to timeliness); Hodgson v. UMW, 473 F.2d 118, 129 (D.C. Cir. 1972) (considering interest of applicants in scope of relief relevant to timeliness).

53. *See, e.g.*, Hodgson v. UMW, 473 F.2d 118, 129 (D.C. Cir. 1972) (considering as relevant to timeliness fact that applicants' rights could be irretrievably lost if intervention were not permitted).

54. *See, e.g.*, NAACP v. New York, 413 U.S. 345, 368 (1973) (considering fact that applicants' claim of inadequate representation was unsubstantiated as relevant to timeliness).

vention of right from permissive intervention.[55] Incorporation of the essential conditions of a right to intervene into the "all the circumstances" rubric of timeliness may signal an eventual collapse of the right to intervene into the more discretionary permissive intervention.

III. The Internal Ordering of Rule 24(a)(2)

Restructuring Rule 24(a)(2) may prevent this collapse of the right to intervene while preserving a degree of trial court discretion on timeliness. Such a restructuring would ensure that the proper balance between the interests of the applicants, the parties, and the court is considered, and provide a mechanism for evolving more specific rules of law defining timeliness.

A. *Serially Ordering Rule 24(a)(2)*

This Note proposes that Rule 24(a)(2) be restructured or reinterpreted so that the necessary conditions of a right to intervene are serially ordered as follows:

> Anyone shall be permitted to intervene as of right in an action when
> (*i*) the applicant claims an interest relating to the property or transaction that is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties; and
> (*ii*) the application is timely.

Three relationships define what is meant here by a "serial order." First, the order indicates the sequence in which the trial court should address the conditions. A ruling must be made on whether the applicant meets condition (*i*) before the court moves to consider condition (*ii*).

Second, the proposal organizes the conditions in order of their importance. Condition (*i*) ensures operation of the central policy distinguishing the concept of a right to intervene from permissive intervention: judicial concern for fairness to nonparties.[56] Placing condition

55. The distinction has been narrowed to such an extent that commentators can say that the criteria for intervention of right "are different in degree rather than kind from those governing intervention upon permission of the court." F. JAMES & G. HAZARD, *supra* note 29, § 10.19, at 514. However accurate this may be as a description of current intervention practice, it marks a development that was not intended. *See* pp. 587-88 *supra*.

56. *See* pp. 587-88 *supra*.

(*i*) before condition (*ii*) requires the trial court to consider this essential concern before passing to the question of timeliness.

Third, the order reflects a diminishing burden of proof on the party claiming a right to intervene. Once an applicant demonstrates that the interest, impairment, and representation criteria of condition (*i*) are met,[57] he should not bear as heavy a burden of proof on timeliness as he might were his status under condition (*i*) unknown or his application one for permissive intervention only.[58]

B. *Consequences of Serially Ordering Rule 24(a)(2)*

By serially ordering Rule 24(a)(2), several advantages would be gained. The foremost is that such a Rule would encourage the judiciary to develop principled answers to the central issue now posed by intervention of right.[59] Trial courts, as well as reviewing courts, would have to decide under what circumstances an applicant should be allowed to participate once he has demonstrated that he has the requisite interest, that his ability to protect that interest may be practically impaired, and that he is inadequately represented. This problem is precisely the issue posed by timeliness, for such an application should be granted unless it is untimely. The serially ordered structure, while neutral as to the particular content that courts might develop,[60] would facilitate judicial

57. Although this Note does not argue that an internal serial ordering of condition (*i*) is necessary, there may be reasons for considering interest only after impairment and representation. Nonparties who may be adversely affected by the outcome of the litigation and who are capable of introducing new evidence and argument that may affect that outcome should be heard within the context of the litigation before the harm is done. Under current doctrine, the interest asserted by the applicant must be a "significantly protectable interest." Donaldson v. United States, 400 U.S. 517, 531 (1971); *see* United States v. Perry County Bd. of Educ., 567 F.2d 277, 279 (5th Cir. 1978) (intervention requires direct, substantial, legally protectable interest in the proceedings). It may be doubted, however, whether such a substantial interest barrier is needed to control the flood of would-be intervenors; in fact, the first two conditions alone may be adequate. *See* Smuck v. Hobson, 408 F.2d 175, 179-80 (D.C. Cir. 1969). At any rate, the interest requirement should be viewed as of lesser importance than either impairment or representation, and perhaps it should have more influence on the manner of participation that is allowed to the applicant than on the decision about whether the applicant should be heard at all. *See id.* at 179-80.

58. The burden of showing the inadequacy of existing representation has already been minimized. *See* note 44 *supra*.

Some courts have held that the timeliness decision should be treated more leniently in intervention of right petitions than in those seeking permissive intervention. *E.g.*, Alaniz v. Tillie Lewis Foods, 572 F.2d 657, 659 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978). But this approach may miss an important distinction. The applicant should not lessen his burden of proving timeliness merely by *claiming* a right to intervene; he should show that he otherwise *has* a right to intervene by demonstrating that he satisfies condition (*i*).

59. *See* pp. 591-92, 596 *supra*.

60. For example, the serial structure is neutral as to whether to define timeliness differently in connection with government enforcement suits than in connection with private

evolution of more specific principles defining timeliness.[61]

Moreover, there would not be an immediate need to attempt to replace the current vague timeliness requirement with a more specific rule of law.[62] By placing the decision on timeliness after those on interest, impairment, and representation, the range of factors that would be taken into account in ruling on the application would not be curtailed. By tying the applicant's burden of proof on timeliness to the trial court's findings on the other conditions, however, the presently unbridled trial court discretion over how to balance all the factors affecting timeliness[63] would be somewhat restricted because

suits. Although court reasoning on the interest, impairment, and representation requirements may appropriately be influenced by the fact that the main action is a government enforcement action, *see* Note, *Intervention in Government Enforcement Actions*, 89 HARV. L. REV. 1174 (1976), such a fact has less obvious relevance to timeliness. The courts may nevertheless decide that prejudice to prosecutorial discretion is a central element of timeliness when private party applicants seek to attack a final decree based on government consent. *Cf. id.* at 1197 (intervention to challenge consent decree increases potential for interfering with governmental discretion over amount of resources to expend, chances of victory, and disclosures at trial). Whatever position the courts take, however, on whether to treat enforcement actions differently from private actions when defining timeliness, the increased appellate control generated by the proposed serial ordering should serve to implement the decision.

61. There is reason to think that, under appellate scrutiny, presumptions governing the appropriate balance of interests under timeliness would be forthcoming. For example, the holding in United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), suggests that whenever a motion to intervene to appeal a denial of class action status is promptly made within the proper appeals period, the motion is presumptively timely. *Id.* at 392-96.

It might also be possible to establish through appellate review rebuttable presumptions governing post-judgment applications for intervention. Although a rule has developed in some courts that post-judgment applications should be granted only in unusual circumstances, *see, e.g.*, McDonald v. E. J. Lavino Co., 430 F.2d 1065, 1071 (5th Cir. 1970), when applicants seek only to participate in the remedial phase of an action, timeliness should not be an automatic barrier to post-judgment intervention, *see* Hodgson v. UMW, 473 F.2d 118, 129 (D.C. Cir. 1972), especially since intervention may be desirable in light of wide trial court discretion to devise equitable remedies. Likewise, the decision of a party who receives an adverse judgment not to appeal may itself be relevant to the issues of adequacy of representation and timeliness. Smuck v. Hobson, 408 F.2d 175, 181 (D.C. Cir. 1969).

Another issue on which appellate courts should establish rules of law is "protective intervention." One approach is to insist upon early "protective" intervention in a suit whenever the applicant's interests might be at risk. *E.g.*, Alaniz v. Tillie Lewis Foods, 572 F.2d 657, 659 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978) (denying intervention to applicants who should have joined negotiations before settlement if knew of risk of detrimental decree). Another approach is to approve waiting for adverse developments in the litigation before moving to intervene. *E.g.*, Liddell v. Caldwell, 546 F.2d 768, 770 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977) (allowing intervention to applicants who did not seek to intervene until plaintiffs abandoned initial claims). Potential applicants should be given more specific guidelines, however, and not merely be told that delay in applying for intervention is a factor to be considered by the trial judge in his discretion. *E.g.*, Pennsylvania v. Rizzo, 530 F.2d 501, 506 (3d Cir.), *cert. denied*, 426 U.S. 921 (1976) (reason for delay a factor that ought to inform district court's discretion).

62. *See* pp. 593-96 *supra* (discussing vagueness of timeliness requirement and seeming need for trial court discretion).

63. *See* note 40 *supra* (listing relevant factors).

consideration of interest, impairment, and representation would be ensured and their separate weight in the timeliness balancing could be scrutinized. This arrangement would reduce appellate court deference to a trial court's weighting of the elements of condition (*i*) in ruling on timeliness. The increased accountability of the trial judge should generate an increased disposition in the lower court to explain why, despite the fact that a particular applicant has met condition (*i*), he has been barred from participation.[64] Exposing such reasoning would facilitate appellate court judgments on fairness and efficiency. This interactive structure, it is hoped, would rekindle pressure on the federal court system to evolve a theory on the requirements of justice toward adversely affected nonparties and to widen the narrowing distance between intervention of right and permissive intervention.

Finally, courts have held that the applicant's interest, impairment, and representation are relevant factors under timeliness.[65] But reducing these considerations to mere factors under the vague timeliness requirement encourages courts to ignore them altogether. The court's determinations on the interest, impairment, and representation requirements should be made before the court rules on timeliness, and the applicant's burden of showing timeliness should be reduced once those requirements are met. When the requirements under condition (*i*) are satisfied, they should be given weight automatically as the applicant undertakes to establish timeliness.

Conclusion

The history of the intervention doctrine displays a persistent judicial attempt to evolve a general solution to the question of when applicants possess a right to intervene. At some point, justice to nonparties who possess interests that are adversely affected yet unrepresented would seem to outweigh both the detriment to existing parties and the possible imposition on court processes. Identifying this point by a rule of law is difficult. The simple device of serially ordering the conditions for a right to intervene, however, and of placing the timeliness decision at the end of that list promises to move the courts toward a more adequate theory of intervention of right without unduly impairing the trial court's ability to manage increasingly complex litigation.

64. It is surely too inefficient simply to require hearings, formal findings, and opinions on all motions to intervene as of right. The preferable situation is to have fewer marginal applications summarily dismissed or dismissed with very little reasoning.

65. *See* pp. 594-97 *supra*.