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INTERVENTION OF RIGHT IN JUDICIAL PROCEEDINGS TO REVIEW INFORMAL FEDERAL RULEMAKINGS

*Michael Ray Harris**

The codification of the Federal Rules of Civil Procedure in 1938 (the “Federal Rules”) created not only a more transactional approach to litigation, but also the flexible party structure that was necessary for “public law litigation” to flourish. Indeed, many argue that intervention by non-parties in public law cases is essential to ensure that the court can hear from and protect the wide range of interests likely to be impacted by its decision. This Article seeks to make a case for limiting intervention as of right in a specific subset of public law proceedings—those brought to review the legality of informal federal rulemakings pursuant to the Administrative Procedure Act (“APA” or the “Act”). The courts in these cases are placed in a difficult position in considering applications to intervene. On one hand, given the narrow scope of judicial review it is unclear how a court will benefit from the addition of defendant-intervenors seeking to uphold the administrative rule. Instead the court faces the likelihood of information overload and/or information degradation as defendant-intervenors incorporate duplicative or irrelevant arguments into the proceedings. On the other hand, when a court chooses to deny such intervention, it creates the possibility of a lengthy appeal that will further delay judicial review. In sum, intervention practice under the Federal Rules harms the rights of those entitled to judicial review of an agency rulemaking and, most importantly, negatively impacts the public as a whole by reducing the efficiency of the administrative rulemaking process. As such, this Article

* Assistant Professor of Law, University of Denver Sturm College of Law. An earlier draft of this Article was selected for presentation at the Second Annual Fall Colloquium on Environmental Scholarship at Vermont Law School and at the 2011 Rocky Mountain Junior Law Scholar’s Forum at BYU Law. I express my deepest gratitude to all of those who commented on this paper at those events. Your suggestions were invaluable, as was the diligent research and editing of DU law students Jessica Morales, Tyler Geisert, and Mason Brown.

argues that the practice is inconsistent with both the APA and the intent of third-party practice under the Federal Rules.

I. INTRODUCTION

Intervention—the procedural device enabling a third person to enter and become a party to an existing court proceeding—is a comparatively recent development in Anglo-American law.¹ The codification of the Federal Rules of Civil Procedure (the “Federal Rules”) in 1938 brought recognition that a lawsuit is often not purely a private fight between two litigants but can also have significant ramifications on the interests of untold numbers of absentee persons.² Accordingly, the drafters of the new Federal Rules sought not only a more transactional approach to litigation, but also to expand, where appropriate, participation by non-parties in federal court litigation.³

One consequence of a more flexible party structure under the Federal Rules was the growth of “public law litigation” in the second half of the twentieth century.⁴ As Professor Abram Chayes explained, public law litigation seeks to address broad “grievance[s] about [the content or context] of public policy.”⁵ Because public law cases can have pervasive impacts, “their adjudication often ‘call[s] for adequate representation in the proceedings of the range of interests that will be affected by them.’”⁶ In this context, public law proponents have long

1. 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1901 (3d ed. 2007). See *infra* Part II.A for a discussion regarding the history and growth of intervention procedure in the American federal courts.

2. WRIGHT, MILLER & KANE, *supra* note 1, § 1901; Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH. J. RACE & L. 263, 271 (1999).

3. See Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215, 240 (2000); *infra* Part II.A.1.

4. Appel, *supra* note 3, at 215 (internal quotation marks omitted); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (internal quotation marks omitted). For a discussion regarding the relationship between intervention and public law litigation, see generally Appel, *supra* note 3 and Cindy Vreeland, Comment, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279 (1990).

5. Chayes, *supra* note 4, at 1302. Examples of public law litigation include *Rizzo v. Goode*, 423 U.S. 362, 366-67 (1976) (involving police misconduct); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding public school segregation unconstitutional); *Sheppard v. Phoenix*, 210 F. Supp. 2d 450, 451 (S.D.N.Y. 2002) (involving prisoner rights); *N.Y. State Ass’n for Retarded Children v. Carey*, 393 F. Supp. 715, 716 (E.D.N.Y. 1975) (concerning disability rights); and *Perez v. Bos. Hous. Auth.*, 400 N.E.2d 1231, 1234 (Mass. 1980) (addressing housing equality).

6. See Vreeland, *supra* note 4, at 280 (alteration in original) (quoting Chayes, *supra* note 4, at 1310).

asserted that a broad right to intervene is necessary to ensure that the court hears all points of view.⁷

In this Article, I do not quarrel over the role of intervention in public law cases generally. Instead, I seek to make a case for limiting intervention as of right under Rule 24(a) of the Federal Rules (“Rule 24(a)”) in a specific subset of public law proceedings—those brought to review the legality of informal federal agency rulemakings pursuant to the Administrative Procedure Act (the “APA” or the “Act”).⁸ There are important distinctions between the cases I am concerned with here and the public law cases championed by Professor Chayes and others that suggest courts should avoid making the same general assumptions about the necessity for broad, multi-party representation on both sides of informal rulemaking cases.

In any federal court case, an effective intervention rule must balance the interests of the original parties in controlling the litigation, the protection of third parties’ interests that could be altered by the outcome, and the interest of the court in the efficiency and accuracy of the proceeding.⁹ When dealing with public law litigation, a court must consider these factors in the context of a proceeding with “sprawling party structures, an emphasis on legislative factfinding, prospective relief, ongoing decrees that affect widespread interests, and active involvement by judges.”¹⁰ But in informal rulemaking cases, Congress

7. The need for intervention in public law cases is exemplified by affirmative action cases in federal court. As one commentator explains:

Without intervention by beneficiaries, affirmative action cases typically pit unsuccessful White applicants and counsel opposed to traditional civil rights enforcement against governments and other institutions with a history of racial bias and strong incentives to avoid confessing civil rights liability. None of those parties have an unencumbered interest in identifying or preserving the constitutional and statutory obligations of public institutions to halt, avoid, and remedy discrimination against people of color; indeed, maintaining those obligations is contrary to the central interests of both sides. Furthermore, each party in a bipolar affirmative action case faces strong disincentives to presenting evidence of recent discrimination by the defendant or questioning the validity of standardized tests and other selection criteria that may discriminatorily exclude certain classes of applicants.

Yet those issues are at the core of litigation regarding the validity of affirmative action policies.

Jenkins, *supra* note 2, at 268 (emphasis in original) (footnotes omitted).

8. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). I will assume that most readers of this Article have some familiarity with judicial review of informal agency rulemaking under the APA. If not, see *infra* Part III.A.2.

9. See John E. Kennedy, *Let's All Join in: Intervention Under Federal Rule 24*, 57 Ky. L.J. 329, 329-30 (1969); see also *Friends of Animals v. Kempthorne*, 452 F. Supp. 2d 64, 67-68 (D.D.C. 2006) (considering different interests in intervention).

10. Vreeland, *supra* note 4, at 280.

has provided for an alternative forum to address many, if not all, of these actualities associated with developing public policy.¹¹ With regard to party participation and legislative fact-finding, for instance, Congress provided that the place for airing different points of view on the appropriate scope of policy be not the courtroom, but rather in the context of administrative rulemaking.¹²

Indeed, one of the hallmarks of the post-New Deal administrative state is its outright rejection of the traditional adversarial model of decision-making in which Congressional mandates and prohibitions were enforced through private litigates in a court of law.¹³ The founders of the modern American administrative state desired a system of policymaking characterized by both expertise and flexibility to respond to modern social and economic problems.¹⁴ The adoption of the APA in 1946 sought to offer the “prospect of achieving reasonable uniformity and fairness [throughout the administrative process] without . . . interfering unduly with the efficient and economical operation of the” agency to respond to modern social and economic problems.¹⁵ By passing the APA, Congress granted affected parties the right to seek judicial review of agency decisions, but did so in a manner

11. See William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 39-41 (1975) (comparing the procedure of formal adjudication with the limited statutory requirements for informal rulemaking as set forth in Section 551 of the APA).

12. See 5 U.S.C. § 553 (2006). Congressional delegations of rulemaking authority, while often criticized as unconstitutional, are a mainstay of the American lawmaking apparatus. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233 (1994). As the Supreme Court has acknowledged, “[s]o long as Congress ‘shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.’” *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

13. See Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 268 (1978).

14. Michael Ray Harris, *Standing in the Way of Judicial Review: Assertion of the Deliberative Process Privilege in APA Cases*, 53 ST. LOUIS U. L.J. 349, 373 (2009); see also Michael Ray Harris, *Breaking the Grip of the Administrative Triad: Agency Policy Making Under a Necessity-Based Doctrine*, 86 TUL. L. REV. 273, 282-83, 285 (2011).

15. S. REP. NO. 79-752, at 224 (1945). Thus, since passage of the APA in 1946:

[t]he exercise of governmental power by administrative agencies is held in check by four principal mechanisms: (1) structural constraints imposed under the constitutional doctrine of separation of powers; (2) statutory constraints set forth generally in the Administrative Procedure Act and specifically in each agency’s organic legislation; (3) the requirement [as evidenced in Section 554 of the APA] that individuals be treated fairly in conformity with the standards of procedural due process; and (4) the institutional role of judicial review to assure agency adherence to applicable legal standards.

E.P. Krauss, *Unchecked Powers: The Supreme Court and Administrative Law*, 75 MARQ. L. REV. 797, 797 (1992).

intended to limit the role of the judiciary.¹⁶ The APA sets a very narrow scope of review, with the court empowered only to review the reasonableness of the agency's decision in light of the record compiled by the agency through the rulemaking process.¹⁷ Thus, with a few limited exceptions, there is no need for the parties to develop the evidentiary record in the court, whether by producing documentary evidence or presenting testimony from witnesses.¹⁸ Likewise, unlike in other public law cases, the court is prohibited from taking an active role in directing prospective relief.¹⁹

Many have already argued that judicial review of agency rulemakings—while necessary to prevent administrative overreaching—has increased in scope well beyond that envisioned by the APA and, as a result, has ossified the rulemaking process.²⁰ Outside of constitutional standing requirements,²¹ and occasional statutory time limitations,²²

16. See 5 U.S.C. § 702 (2006) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

17. *Id.* § 706; see also *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983).

18. It is black letter law that judicial review of informal rulemaking is to be based on the administrative record that was developed during the rulemaking process. See Marshall J. Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337, 354 (1986); see also *Camp v. Pitts*, 411 U.S. 138, 141-42 (1973). For further discussion, see *infra* text accompanying notes 192-204.

19. The APA expressly provides that the sole recourse in these cases is for a court to “hold unlawful and set aside agency action, findings, and conclusions found to be [among other things] . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); see also *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1573-74 (10th Cir. 1994). “Informal agency action must be set aside if it fails to meet statutory, procedural or constitutional requirements or if it was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Id.* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971)) (citation omitted) (internal quotation marks omitted). For further discussion, see *infra* text accompanying notes 207-08.

20. See generally Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251 (2009) (acknowledging the contentions of scholars that judicial review places burdens and uncertainty on agency policymaking and arguing that the entire landscape of influence is much more nuanced than the simple picture of blame that critics of judicial review draw).

21. The Cases and Controversies Clause of the U.S. Constitution provides:

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 will 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 different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1. This clause limits the jurisdiction of federal courts to the hearing of

there are virtually no limits on the right to access the federal courts and become a plaintiff to challenge an agency rule. The significant threat that some affected party will seek judicial review has caused agencies to shy away from rulemaking altogether, or take extra steps, for example, “excessive data gathering, analysis, and long-winded explanations,” to bolster the chances and increase the likelihood that the rule will survive the court process.²³ This, of course, “imposes unnecessary costs and delays upon the agencies’ regulatory programs.”²⁴

Liberal intervention rules that provide a right to so-called “defendant-intervenors” to participate in these actions can exacerbate the problem of rulemaking ossification. In recent years, concern that the government may choose to not defend, or will inadequately defend, its own regulations²⁵ has led to an increase in motions to intervene on behalf of the government agency.²⁶ When allowed, judicial review can result in a courtroom full of both proponents and opponents to a particular agency policy. In these cases, judicial review is often turned into an unnecessary replication of the original rulemaking process. Simply put, unless properly managed, intervention will further erode the intended benefit of bureaucratic policymaking—rulemaking matters should be primarily resolved through efficient administrative, not adversarial, means.

Part II of this Article begins with a discussion of the development of Rule 24(a) intervention and its use in public law litigation. As a general matter, scholars and public interest lawyers have pushed for

cases that pose an actual controversy—that is, a dispute between adverse parties which is capable of being resolved by the court. For a discussion of the Supreme Court’s standing jurisprudence and its interplay with Rule 24 of the Federal Rules of Civil Procedure, see *infra* Part II.B.1.c.

22. In many statutes, but not all, Congress has provided for a statute of limitations applicable to the seeking of judicial review under the APA. See 30 U.S.C. § 1276(a)(1) (2006) (providing that under the Surface Mining Control and Reclamation Act, a petition for review must be filed within sixty days of agency action); 33 U.S.C. § 1369(b)(1) (2006) (providing that under the Clean Water Act, a petition for review of agency rulemaking must be filed within 120 days of promulgation); 42 U.S.C. § 300j-7(a) (2006) (providing that under the Safe Drinking Water Act, a petition for review must be filed within forty-five days of promulgation); *id.* § 6976(a)(1) (providing that under the Resource Conservation and Recovery Act, a petition for review must be filed within ninety days of promulgation); *id.* § 7607(b)(1) (providing that under the Clean Air Act, a petition for review of an agency rulemaking must be filed within sixty days from the appearance in the Federal Registrar of the notice of promulgation); *id.* § 9613(a) (providing that under the Comprehensive Environmental Response, Compensation, and Liability Act, a petition for review must be filed within ninety days of promulgation).

23. William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 393-95 (2000).

24. *Id.* at 395.

25. See *infra* Part V.C.

26. See *infra* notes 87-90 and accompanying text.

expansion of intervention in public law cases,²⁷ including, in some instances, judicial proceedings to review informal agency rulemakings.²⁸ Courts, however, have struggled over how to best articulate the appropriate role of intervenors in these cases. Several courts have substantially limited intervention by requiring the proposed intervenor to demonstrate that an adverse decision in the case would impair “a direct, significant and legally protectable interest,”²⁹ despite the far more generous language of Rule 24(a).³⁰ Other courts have gone even further to impede intervention by applying presumptions that a government defendant in an APA case can adequately represent the interests of absentee parties³¹ and others by requiring the intervenor to demonstrate constitutional standing.³² The general focus of the courts on the technical application of Rule 24(a) in public law cases has resulted in a failure of the judiciary to examine the broader issue of whether intervention impairs the administrative process in a manner inconsistent with the APA and the Federal Rules.

Parts III and IV contain the heart of my argument against application of Rule 24(a) in informal rulemaking cases. Part III makes the argument that intervention practice under Rule 24(a), as a practical matter, affects the efficiency of administrative procedure, of which judicial review is just a part. Motions to intervene, when contested, often lead to significant delay in reaching the merits of the court’s review of agency action. Moreover, once admitted to the case, defendant-

27. See, e.g., Appel, *supra* note 3, at 279; Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 288 (1990); Emma Coleman Jones, *Problems and Prospects of Participation in Affirmative Action Litigation: A Role for Intervenors*, 13 U.C. DAVIS L. REV. 221, 223 (1980).

28. See, e.g., Appel, *supra* note 3, at 237, 239, 310. Professor Appel takes a moderate approach to intervention in public law cases, finding that courts should take steps to better ensure that intervention benefits the litigation as opposed to allowing intervention for intervention’s sake. See *id.* at 217-18 (noting that in some cases “it is far from clear . . . how allowing intervention assists the litigation” and suggesting that his proposed changes to intervention practice “not be taken to mean that [he] oppose[s] intervention in public law cases”). He specifically advocates for use of intervention in environmental litigation, including judicial review of environmental rulemakings. *Id.*

29. See, e.g., *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985) (involving a challenge of legislation for which the proposed intervenor, an anti-abortion group, had lobbied for in the state legislature).

30. FED. R. CIV. P. 24(a)(2). Rule 24(a) allows intervention of right when a prospective intervenor:

claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

31. See, e.g., *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 984-85 (2d Cir. 1984).

32. See, e.g., *City of Cleveland v. Nuclear Regulatory Comm’n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994).

intervenors often provide the court with no useful additional information, but instead attempt to side track the proceedings by enlarging the scope of issues beyond the court's narrow scope of review.

Part IV argues that defendant-intervention in these cases is also inconsistent with the Federal Rules. In seeking to increase participation in federal court litigation, the primary concern of the drafters of the Federal Rules focused on reducing the need for subsequent judicial proceedings on issues already before the court.³³ To do this, the Federal Rules incorporated twin mechanisms: joinder³⁴ and intervention.³⁵ These procedures were intended to ensure that one whose rights could be affected by the outcome of a case, and thus might be in the position to collaterally attack the court's judgment, has instead a means to participate in the first instance—whether by being invited into the action or demanding to be heard—in order to promote both fairness and judicial efficiency.³⁶

In a case of judicial review of informal rulemaking, however, individual rights, while certainly impacted by the agency's rulemaking, are, strictly speaking, not at issue when a court is reviewing agency rulemaking. The APA provides that individual rights are to be considered and of course balanced with the broader public interest in regulatory planning by the agency during rulemaking.³⁷ In an APA proceeding, while a judge is in the position to make sure that the agency considered all points of view, he or she is not in a position to consider arguments outside the record or take remedial action to protect defendant-intervenor rights.³⁸ Given the broader public interests at stake, the limited judicial role, and the presence of alternative forums of participation to address individual rights, the concerns embodied in Rules 19 and 24 of the Federal Rules are not as strongly present in these cases. Oddly, courts have acknowledged this proposition with regard to joinder,³⁹ but have inexplicably expanded application of the counterpart rule of intervention.

Finally, in Part V, I will propose amendments to the APA, the Federal Rules, or both, in order to address non-party involvement in

33. FED. R. CIV. P. 24 advisory committee's note.

34. FED. R. CIV. P. 19.

35. FED. R. CIV. P. 24.

36. See FED. R. CIV. P. 19 advisory committee's note; FED. R. CIV. P. 24 advisory committee's note.

37. See 5 U.S.C. § 553 (2006).

38. *Id.* § 706; see, e.g., *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983).

39. See, e.g., Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745, 759 (1987).

informal rulemaking cases. First, intervention as a matter of right under Rule 24(a) should be eliminated. Second, limited permissive defendant-intervention under Rule 24(b) should be allowed where: (a) a plaintiff seeks a preliminary injunction and the court must consider non-record evidence in considering the motion, or (b) the court has found the agency's rule to be invalid and requests input on whether equity requires vacature or remand of the rule. Finally, all settlements in informal rulemaking cases should be subject to a judicial consent decree process that allows for public comment regarding whether the settlement is in the public interest.

II. INTERVENTION, RULE 24, AND PUBLIC LAW LITIGATION

A. *Development of Intervention Procedure in the American Legal System*

1. Early Roots in Admiralty and Equity Proceedings

As Professor Peter A. Appel has observed, “[t]he exact origin of intervention practice in the federal courts is somewhat unclear.”⁴⁰ This procedure was relatively unknown in early common law,⁴¹ where a plaintiff was granted complete control of his or her action.⁴² Intervention, it has been said, “is the child of continental doctrines of equity,”⁴³ developing in cases, for example, where a “fund” was deposited into a court to which third parties could assert “a right that would be lost absent intervention.”⁴⁴ The *in rem* nature of these cases required that courts accept the broadest possible representation of interests.⁴⁵ Indeed, the decree of the court in these actions was “binding

40. Appel, *supra* note 3, at 241.

41. *See id.* at 243-45.

42. *See* 2 J. CHITTY, THE PRACTICE OF THE LAW IN ALL ITS DEPARTMENTS 493-94 (1835). As other scholars have observed, “[f]or the most part, the notion that third persons might invite themselves into lawsuits between others ran counter to the Anglo-American notion that the plaintiff was master of the suit.” FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 542 (4th ed. 1992).

43. Note, *Intervention and the Meaning of “Bound” Under Federal Rule 24(a)(2)*, 63 YALE L.J. 408, 408 n.5 (1954) [hereinafter *Meaning of “Bound”*].

44. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 133-34 (1967). In addition to the fund cases, the early practice of intervention in federal court can be traced to *in rem* admiralty cases. *See, e.g.*, *The Mary Anne*, 16 F. Cas. 953, 954 (D. Me 1826) (No. 9195).

45. *See* George B. Fraser, Jr., *Actions in Rem*, 34 CORNELL L.Q. 29, 29 (1948) (explaining that an action *in rem* is a “legal proceeding[] directed against property itself in order to reach and dispose of the property or of some interest therein,” which is premised on the idea that “a state has the power to determine the title, status, or condition of property within its borders”).

on all the world as to the points which are directly in judgment before it,"⁴⁶ and thus, some form of intervention practice was needed to prevent injustice against those with a legitimate right to the property in question.⁴⁷

By the time the Federal Rules were adopted in 1938, the drafters had concluded that three separate rules should be included to account for the fact that litigation between parties often implicated the rights of others unnamed as parties.⁴⁸ The first is compulsory joinder under Rule 19. This rule recognizes that in some circumstances, the interest of the absentee might be so affected by the outcome that the case should not be allowed to move forward without joining the absentee.⁴⁹ The second is the class action under Rule 23. This rule provides that in limited circumstances, those who have come forward as named plaintiffs will be given the right to represent the interests of others similarly situated, but absent.⁵⁰ Finally, Rule 24 was adopted to recognize intervention.⁵¹ The drafters of this rule "explicitly saw intervention as a counterpart to joinder."⁵² Under Rule 24, an absentee would not be required to wait to be "rung into the action by a party," but could demand admission to the case as an intervening party.⁵³

46. *The Mary Anne*, 16 F. Cas. 953 at 954; *see also* *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 320 (1818) ("But if he were a mere stranger, he would still be bound by such sentence, because the decree of a court of competent jurisdiction *in rem* is, as to the points directly in judgment, conclusive upon the whole world.").

47. Indeed, intervention "is a self-help measure allowing absentees to protect themselves when they have questions of law or fact in common with the existing action." Elizabeth Zwickert Timmermans, Note, *Has the Bowsher Doctrine Solved the Debate? The Relationship Between Standing and Intervention as of Right*, 84 NOTRE DAME L. REV. 1411, 1413 (2009).

48. WRIGHT, MILLER & KANE, *supra* note 1, § 1901.

49. *See* FED. R. CIV. P. 19(a).

50. FED. R. CIV. P. 23(a); *see also* Heather P. Scribner, *Rigorous Analysis of the Class Certification Expert: The Roles of Daubert and the Defendant's Proof*, 28 REV. LITIG. 71, 76 (2008) (explaining that in order to maintain any class action, Rule 23(a) requires "numerosity, commonality, typicality, . . . adequacy of representation, . . . [and t]here must be an identifiable 'class,' that is, a relatively large group of people who can be objectively [thought to] have similar grievances").

51. FED. R. CIV. P. 24.

52. Appel, *supra* note 3, at 254.

53. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 400-01 (1967); *see also* Timmermans, *supra* note 47, at 1413.

2. Judicial Interpretation of Rule 24 (1937–1966): A Rigid View

On intervention of right, the 1934 original version of Rule 24 read:

Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.⁵⁴

Though Rule 24 has been said to be a mere “codification of general doctrines of intervention,”⁵⁵ it is clear that the rule was not intended to be a mere “restatement of existing federal practice at law and in equity.”⁵⁶ Indeed the rule, by its very terms, sought to expand intervention beyond the *in rem* cases from which it was developed (and which is still authorized by Section (a)(2)).⁵⁷ Most judicial focus on the new rule was over the generalized scope of Section (a)(2).⁵⁸ Under this provision, to establish a right to intervene, applicants were required to demonstrate both that they would be bound by an adverse judgment and that an existing party could not adequately represent their interests.⁵⁹ After adoption of Rule 24, there was at least some tension among courts and scholars over just how broad this right of intervention was, particularly over the meaning of the term “bound.” Some authorities argued, and a few Courts of Appeals agreed, that “bound” should be interpreted “to mean ‘practical prejudice’” to the applicant.⁶⁰ They offered what was labeled “vague formulae” by the editors of the *Yale Law Journal* in 1954, “providing for intervention of right whenever the applicant's interests are ‘seriously jeopardized’ or ‘the effect of the judgment would be prejudicial.’”⁶¹

54. FED. R. CIV. P. 24(a), 308 U.S. 663, 690 (1939) (amended 1946).

55. WRIGHT, MILLER & KANE, *supra* note 1, § 1903 (quoting *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 508 (1941)) (internal quotation marks omitted).

56. *Id.* (quoting *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 133 (1967)).

57. FED. R. CIV. P. 24(a)(2); *see supra* notes 43–47 and accompanying text.

58. *Meaning of “Bound,” supra* note 43, at 409–10.

59. FED. R. CIV. P. 24(a), 308 U.S. 663, 690 (1939) (amended 1946).

60. *See, e.g., Timmermans, supra* note 47, at 1414 (internal quotation marks omitted). The Third Circuit, for example, found that intervention of right would be granted upon a showing that the applicant's rights would be “affected” by an adverse court decree. *Mack v. Passaic Nat'l Bank & Trust Co.*, 150 F.2d 474, 477 (3d Cir. 1945).

61. *Meaning of “Bound,” supra* note 43, at 414 (footnotes omitted) (quoting Raoul Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts*, 50 YALE L.J. 65, 65 n.4 (1940) and 7 CYCLOPEDIA OF FEDERAL PROCEDURE ¶ 24.16 (3d ed. 1951)).

A majority of courts, however, interpreted the term “bound” to require a showing of a possible *res judicata* effect.⁶² This interpretation effectively limited the right to intervene to two situations—“where the applicant’s rights are derived from the same source as a litigant’s and he [or she] raises the same issues . . . or where he [or she] is a privy of a litigant.”⁶³ These courts rejected the notion that an applicant had a right to intervene where a judgment’s practical effect would be highly prejudicial to his or her interests.⁶⁴ The rationale expressed was that the protection afforded by Rule 24 is not essential to one who might have another legal remedy available after judgment in the case at bar.⁶⁵

In 1961, the Supreme Court spoke to resolve the question of just how broad the term “bound” would be defined for purposes of intervention by upholding the narrow approach taken by the lower courts in *Sam Fox Publishing Co. v. United States*.⁶⁶ In doing so, the Court acknowledged that Rule 24(a)(2) effectively created a “Catch-22: movants who were not adequately represented by the existing parties necessarily could not be bound under *res judicata* principles, and those who would be bound could not demonstrate inadequate representation.”⁶⁷ Ironically, the Court had struck Rule 24(a)(2)—a rule it adopted in 1937⁶⁸—as a viable means for intervention of right.⁶⁹ What was left, at least if the rule was read literally, was the pre-1937 right of intervention in *in rem* cases, as well as in any suit for which Congress expressly established the right to intervene.⁷⁰

62. Timmermans, *supra* note 47, at 1414 (internal quotation marks omitted).

63. *Meaning of “Bound,” supra* note 43, at 410-11.

64. *Id.* at 412; *see also, e.g., Sutphen Estates, Inc. v. United States*, 342 U.S. 19, 21-22 (1951).

65. *See Sutphen Estates, Inc.*, 342 U.S. at 21-22.

66. 366 U.S. 683, 689-91 (1961) (denying intervention to private litigants in antitrust case on the ground that they would not be bound by adjudication of the dispute since they would not be precluded from bringing subsequent litigation).

67. Jenkins, *supra* note 2, at 271-72 (footnotes omitted).

68. Letter of Submittal, 308 U.S. 649 (1939). The U.S. Supreme Court has the power to promulgate and amend the Federal Rules of Civil Procedure, upon advice of the advisory committee. 28 U.S.C. §§ 2072-73 (2006).

69. *See Kaplan, supra* note 53, at 401-02 (noting that in 1961, the Court interpreted Rule 24(a)(2) in a “crippling way” when it decided *Sam Fox*).

70. In truth, however, even as a majority of courts were applying a strict *res judicata* requirement to the right to intervene under Rule 24(a)(2), lower courts were at work eroding the rigidity of the traditional equity and admiralty right to intervene embodied in Rule 24(a)(3). *See, e.g., Formulabs, Inc. v. Hartley Pen Co.*, 275 F.2d 52, 54-56 (9th Cir. 1960). As the Advisory Committee on Civil Rules noted in 1966, “some decided cases virtually disregarded the language of this provision” and have applied “[t]he concept of a fund . . . so loosely that it is possible for a court to find a fund in almost any in personam action.” FED. R. CIV. P. 24 advisory committee’s note (1966 Amendment) (citation omitted) (internal quotation marks omitted).

3. Judicial Interpretation of Rule 24 (1966–Present):

An Elastic View

After *Sam Fox*, the Advisory Committee on Civil Rules (the “Committee”) revised the Federal Rules to address the rigidity that the Court had read into the term “bound” under Rule 24(a)(2).⁷¹ While the Committee begrudgingly acknowledged that the reasoning of *Sam Fox* might be “linguistically justified,” it nonetheless felt that such a strict reading of the provision was a very “poor result[.]” overall.⁷² The Committee did not find it necessary—and quite possibly not efficient—for a person who demonstrates that his or her interest is not adequately represented by an existing party to be put at risk of having an adverse judgment entered which would extend to him or her and thus “be obliged to test the validity of the judgment as applied to his [or her] interest by a later collateral attack.”⁷³ Instead, such person should have, “as a general rule, . . . [a right] to intervene.”⁷⁴

In amending Rule 24(a) in 1966, the Committee once again emphasized the relationship between intervention and joinder. The Committee believed that Rule 24(a) was:

[A] kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he [also] ought to have a right to intervene in the action on his own motion.⁷⁵

Thus, while the language of the two rules does differ, “the Committee theoretically linked intervention and joinder, and it intended that the new rule on intervention would fill in any gaps created by the joinder rule.”⁷⁶

As a result of the 1966 amendments, Rule 24(a) now reads:⁷⁷

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 the

71. FED. R. CIV. P. 24 advisory committee’s note (1966 Amendment).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. Appel, *supra* note 3, at 254.

77. “Rule 24 has been amended eight times since it was originally adopted [in 1937], but only the 1966 amendment is [considered to have] major significance.” WRIGHT, MILLER & KANE, *supra* note 1, § 1903.

applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.⁷⁸

This amendment has had the effect the Committee intended on intervention in federal courts. Courts in every federal circuit have read Rule 24(a)(2) to require satisfaction of four distinct elements: (1) timeliness of motion; (2) an interest in the property or transaction on which the action is based; (3) a threat that the movant's interest could be impaired by disposition of the action; and (4) a lack of adequate representation of the movant's interest by the existing parties.⁷⁹ As a general rule, the courts have not found that any of these four elements pose any significant burden to intervention in litigation among private parties.⁸⁰

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

79. See *R & G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 7 (1st Cir. 2009); *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 995 (10th Cir. 2009); *Lease Oil Antitrust Litig. v. Chesapeake Exploration Ltd. P'ship*, 570 F.3d 244, 247 (5th Cir. 2009); *San Juan Cnty. v. United States*, 503 F.3d 1163, 1187-88 (10th Cir. 2007); *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 779 (6th Cir. 2007); *Mt. Hawley Ins. Co. v. Sandy Lake Props., Inc.*, 425 F.3d 1308, 1311 (11th Cir. 2005); *Liberty Mut. Ins. Co. v. Treedale, Inc.*, 419 F.3d 216, 220 (3d Cir. 2005); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003); *South Dakota ex rel. Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 785 (8th Cir. 2003); *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 176 (2d Cir. 2001); *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 945-46 (7th Cir. 2000); *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996); *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 365-66 (3d Cir. 1995); *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976).

80. See *B. Fernández & Hnos., Inc. v. Kellogg USA, Inc.*, 440 F.3d 541, 545 (1st Cir. 2006) (finding that cereal distributor was entitled to intervene as of right even though its parent company was a party to the lawsuit, the court held that "[a]n intervenor has a sufficient interest in the subject of the litigation where the intervenor's contractual rights may be affected by a proposed remedy," and that an intervenor needs only a "minimal" showing to demonstrate inadequate representation); *Ross v. Marshall*, 426 F.3d 745, 748, 753, 761 (5th Cir. 2005) (reversing the district court's denial of insurer's motion to intervene as of right, the court held that "[i]ntervention should generally 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) (citation omitted))); *Zurich Capital Mkts. Inc. v. Coglianese*, 236 F.R.D. 379, 384, 387 (N.D. Ill. 2006) (finding that mutual fund liquidator was entitled to intervene as of right and holding with regards to timeliness of the motion that, "[a]lthough the first factor weighs in favor of finding that the Liquidator's motion to intervene was not timely, the Court must assess the possible prejudice to the parties to determine timeliness"). Indeed, very quickly after the 1966 amendment, the Supreme Court sent a strong signal to the lower courts that Rule 24(a) provides for "a sweeping right to intervene." *Appel, supra* note 3, at 257 (discussing *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967)).

B. Intervention in Public Law Cases

1. The View of the Courts (As Expressed)

For the most part, codification of the equity procedure of intervention also provided for an environment in which public law litigation could “flourish” in the federal courts.⁸¹ While the drafters of the Federal Rules certainly sought to address intervention and other procedures primarily in a private law context,⁸² the 1966 amendments were sufficiently expansive such that a court applying the rules would find it very difficult to exclude intervention in a public law case.⁸³ As Professor Tobias explains:

To be sure, the liberal ethos pervading the Rules as a whole and the liberality and flexibility that equity fostered in specific Rules enabled public interest litigants to institute suit, successfully resist preliminary motions, conduct broad discovery, and reach the merits of their claims. Moreover, equity underlies numerous procedural measures employed in public law litigation, particularly when judges fashion a remedy in institutional litigation.⁸⁴

There are those, however, who believe the Federal Rules are behind an explosion of federal court litigation.⁸⁵ The perception is often that litigants are misusing the civil justice system, filing suits that lack merit, and/or abusing procedural mechanisms by seeking a strategic advantage.⁸⁶ Public law litigation has not escaped this criticism. Public

81. See Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 286 (1989) [hereinafter *Public Law Litigation*].

82. Brian Hutchings, Note, *Waiting for Divine Intervention: The Fifth Circuit Tries to Give Meaning to Intervention Rules in Sierra Club v. City of San Antonio*, 43 VILL. L. REV. 693, 696 (1998); see also *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984) (recognizing that Rule 24 contemplated traditional private litigation).

83. See *Public Law Litigation*, *supra* note 82, at 286-87.

84. *Id.*

85. See *id.* at 287.

86. *Id.* at 287-88. For data examination evidencing overall increase in civil trials at both the state and federal levels, see Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 768 & fig.7 (2004) (illustrating an increase in state civil trials between 1976 and 2002) and Marc Galanter, *The Vanishing Trial: What the Numbers Tell Us, What They May Mean*, DISP. RESOL. MAG., Summer 2004, at 3, 4 (explaining that the data assembled by Ostrom, Strickland & Hannaford-Agor, *supra*, bears an “unmistakable resemblance to trends in federal courts”); see also David Coale & Wendy Couture, *Loud Rules*, 34 PEPP. L. REV. 715, 723 (2007) (stating that “[f]ew would dispute that there are a great, and increasing, number of cases in today’s legal system”); John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 435-36 (1986) (explaining that “the whole problem has been substantially exacerbated, due perhaps . . . to the so-called litigation explosion, [and] to the substantial increase in very complex cases involving multiple parties All of this has had the effect of adding greatly to the court clog and the

interest cases have increased significantly since the 1970s.⁸⁷ This area of the law has become increasingly dominated by institutional participants, often challenging government activity.⁸⁸ The number and types of interests in these cases has greatly expanded, with not only civil rights, environmental, and other public interest advocates seeking a voice in the courtroom, but also business interests often initiating these cases or seeking to intervene to protect their economic interests in government policy.⁸⁹ Some have argued that these cases are crippling our judicial system.⁹⁰

Accordingly, there have been occasional efforts by the Supreme Court and to curtail federal court litigation in ways that certainly could impact public law litigation.⁹¹ And while overall, courts have remained receptive to these cases and intervention into them by non-parties,⁹² in some instances the courts have moved to interpret Rule 24 in ways that clearly impede public interest litigation.⁹³ Some of these decisions appear to be aimed directly at cases seeking review of informal federal rulemakings. Generally, these judicial decisions can be divided into three categories—those that: (1) define an “interest” under Rule 24(a) narrowly; (2) set a rebuttable presumption that a government party can adequately represent broader public interests; and (3) require an intervenor to establish constitutional standing.

exasperation of the courts and the public”). The Supreme Court observed this trend as far back as the 1970s, at the mere beginning of public law growth. *See, e.g.,* *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979); *Nat’l Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976).

87. *Public Law Litigation*, *supra* note 82, at 293; *see also* Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 6-7 (1984).

88. *Public Law Litigation*, *supra* note 82, at 293.

89. *See id.* at 294-95; *see also* Jeffery Rosen, *Supreme Court, Inc.: How the Nation’s Highest Court Has Come to Side With Business*, N.Y. TIMES, Mar. 16, 2008, § 6 (Magazine), at 38, 40.

90. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 65, 67 (1983) (explaining public concern with our litigious society, Professor Galanter noted “[w]e are told of an epidemic, avalanche, flood, tidal wave or deluge of litigation, threatening to culminate in an ‘apocalypse’ or ‘doomsday,’” and that others are concerned that “[s]wollen caseloads render courts unable to lavish on cases the deliberation and craftsmanship that should distinguish courts from other decision makers”).

91. The Supreme Court in the 1970s issued advisories to lower courts to be stringent with those filing frivolous claims or abusing the discovery process. *See, e.g.,* *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (recognizing in a civil antitrust action the potential for misuse “of the liberal discovery provisions of the Federal Rules of Civil Procedure”). The most influential Supreme Court action on public interest law has clearly been its narrowing of constitutional standing since the early 1990s. *See* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 296-97 (2008). For a discussion on how this further impacts intervenors in rulemaking cases, *see infra* Part IV.A.1.

92. Appel, *supra* note 3, at 282.

93. Hutchings, *supra* note 82, at 698 (explaining that some courts interpret Rule 24 narrowly, requiring a showing of concrete interest in the action).

a. Defining What Constitutes a Rule 24(a)
“Interest” in the Litigation

Rule 24(a) does not define what constitutes a sufficient “interest” in the litigation so as to allow a court to sustain a movant’s application for intervention.⁹⁴ The Supreme Court has spoken to this issue on only a few occasions and in doing so has sent mixed signals to the lower courts regarding the scope of the right to intervene.⁹⁵ At times, the Court has indicated a very expansive view of what constitutes an interest. In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*⁹⁶—a case decided shortly after the 1966 amendments to Rule 24—the Court felt no need to discuss whether the term was restricted in scope or not.⁹⁷ Instead, the Court simply acknowledged that the Advisory Committee had desired to inject “some elasticity” into the practice of intervention, and thus explained that “the new rule 24(a)(2) is broad enough to include [the proposed intervenor] Cascade.”⁹⁸ Likewise, in *Trbovich v. United Mine Workers of America*,⁹⁹ the Court seemed to indicate that even a generalized right in “free and democratic union elections” was a sufficient interest to allow an individual member of a union to intervene in an action brought by the United States to enforce federal labor laws.¹⁰⁰

At other times, however, the Supreme Court has sent strong signals to lower tribunals that the term “interest” should be construed far more narrowly in considering an application to intervene under Rule 24(a)(2). For example, in *Donaldson v. United States*,¹⁰¹ the Court upheld the denial of intervention by a taxpayer in a proceeding brought by the Internal Revenue Service to enforce a subpoena against the applicant’s former employer.¹⁰² The Court found that the proposed intervenor lacked a sufficient interest in the action, holding that under Rule 24(a)(2), an applicant must demonstrate a “significantly protectable interest.”¹⁰³ About a decade later, the Court touched upon the issue again in *Diamond v. Charles*.¹⁰⁴ In that case, a group of physicians had challenged the

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

95. See Hutchings, *supra* note 82, at 709.

96. 386 U.S. 129 (1967).

97. See *id.* at 135-36.

98. *Id.* at 134, 136.

99. 404 U.S. 528 (1972).

100. *Id.* at 529, 539 (quoting *Wirtz v. Local 153, Glass Bottle Blowers Ass’n*, 389 U.S. 463, 475 (1968)) (internal quotation marks omitted).

101. 400 U.S. 517 (1971).

102. *Id.* at 518-19, 521, 531.

103. *Id.* at 531.

104. 476 U.S. 54 (1986).

constitutionality of a state abortion law.¹⁰⁵ Dr. Diamond moved to intervene on the ground that his interest as a conscientious objector to the practice of abortion, as well as his status as a father of a teenage girl, could be impacted by an outcome in the case.¹⁰⁶ In dicta, the concurring Justices went so far as to state that Dr. Diamond should not have been allowed to intervene in the case; in their opinion, the “significantly protectable interest” required in *Donaldson v. United States* must be a “direct and concrete interest that is accorded some degree of legal protection.”¹⁰⁷

The response by lower courts on this issue has been equally varied over the years.¹⁰⁸ This is best represented by the difficulty the Tenth Circuit has experienced in crafting a workable definition of Rule 24(a)’s interest requirement and its exasperated admission that none of the Supreme Court’s opinions are “much help” at all.¹⁰⁹ Initially, the Tenth Circuit appeared to take a very stringent view of intervention by requiring that the interest be “direct, substantial, and legally protectable.”¹¹⁰ I will refer to this, as the Tenth Circuit did, as the “DSL test.”¹¹¹ After announcing the DSL test in 2001, lower courts in the circuit were arguably free to take a dim view on intervention in public law litigation. After less than a decade, however, the Tenth Circuit was in full retreat, dismantling the DSL test one piece at a time.¹¹² The court

105. *Id.* at 57.

106. *Id.* at 57-58.

107. *Diamond*, 476 U.S. at 74-75 (O’Connor, J., concurring in part and concurring in judgment) (internal quotation marks omitted).

108. See Hutchings, *supra* note 82, at 698-99 & n.16.

109. See, e.g., *San Juan Cnty. v. United States*, 503 F.3d 1163, 1190 (10th Cir. 2007).

110. *Utah Ass’n of Cntys. v. Clinton*, 255 F.3d 1246, 1251 (10th Cir. 2001) (internal quotation marks omitted) (quoting *Coal. of Ariz./N.M. Cntys. for Stable Econ. Growth v. Dep’t of Interior*, 100 F.3d 837, 840 (10th Cir. 1996)).

111. *San Juan Cnty.*, 503 F.3d at 1192 (internal quotation marks omitted).

112. See *id.* at 1192-93. The court began by holding that the “direct” and “legally protectable” components were “problematic.” *Id.* at 1192 (internal quotation marks omitted). With regard to “direct,” the court concluded that “[w]hether an interest is direct or indirect could be a matter of metaphysical debate because almost any casual connection can be represented as a chain in which intermediate steps separate the initial act from the impact on the prospective intervenor.” *Id.* at 1192-93. Of course, the court ignored that this is the very problem that plagues much of tort law. See, e.g., *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989, 1006 (2d Cir. 1974) (explaining that in determining the cause of an insurance loss in commercial litigation, “the causation inquiry stops at the efficient physical cause of the loss; it does not trace events back to their metaphysical beginnings”); *Page v. St. Louis Sw. Ry. Co.*, 349 F.2d 820, 822, 826-27 (5th Cir. 1965) (discussing asserted contributory negligence: “Here he wants the good old fashioned dialectic of proximate causation with all of its built-in metaphysical concepts of natural and unbroken sequence, but for, foreseeability of harm and the like. His reasoning is fascinating and beguiling.”); *Ala. Fuel & Iron Co. v. Baladoni*, 73 So. 205, 207 (Ala. Ct. App. 1916) (finding that emotional disturbance is metaphysical and “too subtle and speculative to be capable of [] measurement by any standard known to the law”). The Page court added: “This effort to cross examine the jury—whether

concluded that while the test worked just fine where a proposed intervenor had a DSL interest, the test otherwise “misse[d] the point.”¹¹³ As the court understood Rule 24(a)(2), “the factors mentioned in the Rule are intended to capture the circumstances in which the practical effect on the prospective intervenor justifies its participation in the litigation. Those factors are not rigid, technical requirements.”¹¹⁴

Other circuits have followed the Tenth Circuit in professing to apply a very liberal interpretation of the term “interest” in Rule 24(a)(2).¹¹⁵ Others have opted for “narrower articulations of the interest requirement,”¹¹⁶ choosing to read the Rule’s language on what the Tenth Circuit labeled “an overly technical manner.”¹¹⁷ These circuits continue to adhere to the DSL test.¹¹⁸ Of particular note is the Seventh Circuit’s stringent application of the DSL test in public law cases.¹¹⁹ That circuit has gone as far as to suggest that the interest requirement is more rigorous than what a plaintiff must show to have constitutional standing in a public law case.¹²⁰ This arguably “erects special barriers to

special interrogatories are used or in outlining the successive fact findings as a predicate for a general verdict—leads only to confusion and a proliferation of metaphysical terms scarcely understandable to the most astute scholar.” *Page*, 349 F.2d at 826-27. With regard to the term “legally protectable,” the court noted that it had already found that term problematic in the context of constitutional standing. *San Juan Cnty.*, 503 F.3d at 1193. Notably, as discussed *infra* Part II.B.1.c, the Tenth Circuit is one of the jurisdictions that rejects that a proposed intervenor must demonstrate individual standing in the action to proceed.

113. *San Juan Cnty.*, 503 F.3d at 1193.

114. *Id.* at 1195. The court further noted with great interest that “leading treatises on the subject appear to share a similar reading of Rule 24(a)(2).” *Id.*

115. *See* *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 995 (10th Cir. 2009) (“We ‘follow[] a somewhat liberal line in allowing intervention.’”) (alteration in original) (quoting *Utah Ass’n of Cntys. v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001) (citation omitted) (internal quotation marks omitted)); *Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 780 (6th Cir. 2007) (explaining that “this Circuit ‘has opted for a rather expansive notion of the interest sufficient to invoke intervention of right’”) (quoting *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)); *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996) (explaining that, “‘the interest [asserted] is protectable under *some* law,’ and . . . there is a ‘relationship between the legally protected interest and the claims at issue’”) (emphasis added) (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1494 (9th Cir. 1995), *abrogated by* *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (alteration in original)); *see also* *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976) (assuming that Virginia’s interest in “the ‘general welfare’ of its citizens” is a sufficient interest under Rule 24(a)(2)).

116. *See* *Hutchings*, *supra* note 82, at 716-17.

117. *San Juan Cnty.*, 503 F.3d at 1196.

118. *See, e.g.,* *Lease Oil Antitrust Litig. v. Chesapeake Exploration Ltd. P’ship*, 570 F.3d 244, 251 (5th Cir. 2009) (modifying, slightly, the “direct” requirement to “sufficiently related,” however maintaining a relatively strict adherence to the DSL test); *Liberty Mut. Ins. Co. v. Treeddale, Inc.*, 419 F.3d 216, 220-21 (3d Cir. 2005).

119. *Vreeland*, *supra* note 4, at 288; *see also* *Public Law Litigation*, *supra* note 82, at 323-25.

120. *Vreeland*, *supra* note 4, at 288.

intervention by public interests groups, whose interests by definition are not susceptible to direct injury in the same sense as those of traditional private parties.”¹²¹ This leads to the result that while a public interest organization is barred from intervening in a case that “as a practical matter” could impede the interests of its members, those asserting an economic or property interest, such as an industry applicant, are given more access to intervention.

b. A Rebuttable Presumption that the Government Adequately Represents the Public Interest

When the government is an existing party, some courts have further scrutinized applications for intervention on the presumption that the government can adequately represent the interest of all its citizens.¹²² To overcome this presumption, a proposed intervenor must specifically demonstrate an interest that is different from the general public interest which was unrepresented.¹²³ Again, this arguably could make it easier for economic interests to intervene in cases reviewing informal rulemaking, as courts regularly recognize that the government does not represent specific business interests.¹²⁴ On the other hand, groups like

121. *Id.* at 289.

122. See Kathy Black, Comment, *Trashing the Presumption: Intervention on the Side of the Government*, 39 ENVTL. L. 481, 482-83 (2009). The most extreme example of this presumption was the Ninth Circuit’s “federal defendant rule,” which categorically excluded defendant-intervenors in actions brought under the APA to challenge the government’s compliance with the National Environmental Policy Act (the “NEPA”). See Stephanie D. Matheny, Note, *Who Can Defend a Federal Regulation? The Ninth Circuit Misapplied Rule 24 by Denying Intervention of Right in Kootenai Tribe of Idaho v. Veneman*, 78 WASH. L. REV. 1067, 1083-84 (2003). In a series of cases that expanded more than twenty years, that circuit has placed a heavy burden on any party seeking the right to intervene to defend a NEPA challenge. *Id.* Since the introduction of this rule in *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), the Ninth Circuit has:

stated two discrete rationales for denying defendant-side intervention. First, the court has adopted a blanket federal defendant rule, holding that because only the federal government can violate NEPA, it is the only proper defendant in a NEPA challenge. Second, in many of the same cases, the court also denied intervention because the applicants asserted purely economic injuries that fall outside of NEPA’s zone of interest for the environment. These two competing rationales have led to ambiguity in the Ninth Circuit’s application of Rule 24, particularly when absentees assert environmental injuries.

Matheny, *supra* at 1083-84. The Ninth Circuit abandoned the federal defendant rule in January 2011 when it decided, *en banc*, *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173, 1176 (9th Cir. 2011). For background on the NEPA, see generally Michael C. Blumm, *The National Environmental Policy Act at Twenty: A Preface*, 20 ENVTL. L. 447 (1990).

123. See Katharine Geopp, Note, *Presumed Represented: Analyzing Intervention As of Right When the Government Is a Party*, 24 W. NEW ENG. L. REV. 131, 162 (2002) (explaining that “if the intervenor asserts an interest that is private or identifiably distinct from the general public interest, Rule 24(a)(2) and *Trbovich* indicate that intervention should be allowed with a minimal burden”).

124. See Black, *supra* note 122, at 496; see, e.g., *Univ. of Kan. Ctr. for Research, Inc. v. United*

public interest groups attempting to intervene in cases on non-economic grounds—such as to protect public health and welfare—face inconsistent, if not a more rigid, presumption.¹²⁵

c. Requiring Intervenors to Demonstrate Article III Standing

The last judicial barrier that has been imposed on proposed intervenors in public law litigation is the requirement that the applicant demonstrate an independent basis for standing. To invoke the jurisdiction of the federal court, the plaintiff must satisfy the case or controversy requirement of Article III of the Constitution.¹²⁶ A public interest organization has standing to bring a suit in its own name “when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”¹²⁷ The test for individual standing has three elements. First, the plaintiff must have suffered an “injury in fact” which must be “(a) concrete and particularized, . . . and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’”¹²⁸ Second, the injury must “be ‘fairly . . . trace[able] to the challenged action of the defendant.’”¹²⁹ Third, it must be “likely,” and not “speculative,” that the relief will prevent or redress the injury.¹³⁰ This test ensures that the correct parties are before the court and that the court is resolving an actual case or controversy.

The circuit courts are not in agreement as to whether the interest required to confer Article III standing is “greater, lesser than, or equivalent to the interest required” under Rule 24(a).¹³¹ As already noted, the Seventh Circuit has equated the DSL test to constitutional standing and rejected that narrow reading of the intended right to intervene under the Federal Rules.¹³² A majority of courts, regardless of their view of the DSL test, have tended to reject that the interest required for intervention is as weighty as the interest required by the Cases or

States, No. 08-2565-JAR, 2009 WL 2877645, at *4 (D. Kan. Sept. 2, 2009).

125. Black, *supra* note 122, at 496-97.

126. U.S. CONST. art. III, § 2, cl. 1.

127. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

128. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citation omitted)) (internal quotation marks omitted).

129. *Id.* (alterations in original) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976)).

130. *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43) (internal quotation marks omitted).

131. Timmermans, *supra* note 47, at 1412.

132. See *supra* notes 124-25 and accompanying text.

Controversies Clause in Article III.¹³³ Some courts however, disagree.¹³⁴ In their view, because the intervenor wants to enter the case on “‘equal footing’ with the original parties, Article III requirements” must be met before granting the application.¹³⁵ The Supreme Court has not spoken directly to the proper relationship between Article III standing and intervention of right under Rule 24(a), so for now we must live with this split of authority among the circuit courts of appeals.¹³⁶ But given the role of the courts in our constitutional system to adjudicate disputes about “legal” rights as opposed to personal interest, it seems impossible to escape the conclusion that some interplay between the two doctrines must surely exist and that this relationship needs to be resolved with certainty in order to appropriately determine when a third-party can participate in existing litigation. In this regard, I will return to these two doctrines in Part IV where I will suggest that the interest required under Rule 24(a) for intervention should be akin to the interest component of the Supreme Court’s standing test, although I would not necessarily conclude, as some courts have, that all standing requirements need to be met by a proposed intervenor.¹³⁷

2. The View of the Courts (As Implied)

To date, the limits on intervention in public law cases that the courts have fashioned are expressly based on the technicalities of the language of Rule 24(a) or at least ambiguities in that language.¹³⁸ The hesitation of some courts, however, to apply a broad right of review in public law cases involving informal rulemaking might very well be based upon some doubt within the judiciary over the benefit of intervention, particularly defendant-intervention, in such cases. As

133. See *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 529-31 (1972) (allowing a union member to intervene in action against union even though member could not institute his own action under applicable statute); *San Juan Cnty. v. United States*, 503 F.3d 1163, 1167 (10th Cir. 2007) (holding that “applicants for intervention need not establish standing”); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 734 (D.C. Cir. 2003) (concluding that “the NRD has established its Article III standing, and that lack of standing is not a ground for rejecting its motion to intervene as of right”); *Habitat Educ. Ctr., Inc. v. Bosworth*, 221 F.R.D. 488, 492 (E.D. Wis. 2004) (explaining that “[t]ypically, [other circuits] regard the imposition of a standing requirement in the intervention context as unsupported by law and unnecessarily burdensome”); *Mausolf v. Babbitt*, 158 F.R.D. 143, 146 (D. Minn. 1994) (explaining that “[t]he Federal Rules of Civil Procedure do not demand that a party have standing to sue in order to intervene as a party, the Supreme Court has declined to decide whether an intervenor must have such standing, . . . and our Court of Appeals imposes no such standing requirement”) (citation omitted).

134. See *Timmermans*, *supra* note 47, at 1412.

135. *Id.*

136. *Id.*

137. See *infra* Part IV.A.1.

138. See *supra* Part II.B.1.a–b.

already noted, traditional public interest law cases often involved civil rights issues.¹³⁹ Certainly, in those cases brought to vindicate civil rights, there is often a need to protect the constitutional rights of plaintiffs, defendants, and often non-parties, and courts can better fashion a remedy to do so by expanding the voices heard in the case through use of Rule 24(a). For reasons that I now turn to, it is dubious that a similar reasoning for intervention can be applied to judicial review of informal agency rulemaking.

III. WHY INTERVENTION IN RULEMAKING CASES IS CONTRARY TO THE PRINCIPLES EMBODIED IN THE APA

A. *American Administrative Process*

1. Rejection of the Adversarial System of Public Policy Making

At the heart of the modern administrative state is the rejection of an adversarial model of government decision-making. The American legal system was built upon a model of private litigants testing and expanding the scope of statutory and common-law principles on a case-by-case basis.¹⁴⁰ Public policy development under this model, while certainly deliberate, ultimately became too slow to adequately respond to rapidly changing economic and social conditions of a burgeoning, increasingly industrialized America.¹⁴¹ Thus, at the dawn of the twentieth century, new theories of administrative processes began to emerge.¹⁴² Progressives, and then the New Dealers, sought a system of comprehensive governmental planning for developing social and economic infrastructure.¹⁴³ James Landis and other early proponents of the administrative state were “encouraged in the possibilities of planning [where an agency] did not always wait for problems to arise in the form of a case or controversy; [but] looked ahead and prepared itself by

139. See *supra* note 7 and accompanying text.

140. Lawyers at the dawn of the modern administrative state fought hard to maintain this adversarial model. See Verkuil, *supra* note 13, at 265. Lawyers at the time preferred the courts for two reasons: (1) “jury trials and other procedural protections meant less control by the decisionmaker over the process” and (2) “the judiciary’s antipathy to [new, bureaucratic] government programs.” *Id.*

141. See Harris, *supra* note 14, at 279-80.

142. See *id.* at 281-82.

143. *Id.* at 281-83.

investigation and study.”¹⁴⁴ Their vision was a new form of regulation of enterprise based upon administrative process.¹⁴⁵

Today, “[a]gencies are bureaucracies of public administration.”¹⁴⁶ While the power that agencies exercise is certainly similar in some regards to the exercise of judicial and legislative power, it is distinct from that conceived by the Constitution. Unlike the courts, agencies do not interpret their statutory obligations with strict, objective attention to the text, structure, and history of a particular piece of legislation.¹⁴⁷ Nor are they equipped to handle the politic-laden legislative function of Congress, as no true political checks are incorporated into the agency rulemaking structure.¹⁴⁸ Agencies are tasked with a much narrower objective within our system: to enable the enforcement of congressional directives through application of expertise, practicality, broad stakeholder input, and inclusion of political considerations.¹⁴⁹ Agencies have the “expert judgment and public policy acumen,”¹⁵⁰ the means “to collect and digest . . . volumes of information,” and the necessary “flexibility to respond to changing” circumstances as needed to ensure effective policy-making and implementation.¹⁵¹ While not always realized in practice, the value of administrative process is, and always has been, its ability to produce government policy in an efficient, streamlined manner.¹⁵²

144. Louis L. Jaffe, *James Landis and the Administrative Process*, 78 HARV. L. REV. 319, 322 (1964).

145. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 122 (1938). As Mr. Landis explained: So much in the way of hope for the regulation of enterprise, for the realization of claims to a better livelihood has, since the turn of the century, been made to rest upon the administrative process. To arm it with the means to effectuate those hopes is but to preserve the current of American living. To leave it powerless to achieve its purposes is to imperil too greatly the things that we have learned to hold dear.

Id.

146. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How Chevron Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 678 (2007).

147. *See id.*

148. *See id.* at 679-80 (explaining the flexibility in the administrative rulemaking function of an agency). *See generally* Krauss, *supra* note 15 (discussing the largely unchecked power of government agencies).

149. Foote, *supra* note 146, at 691.

150. Peter M. Shane, *Ambiguity and Policy Making: A Cognitive Approach to Synthesizing Chevron and Mead*, 16 VILL. ENVTL. L.J. 19, 32 (2005).

151. David S. Rubenstein, “Relative Checks”: *Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169, 2183 (2010).

152. *See id.* at 2183-84.

2. The APA

The transformation from the adversarial system to administrative process left open many questions regarding how best to limit bureaucratic power and protect individual rights. As Nobel laureate, and then secretary of state, Elihu Root explained it in 1916:

There is one special field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. . . . There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong doing [sic] which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation. [Of course these new agencies] carry with them great and dangerous opportunities [for] oppression and wrong. [Thus they must also be] regulated. The limits of their power . . . must be fixed and determined. The rights of the citizen against them must be made plain.¹⁵³

The task for those defending the new administrative state was to create a system of institutional safeguards involving internal and external processes.¹⁵⁴ Ultimately, Congress would enact the APA in 1946, “[t]o improve the administration of justice by prescribing fair administrative procedure.”¹⁵⁵ “[T]he APA established the fundamental relationship between regulatory agencies and those whom they regulate—between government, on the one hand, and private citizens, business, and the economy, on the other hand.”¹⁵⁶ The Act sought to strike a balance between promoting individual rights and maintaining the policymaking

153. Elihu Root, *Public Service by the Bar*, 2 A.B.A. J. 736, 749-50 (1916). For a discussion of the turbulent debate between public and private rights under agency process during this period of time, see generally Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986).

154. See Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 618 (1927). As Justice Frankfurter explained it, “[t]hese safeguards [will] largely depend on a highly professionalized civil service, an adequate technique of administrative application of legal standards, a flexible, appropriate, and economical procedure . . . easy access to public scrutiny, and a constant play of criticism by an informed and spirited bar.” *Id.*

155. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at scattered sections of 5 U.S.C.). In truth, the APA was in large part a compromise between those in Congress who continued to view the adversarial model as superior and those who had supported the President’s New Deal policies. See generally George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

156. Shepherd, *supra* note 155, at 1558.

flexibility envisioned by the New Dealers.¹⁵⁷ As the Senate Judiciary Committee noted at the time of the Act's passage in Congress, the APA "'is designed to provide . . . fairness in administrative operation' and 'to assure . . . the effectuation of the declared policy of Congress.'"¹⁵⁸

The basic structure of the APA exemplifies these twin goals. First, it establishes procedural "requirements concerning public access to agency law, agency rulemaking procedure, agency adjudication procedure, and[, in many aspects most importantly,] judicial review of agency action."¹⁵⁹ The Act generally divides the universe of "agency action into two classes—rulemaking and adjudication[s]—and subject[s] each class to separate procedural schemes."¹⁶⁰ The APA further breaks down both rulemaking and adjudication into two procedural varieties—formal and informal.¹⁶¹ For purposes of this Article, I focus exclusively on informal rulemakings under the APA.¹⁶² In general, in the modern era of administrative law, it is through informal rulemaking that agencies within the Executive Branch have tended to make wholesale changes to

157. *See id.* The Act was enacted "largely in response to the tremendous and unprecedented [growth] of the administrative state . . . and the concomitant backlash to this expansion [from] the legal and business communities." Breger, *supra* note 18, at 338.

158. *See* McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 180 (1999) (alteration in original) (quoting S. REP. NO. 79-752, at 252 (1945)).

159. Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297, 303 (1986) (footnotes omitted). "The first broad concept embodied in the federal APA and emulated by the states concerns the desirability of a *general and comprehensive* APA." *Id.* (emphasis in original).

160. *Id.* at 308; *see also* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1947) [hereinafter AG MANUAL] (explaining that "the entire Act is based upon a dichotomy between rule making and adjudication"). "Rulemaking involves[, as the name implies,] the issuance of [agency] rules" and regulations, which are generally defined as "statements of general applicability prescribing law or policy." Bonfield, *supra* note 159, at 325; *see also* AG MANUAL, *supra*, at 14 (explaining rulemaking as "agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations"). "[A]djudication[, on the other hand,] involves the issuance of [agency] orders," which can be defined as statements of particular applicability [that] determin[e] the rights of specified parties that then may be relied upon by agencies as precedents. Bonfield, *supra* note 159, at 325; *see also* AG MANUAL, *supra*, at 14-15 (explaining that "adjudication is concerned with the determination of past and present rights and liabilities. . . . [I]t may involve the determination of a person's right to benefits under existing law so that the issues relate to whether he is within the established category of persons entitled to such benefits").

161. JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 5-6 (4th ed. 2006).

162. I do not specifically address judicial review of other agency actions, such as adjudications, in this Article. However, for reasons that will become apparent, I prefer improving administrative decision-making of all kinds by placing greater emphasis on improving administrative process and deemphasizing the role of judicial review. Thus, I tend to want to rid all judicial review of agency action from the added burden of intervention. *See infra* Part V.

public policy in areas affecting the environment, education, public health and safety, communications, and other social and economic aspects of American life.¹⁶³

a. Procedural Requirements and the Role of the Public in Informal Agency Rulemaking

The procedural requirements of the APA for informal rulemakings are found in Section 553 of the APA.¹⁶⁴ The APA requires that an agency engaged in informal rulemaking provide notice to the public of the proposed rule, an opportunity for public comment, and the public issuance of a statement of basis and purpose of the final rule adopted.¹⁶⁵ These requirements are commonly referred to as “notice-and-comment rulemaking”¹⁶⁶ and they impose a significant duty on the agency to both obtain and consider broad public input on the policy choices the agency intends to make during rulemaking.¹⁶⁷ As the Court of Appeals for the District of Columbia put it, the notice and comment requirements in informal rulemakings:

are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.¹⁶⁸

163. See Pedersen, *supra* note 11, at 38. Informal rulemaking has become the primary procedural tool used by agencies to make future changes in governmental policy that will impact large segments of the population or the economy. *Id.* As one author has put it:

[t]hrough the rulemaking process pass the sum and substance of the hopes and fears of this democratic nation. We will understand it, our government, and ourselves better when we treat rulemaking as the most important source of law and policy for the conduct of our daily lives. It will occupy that status unless the improbable occurs and we find some very different way to govern ourselves.

CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 279 (2d ed. 1999). It should also be noted that while both formal and informal rulemaking are available to an agency under Section 553 of the APA, *see* 5 U.S.C. § 553 (2006), formal rulemaking procedure is rarely, if ever, utilized by modern administrative agencies. Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 106-07 (noting that “formal rulemaking has turned out to be a null set” in that since “the impracticalities of formal rulemaking are well known, Congress rarely requires this technique, and courts avoid interpreting statutes to require it, even in the rare cases where the statute seems to do so”).

164. *See* 5 U.S.C. § 553(b)–(c).

165. *Id.*; *see also* Am. Med. Ass’n v. Reno, 57 F.3d 1129, 1132 (D.C. Cir. 1995).

166. LUBBERS, *supra* note 161, at 6 (internal quotation marks omitted).

167. *See* 5 U.S.C. § 553(b)–(c).

168. Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005).

b. The Role of the Courts on APA Informal Rulemaking

The APA gives the courts an important role in the administrative process by giving the judiciary the power to determine whether an agency acted within its authority, and within reason, in making its decision. Section 702 of the Act reads “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”¹⁶⁹ In *Citizens to Preserve Overton Park, Inc. v. Volpe*,¹⁷⁰ the Supreme Court case that directly considered the applicable scope of review of informal agency rulemaking, the Court held that *all* agency actions “must be set aside if the action was ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law’ or if the action failed to meet statutory, procedural, or constitutional requirements.”¹⁷¹ This test has been dubbed the “arbitrary and capricious” test,¹⁷² or “hard look” review.¹⁷³ In general, the duty of a court reviewing informal agency rulemaking is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made.¹⁷⁴ Most importantly, judicial review is not intended to recreate an adversarial process. The APA focuses on the rationality of an agency’s decision-making process rather than on the rationality of the actual decision; “[i]t is well established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.”¹⁷⁵ While the agency is certainly not shielded from “a thorough, probing, in-depth review” of its decision by

169. 5 U.S.C. § 702.

170. 401 U.S. 402 (1971).

171. *Id.* at 413-14 (emphasis added) (quoting 5 U.S.C. § 706(2)(A)). The Court held that the action at issue in the case was “nonjudicatory, quasi-legislative in nature.” *Id.* at 415 (emphasis added).

172. See, e.g., Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 40 (1994) (noting that the term should properly be phrased “arbitrary or capricious” (emphasis added) (internal quotation marks omitted)) (internal quotation marks omitted).

173. Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 324 (1996) (internal quotation marks omitted); Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 227 (1996).

174. *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

175. *Id.* at 50; see also *Overton Park*, 401 U.S. at 420 (explaining that judicial review by a court must be made “on the full administrative record” before the agency at the time it made the decision).

the court,¹⁷⁶ ultimately, the scope of review “is narrow and a court is not to substitute its judgment for that of the agency” as set out in the administrative record.¹⁷⁷

*B. As a Practical Matter, Intervention
Undermines the Administrative Process*

The provisions of the APA should be “construed reasonably” and in a manner “which will fairly balance the requirements and interests of private persons and governmental agencies.”¹⁷⁸ Unfortunately, the courts have not always heeded this advice. To the contrary:

Over the past two decades, administrative law scholars have identified hard look judicial review of agency action under the arbitrary and capricious clause of the [APA] as one of, if not the major, impediment to regulatory flexibility. Such scholars contend that review, as currently implemented by the courts, places so many analytic burdens and such uncertainty on agency policymaking that it discourages agencies from acting even when regulatory changes are needed. This position is reflected in the commonly stated adage that judicial review causes ossification of the rulemaking process. In essence, these critics argue that judicial review raises the costs of agency adoption of new policy and thereby discourages such action.¹⁷⁹

Certainly, the fact that defendant-intervention as of right is often sought, and allowed, in these cases is not the only reason that judicial review has eroded the efficiency of the administrative process. But it is a factor. The courts in these cases are placed in a difficult position in considering applications to intervene. On one hand, given the narrow scope of judicial review and that the argument is limited to the administrative record,¹⁸⁰ it is unclear that a court could benefit from numerous defense briefs that review the same arguments.¹⁸¹ Not only do courts face the likelihood of information overload,¹⁸² but also information degradation as intervenors seek to incorporate irrelevant arguments or otherwise reduce the effectiveness of record material before the court.¹⁸³ On the other hand, when a court chooses to deny

176. *Overton Park*, 401 U.S. at 415.

177. *Motor Vehicle Mfrs.*, 463 U.S. at 43.

178. S. REP. NO. 79-752, at 224 (1945).

179. Seidenfeld, *supra* note 20, at 251-52 (footnotes omitted).

180. *Overton Park*, 401 U.S. at 420.

181. Appel, *supra* note 3, at 281.

182. *Id.*

183. See, e.g., *Nat'l Wildlife Fed'n v. Burford*, 878 F.2d 422, 429 n.10 (D.C. Cir. 1989) (explaining that “[t]he intervenor has offered no valid basis for reconsideration of our earlier

intervention, it faces the very real possibility of a lengthy appeal that will further delay judicial review.¹⁸⁴ In sum, intervention practice often harms the rights of those entitled to judicial review under the APA and, most importantly, the public's right to efficient (and fair) resolution of regulatory matters.

1. The Redundancy of Defendant-Intervention

It is not unusual for defendant-intervention to be opposed by plaintiffs in APA rulemaking cases on the basis that the intervenor will unduly complicate the court's review of the agency action.¹⁸⁵ In general, this rationale goes against one of the most oft made arguments in support of a broad right to intervene in public law cases: that "intervenors make new arguments and bring to light evidence that would otherwise not be before the court."¹⁸⁶ This inconsistency highlights the very difference between public law cases generally, and APA rulemaking review cases—the very closed nature of the court's review.

Today, it is black letter law that an agency's reason in promulgating a rule must be documented solely by reference to the administrative record.¹⁸⁷ As the Supreme Court explained in its landmark administrative law opinion in *Citizens to Preserve Overton Park, Inc. v. Volpe*, judicial review of an agency's rulemaking must be based "on the full administrative record" before the agency at the time it made the decision.¹⁸⁸ The Court clarified this mandate in *Camp v. Pitts*,¹⁸⁹ finding that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."¹⁹⁰ Thus, while informal proceedings "are not on the

rejection of this argument, and the Government has not even seen fit to raise the issue. Intervenor's position obviously lacks any merit, and we accordingly reject it"); *Hazel Green Ranch, LLC v. U.S. Dep't of the Interior*, No. 1:07-CV-00414 OWW SMS, 2008 WL 2876194, at *10 (E.D. Cal. July 24, 2008) (noting that outside of bringing its motion pursuant to a different Federal Rule, there was no substantive difference between intervenors' arguments and the government); *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, No. Civ. 03-3013-CO, 2003 WL 23976954, at *5 (D. Or. June 16, 2003) (noting that proposed intervenors "would not contribute to the development of the relevant issues in [the] case" and that "allowing [the proposed intervenors] to interject their proposed arguments would confuse the relevant issues in [the] case").

184. See *infra* Part III.B.2.

185. See, e.g., Response to the State of Wyoming's Motion to Intervene, *Ctr. for Biological Diversity v. Morgenweck*, No. 04-F-0108 (OES) (D. Colo. Apr. 16, 2004).

186. Appel, *supra* note 3, at 295.

187. See, e.g., Breger, *supra* note 18, at 354.

188. *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

189. 411 U.S. 138 (1973).

190. *Id.* at 142; see also *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (explaining that "[t]he task of the reviewing court is to apply the appropriate APA standard of review, 5 U. S. C. § 706, to the agency decision based on the record the agency presents to the

record in the technical sense of the APA, there is, nevertheless, a record in another sense.”¹⁹¹

Exceptions to this limitation on judicial review are rare. In narrow circumstances, district courts have permitted:

extra-record evidence: (1) if admission is necessary to determine “whether the agency has considered all relevant factors and has explained its decision,” (2) if “the agency has relied on documents not in the record,” (3) “when supplementing the record is necessary to explain technical terms or complex subject matter,” or (4) “when plaintiffs make a showing of agency bad faith.”¹⁹²

“These . . . exceptions operate to identify and plug holes in the administrative record.”¹⁹³ Although these exceptions are “widely accepted, [they] are narrowly construed and applied.”¹⁹⁴

Moreover, these exceptions are intended to primarily benefit the party seeking review.¹⁹⁵ After-the-fact rationalization by defendants will “not cure noncompliance by the agency” to fully explain its decision in the record.¹⁹⁶ Likewise, even where a defendant’s arguments are compelling, “[t]he reviewing court should not attempt itself to make up for such deficiencies; [it] may not supply a reasoned basis for the agency’s action that the agency itself has not given.”¹⁹⁷ In short, a court is obligated to review, and the agency obligated to make available to the court, all the actual documents and information that were before the agency at the time that it made its decision.¹⁹⁸ The court is not to engage in an adversarial process in which the parties in the litigation develop extraneous arguments for and against the agency’s rulemaking.¹⁹⁹

reviewing court”).

191. Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park’s Requirement of Judicial Review “On the Record,”* 10 ADMIN. L.J. AM. U. 179, 208 (1996).

192. *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (quoting *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (citation omitted)); *Custer Cnty. Action Ass’n v. Garvey*, 256 F.3d 1024, 1027 n.1 (10th Cir. 2001); see also Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333, 343-44 (1984).

193. *Lands Council*, 395 F.3d at 1030.

194. *Id.*

195. See generally Stark & Wald, *supra* note 192 (discussing the development of the exceptions to the limitation on the judiciary to review the agency’s decision solely by reference to the administrative record in light of the benefit to the party seeking review).

196. *Am. Petroleum Inst. v. EPA*, 540 F.2d 1023, 1029 (10th Cir. 1976).

197. *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

198. See Young, *supra* note 191, at 208-10; see also Pedersen, *supra* note 11, at 62-63.

199. See, e.g., *Motor Vehicle Mfrs.*, 463 U.S. at 50; *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971).

Likewise, unlike in traditional public law cases, courts in APA proceedings are not tasked with developing expansive, judicially directed remedies. Arguably, Section 706 of the APA provides the only remedy available in these cases: “[t]he reviewing court *shall . . . hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] without observance of procedure required by law.*”²⁰⁰ Although courts have found that, in finding an agency action unlawful, a regulation should not be set aside while on remand due to equitable considerations, in these cases, use of other procedural mechanisms, like limited permissive intervention, can be used to protect the interests of third-parties.²⁰¹

In short, the justification for intervention in public law cases simply does not hold water in rulemaking cases. While it is certainly true that it is in the public interest to increase the range of voices heard in developing public policy,²⁰² unlike in traditional public law cases, this opportunity was already available in the context of the underlying administrative proceeding. Certainly, to the extent those voices support the rulemaking, they are part of the record, and therefore can be raised in the court proceedings without replicating the rulemaking process.²⁰³ Indeed, judges are regularly seeking ways to limit intervention and can find themselves in need of chastising intervenors for seeking to expand the case beyond the administrative record and the court’s narrow standard of review. As the late Judge Figa from the District of Colorado put it regarding one intervenor’s attempt to expand the proceedings in a rulemaking review case under the Federal Endangered Species Act (the “ESA”):

[Intervenor] responds to Plaintiffs’ Petition for Review with a Memorandum of Law in Opposition to Plaintiffs’ Petition for Review of Agency Action and attaches voluminous exhibits thereto. The memorandum does little more than restate the status of [Yellowstone cutthroat trout (“YCT”)] management in Wyoming and the state’s perception of its success. It also addresses the existence (or lack thereof) of YCT within its waterways and offers substantive argument in opposition to plaintiffs’ contention that the YCT population is declining. In the Court’s order allowing Wyoming’s intervention, the

200. 5 U.S.C. § 706 (2006) (emphasis added).

201. See *infra* Part V.B.

202. See Appel, *supra* note 3, at 295. Proponents for intervention in public law cases also argue that intervenors might bring better lawyers to the case. *Id.* This seems to be a dubious claim. In any case, “a non-party is not entitled to the best lawyer available” in these cases. *Id.* at 298.

203. See *Camp*, 411 U.S. at 142.

Court directed Wyoming to limit its arguments to “the adequacy of its management plans and policies for Yellowstone cutthroat trout *to the extent, if at all, that such plans and policies have any bearing on the issues plaintiffs raise in their complaint.*” . . . [The Intervenor] does not appear to have followed this directive. For the most part its arguments are irrelevant to the narrow legal issue at hand, whether defendants’ actions violated certain provisions of the ESA and APA.²⁰⁴

2. The Alternative: Unreasonable Delay

For those courts desiring to limit intervention in APA rulemaking cases, the alternative can be even more damaging to the administrative process. As a general rule, a person denied intervention under Rule 24 has the right of immediate appeal.²⁰⁵ When intervention issues are on appeal, the merits of the case often cannot be resolved. Instead, courts choose to wait for resolution of the appeal before proceeding, amounting to what is essentially a stay of the action.²⁰⁶ As one district court explained it, “any action [allowed or taken] for the development of the case without the opportunity of the proposed intervenors to participate therein [would] be inconsistent with the questions pending on appeal as

204. Ctr. for Biological Diversity v. Morgenweck, 351 F. Supp. 2d 1137, 1139 n.2 (D. Colo. 2004).

205. Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co., 331 U.S. 519, 524 (1947); *see also* Citizens for Balanced Use v. Mont. Wilderness Ass’n, 647 F.3d 893, 896 (9th Cir. 2011); WildEarth Guardians v. Nat’l Park Serv., 604 F.3d 1192, 1194 (10th Cir. 2010); Meadowfield Apartments, Ltd. v. United States, 261 F. App’x 195, 196 (11th Cir. 2008); Credit Francias, Int’l, S.A. v. Bio-Vita, Ltd., 78 F.3d 698, 703 (1st Cir. 1996); Corby Recreation, Inc. v. Gen. Elec. Co., 581 F.2d 175, 176 n.1 (8th Cir. 1978). For an example of such an appeal being denied, *see* Hadix v. Caruso, 420 F. App’x 480, 489-90 (6th Cir. 2011), finding that the court lacked jurisdiction to hear an appeal under Rule 24 because it is not a final decision, ending the litigation of the case below on the merits.

206. *See, e.g.,* Stupak-Thrall v. Glickman, 226 F.3d 467, 470 (6th Cir. 2000) (acknowledging that the court held the appeal on the merits “in abeyance” to first decide the motion to intervene). Even where the court does not expressly state it intends to wait for resolution of a proposed intervenors’ appeal, it is often clear from the docket that the merits of the case simply came to a halt while the denial of intervention was on appeal. For example, in *Pogliani v. United States Army Corps of Engineers*, after the district court denied their motion, the proposed intervenors filed an appeal on April 27, 2004. Notice of Appeal, *Pogliani v. U.S. Army Corps of Eng’rs*, No. 01-CV-0951 (NAM/DRH) (N.D.N.Y. Apr. 27, 2004), ECF No. 83. The District Court’s next substantive action on the case, the entry of judgment, did not occur until March 28, 2007—after the appeal was decided. *See* Memorandum–Decision and Order at 2, *Pogliani v. U.S. Army Corps of Eng’rs*, No. 1:01-CV-0951 (N.D.N.Y. Mar. 28, 2007), ECF No. 87. Similarly, in *WildEarth Guardians v. National Park Service*, the proposed intervenors filed a notice of appeal on December 11, 2008. Notice of Appeal, *WildEarth Guardians v. Nat’l Park Serv.*, No. 1:08-cv-00608-MSK-CBS (D. Colo. Dec. 11, 2008), ECF No. 75. The District Court took no further substantive action in the case until March 23, 2001, when it finally issued its judgment affirming the agency action. Opinion and Order Affirming Agency Action, *WildEarth Guardians v. Nat’l Park Serv.*, 804 F. Supp. 2d 1150, 1152 (D. Colo. 2011).

to whether they [were] entitled to such rights.”²⁰⁷ Given that appeals can take up to a year or more to resolve,²⁰⁸ the impact on the efficiency of the administrative process is clear: an outright delay in resolution of important public policymaking. Even more alarming, this delay can occur despite a Congressional mandate setting forth express timetables for agency rulemaking.²⁰⁹

IV. WHY INTERVENTION IN RULEMAKING CASES IS CONTRARY TO THE PRINCIPLES EMBODIED IN THE FEDERAL RULES

A. *Revisiting the Concept of a Rule 24(a)(2) “Interest”*

As already noted, courts have struggled to define what constitutes an appropriate “interest” in public interest litigation under Rule 24(a)(2).²¹⁰ What we do know is that as a general matter, scholars before 1966 were dissatisfied with the “shoddy and unimaginative” approach employed by courts when it came to the Federal Rules.²¹¹ Too much emphasis was placed on the legal impact of the litigation on absentee parties, as opposed to the practical impact. Thus, as Professor John W. Reed observed in 1957:

[T]here is nevertheless a very proper reluctance to make a determination which may affect adversely the interests of A [the absent person]. The distinction is between affecting A’s rights legally and affecting them factually. Since the court is without power to adjudicate the rights of A, it is clear that the court’s determination of the controversy between the parties who are present will not and cannot legally affect A’s rights. But the decision may, in fact, affect A’s interests, as where he is left with a claim against one of the parties in the first action which, although technically unimpaired, is practically

207. *Maine v. Norton*, 148 F. Supp. 2d 81, 83 (D. Me. 2001).

208. See *Frequently Asked Questions*, U.S. CTS. FOR NINTH CIRCUIT, <http://www.ca9.uscourts.gov/content/faq.php> (last updated Nov. 1, 2001). According to the Ninth Circuit, for a civil appeal, it takes “approximately 12-20 months from the notice of appeal date” to oral argument. *Id.*

209. See, e.g., 15 U.S.C. § 2683 (2006) (“Within 18 months after October 28, 1992, the [EPA] Administrator shall promulgate regulations which shall identify . . . lead-based paint hazards . . .”); 16 U.S.C. § 1604(g) (2006) (“As soon as practicable, but not later than two years after October 22, 1976, the Secretary [of Agriculture] shall . . . promulgate regulations . . . that set out the process[es] for the development and revision of the land management plans [for federal public forests and rangelands.]”); 42 U.S.C. § 7409 (a)(1)(A) (2006) (“[W]ithin 30 days after December 31, 1970, [the EPA Administrator] shall publish proposed regulations prescribing a national primary ambient air quality standard.”).

210. See *supra* Part II.B.1.a.

211. John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 355 (1957).

and factually worthless; and it is small comfort to him to be informed that his claim is legally intact. So, although the old jurisdictional bugbear be done away with, courts unquestionably must seek to avoid determinations which will adversely affect absent parties.²¹²

While this description similarly leaves many questions about the scope of an appropriate interest, I propose that it, along with the Advisory Committee's notes on Rule 24, strongly suggest that the drafter's of the federal rule envisioned that three factors would come into play in considering whether an absentee party could (or must) be made part of the action.

1. Factor 1: The Interest Must Be in a Legal Right

The absentee's "interest" must be in the form of a recognized legal "right." Courts are in the business of adjudicating rights, not mere disputes about policy. It would not be a sufficient interest, therefore, that the absentee has a specific emotional attachment to the case or some vague outrage about one of the party's positions.²¹³

As discussed in Part II, the unanswered question is whether the interest in a legal right required by Rule 24(a) is identical to the interest required by Article III of the Constitution.²¹⁴ It would be difficult to propose, however, that in drafting Rule 24(a), the Federal Rules Advisory Committee would have expected that the proposed intervenor would also need to show an "injury in fact" that is fairly traceable to the challenged action of an existing party.²¹⁵ The Committee clearly spoke in terms of "practical" impairment of a third-party's rights.²¹⁶ This standard is less stringent than requiring a party to demonstrate that his or her legal interest in an action is not only "concrete and particularized," but also that injury to that interest is "actual or imminent."²¹⁷

Moreover, standing is a doctrine intended to act as the court's gatekeeper: a party must demonstrate standing to "invoke the court's jurisdiction" in the first instance.²¹⁸ But once jurisdiction is properly

212. *Id.* at 336 (emphasis omitted).

213. *See* Appel, *supra* note 3, at 280. This view of an interest is consistent with the view of some past Supreme Court Justices, that a "significantly protectable interest" under Rule 24(a)(2) must be "a direct and concrete interest that is accorded *some degree of legal protection*." *Diamond v. Charles*, 476 U.S. 54, 75 (1986) (O'Connor, J., concurring in part and concurring in the judgment) (emphasis added) (internal quotation marks omitted).

214. *See supra* Part II.B.1.c.

215. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted).

216. *See supra* notes 75-76 and accompanying text.

217. *See Lujan*, 504 U.S. at 560.

218. *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003).

invoked, courts have regularly allowed other parties to participate. For example, with respect to adding plaintiffs after initiation of the lawsuit, the Supreme Court has recognized the principle that standing of one is standing for all. That is, Article III standing is generally satisfied so long as one plaintiff already in the case has standing.²¹⁹ Thus, it makes no sense to require a proposed plaintiff-intervenor to demonstrate a constitutionally mandated interest that is equivalent to the interest required of the first plaintiff that invoked the court's jurisdiction. Likewise, it is just odd that some courts have required a showing of standing by a proposed defendant-intervenor in order to gain entry into a lawsuit.²²⁰ As at least one court has wondered aloud, why should any defendant be subject to a doctrine that is directed at parties seeking to commence litigation, i.e., plaintiffs?²²¹

Of course, one of the reasons a party seeks to intervene as of right in a district court proceeding—as opposed to merely participating as *amicus curiae*—is that Rule 24(a) grants “party” status to the litigation, including the right to appeal an unfavorable decision.²²² The Supreme Court has held that any party seeking to invoke the jurisdiction of a court of appeals must demonstrate standing in the higher court.²²³ Thus, it could be argued that a proposed intervenor who may wish to seek an appeal at some point should first be required to demonstrate independent standing in the lower court action. But it would be speculative of the outcome to require such of a proposed-intervenor, especially where the same demonstration of standing is not required of an existing co-plaintiff in the district court.²²⁴ Moreover, the nature of the intervenor's interest could change significantly during the lower court action, or as a result of an adverse decision by the district court.

219. See *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981); *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 338 (D.C. Cir. 2003).

220. See, e.g., *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003).

221. See, e.g., *Roeder*, 333 F.3d at 233.

222. See *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 428 (6th Cir. 2008). “The function of an *amicus curiae* [or friend of the court] is to [bring] to the court's attention . . . law[,] facts or circumstances in a matter [before the court that could] otherwise escape [the court's] consideration.” 4 AM. JUR. 2D *Amicus Curiae* § 6 (2007) (emphasis added). An *amicus curiae* is not a party to the litigation. *Id.*

223. *Diamond v. Charles*, 476 U.S. 54, 63-64 (1986).

224. See *Watt*, 454 U.S. at 160.

2. Factor 2: Redressability

As a practical matter, the lower court must be in a position to both consider the proposed-intervenor's interest, as well as to address it in fashioning a remedy in the case. "The interest requirement [should be defined, at minimum,] to ensure that the court is not bogged down with unnecessary intermeddlers who bring nothing to the litigation,"²²⁵ or at least who bring nothing that the court is in a position to address given the context of the litigation. Thus, while an absentee party who might have a breach of contract claim against Mr. X might have an interest in making sure that X does not lose all of his money as a result of an unrelated tort suit between Plaintiff Y and Defendant X, the court in the Y-X suit certainly is not in a position to hear the absentee parties' concerns. It is simply not relevant to the issues before the court in the tort litigation. As one court best put it:

The Court does not propose that our hearing and consideration of the limited issues above stated shall be bogged down by arguments on various motions for leave to intervene which have been submitted, and by oral arguments and briefs on behalf of the numerous would-be intervenors. We have decided to deny all the pending motions for leave to intervene, and an alternative motion . . . for leave to appear as *amicus curiae* and to be heard orally and by brief is also denied.²²⁶

3. Factor 3: Fairness and Efficiency

Finally, a court's resolution of the absentee's interest in the case should assist in avoiding future litigation between the parties. The focus of the Federal Rules is, plain and simple, on fairness to the parties and to judicial economy. Thus, "[t]he purpose of intervention is to expedite litigation by disposing of a whole controversy among individuals and/or entities involved in the same cause of action and to avoid multiplicity of actions."²²⁷ In cases under the APA, the court should also consider whether the role of the intervenor would impede efficient resolution of the agency's obligation to make policy under its Congressional mandates.

225. See Appel, *supra* note 3, at 280; see also *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004) ("Officious intermeddlers ought not be allowed to hijack litigation that the real parties in interest can resolve to mutual benefit.").

226. *Algonquin Gas Transmission Co. v. Fed. Power Comm'n*, 201 F.2d 334, 342 (1st Cir. 1953).

227. *Serio v. Equitable Life Assurance*, 540 N.E.2d 800, 802 (Ill. App. Ct. 1989).

B. The Interests at Stake in APA Cases Do Not Warrant Defendant-Intervention Under Rule 24(a) of the Federal Rules of Civil Procedure

Even setting aside the real-world impact intervention can have on the efficiency of the administrative process discussed in Part III, defendant-intervention in judicial proceedings under the APA is also problematic under the Federal Rules. As a practical matter, the proposed intervenor's "interest" in a judicial review proceeding is: (1) not in an individual legal "right," (2) that can be considered and addressed by the court, (3) in a manner that would assist in the fair and efficient use of judicial and administrative resources.

Of the three factors set forth in Part III.A. above, the question of whether a proposed defendant-intervenor in an APA case has a "right" at stake in the litigation is by far the most sticky. To address this factor, it might be helpful to first step back and consider the question in the context of both private law and other public law cases. The private law case is easy. In most instances, a proposed intervenor is likely to have a property or financial stake for which the applicant seeks to assert his or her rights.²²⁸ With regard to traditional public law litigation, as a general proposition, these cases involve civil rights disputes²²⁹ that invoke individual substantive rights primarily under the Constitution.²³⁰ For example, as Professor Appel explains, in a school desegregation case, "[t]he remedy turns on how the school system can provide [standards for] education to students [that] live up to the constitutional command."²³¹ Given this constitutional overtone, it is easier for a proposed intervenor seeking to represent the broad interests of students and parents to demonstrate that a true right is at stake. Indeed, in these cases a court is generally being asked to use its broad discretion to

228. See, e.g., *LG Elecs. Inc. v. Q-Lity Computer Inc.*, 211 F.R.D. 360, 365 (N.D. Cal. 2002) (explaining that movant was entitled to intervene in patent infringement suit as of right only to oppose patentee's motion to amend its infringement contentions to include movant's computer products, since movant had a protectable interest which might not be adequately protected by existing defendants who did not have the same knowledge as movant concerning design of movant's products); *Pac. Mut. Life Ins. Co. v. Am. Nat'l Bank & Trust Co. of Chi.*, 110 F.R.D. 272, 273-74 (N.D. Ill. 1986) (explaining that the interest of limited partners, who invested over one million dollars into partnership for purpose of developing property, which was now subject of foreclosure action, had direct and substantial interest to warrant intervention as of right).

229. See Appel, *supra* note 3, at 222.

230. See, e.g., Patrick M. Garry, *A One-Sided Federalism Revolution: The Unaddressed Constitutional Compromise on Federalism and Individual Rights*, 36 SETON HALL L. REV. 851, 878 (2006) (stating that "[t]he civil rights movement solidified the transformation in constitutional approaches to the preservation of liberty: from relying on the structural provisions of the Constitution to using the courts to enforce substantive individual rights").

231. Appel, *supra* note 3, at 235-36.

develop remedies that can impact the lives of numerous individuals, including the intervenors.²³²

In APA rulemaking review cases, however, what is at issue is the legality of a rulemaking that was promulgated with the intent of meeting the agency's broad statutory mandate to regulate private conduct for the public good. To succeed on a Rule 24(a) motion in one of these cases, a proposed defendant-intervenor would need to establish that the underlying statute, or the agency's challenged rule, granted him or her a specific legal right.²³³ Since the 1960s, the Supreme Court has made it increasingly difficult for a party to assert a private right of action under a federal statute.²³⁴ The Court requires the party asserting the right to identify "textual evidence that Congress intended to [provide] a private remedy."²³⁵ The Supreme Court has specifically said it is "especially reluctant to imply [private rights] under statutes [creating] duties on the part of persons for the benefit of the public at large."²³⁶ Regarding the authority of an agency to bestow individual rights, the Supreme Court similarly casts serious doubt on that possibility in *Alexander v. Sandoval*²³⁷ when it held that agency regulations could not establish a private right of action by regulation.²³⁸

Even if a proposed defendant-intervenor could establish a "right" stemming from the agency's rulemaking, the court in a judicial review proceeding is precluded from giving it consideration. In addition to the requirement discussed in Part III that review of the agency action be limited to the administrative record, the Supreme Court has stated that the limited purpose of these proceedings is to:

"consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of

232. See *id.* at 236.

233. See FED. R. CIV. P. 24(a)(1).

234. See Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 845-46 (2002).

235. *Id.* at 846.

236. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690-92 n.13 (1979).

237. 532 U.S. 275 (2001).

238. *Id.* at 291; see also Bradford C. Mank, *Can Administrative Regulations Interpret Rights Enforceable Under Section 1983?: Why Chevron Deference Survives Sandoval and Gonzaga*, 32 FLA. ST. U. L. REV. 843, 847 (2005). Even if an agency has the authority to create an enforceable individual right, its intent to do so must be clear and unambiguous. See *id.* As one scholar noted, an agency's regulation creating such a right would need to meet "the Supreme Court's three-prong Blessing test." Charles Davant IV, *Sorcerer or Sorcerer's Apprentice? Federal Agencies and the Creation of Individual Rights*, 2003 WIS. L. REV. 613, 642. In *Blessing v. Freestone*, the Court held, among other things, that in creating a federal right, "the statute [here, the regulation] must unambiguously impose a binding obligation on the States." *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997).

judgment.” . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.²³⁹

In performing this task, a court “is not to substitute its judgment for that of the agency.”²⁴⁰ Instead, the Court has “long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”²⁴¹ Thus, even if a reviewing court was to disagree with the treatment of a proposed intervenor’s interest by the agency, “[i]f [the agency’s] choice represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, [a court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”²⁴²

In this regard, it is fair to say that the presumption that the government cannot adequately represent a defendant-intervenor’s interest in an APA case misses the mark on the role of government in rulemaking cases. As some have noted, “in today’s complex regulatory environment . . . [g]overnmental organizations represent broad interests applicable to all citizens, and cannot effectively represent narrow and possibly conflicting interests.”²⁴³ The nature of regulation, it is argued, sets up a conflict “between the regulator and regulated,” and the same government defendant cannot represent this conflict.²⁴⁴ This is undoubtedly true in the administrative rulemaking process. But for reasons just noted, once the rule goes before the court of review, the case is no longer about interests of the regulator or the regulated; it is only

239. *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (footnotes omitted) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1973) (citation omitted) (internal quotation marks omitted)).

240. *Id.*

241. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

242. *Id.* at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)); *see also* *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994) (“[T]he essential function of judicial review is a determination of (1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion.”).

243. Black, *supra* note 122, at 483.

244. Goepp, *supra* note 123, at 132; *see also* *Utah Ass’n of Cnty. v. Clinton*, 255 F.3d 1246, 1255-56 (10th Cir. 2001).

about whether the government has fully articulated an adequate reason, on the record, for making its policymaking choice.²⁴⁵

It is, therefore, not the doctrine of *parens patriae* that needs to be invoked to limit defendant-intervenor participation, but instead principals of administrative law. The limited scope of judicial review does not allow for a forum for individuals to assert their rights to an agency decision. As Professor Gary Lawson has described the purpose of judicial review:

The agency must demonstrate *awareness* and *candor*. It must indicate that it knows that it is dealing with factual and statutory uncertainty and that an answer is therefore not dictated by any evidentiary or interpretive considerations. *It must then identify the nonfactual and nonstatutory considerations upon which it chooses to rely and the reasons why it selected those considerations rather than others.* The agency should prevail, on this model, so long as [the record discloses] those considerations and the reasons that led to them [and that those considerations and reasons] bear some plausible relation to the agency's mission.²⁴⁶

A court can perform this function and conclude whether the agency has satisfied its obligation regardless of whether or not an intervenor is present in the litigation. More importantly, the court is simply not allowed to revisit the intervenor's interest beyond what is already set forth in the rulemaking record before the court.²⁴⁷

Finally, the presence of an intervenor in these cases does nothing to promote judicial or administrative efficiency. Recall that the purpose behind intervention is, in part, to minimize the need for multiple judicial proceedings.²⁴⁸ The nature of the intervenor's interest in an APA case—to support the agency rulemaking—is generally not one that could be unilaterally attacked (or protected) in an independent action outside of the judicial review proceeding. Moreover, given the court's limited discretion regarding the remedy in these cases—whether to remand an agency rule, set it aside, or both²⁴⁹—it is also unlikely that a decision would generate additional litigation related to an intervenor's interests. The status of the rulemaking would guide the intervenor's action at that

245. See *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1573-74 (10th Cir. 1994).

246. Lawson, *supra* note 173, at 324-25 (third emphasis added).

247. See 5 U.S.C. § 706 (2006); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

248. See *supra* notes 73-75 and accompanying text; see also Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U L. REV. 1061, 1061 (1985) ("There is a strong movement in federal court litigation toward 'packaging' all aspects of a controversy into a single lawsuit." (footnote omitted)); Jenkins, *supra* note 2, at 277.

249. See *infra* notes 276-77 and accompanying text.

point; at least until subsequent agency action occurs. There is, in short, no need to bring the intervenor into the case to aid the policymaking process.

C. Courts Have Acknowledged the Concern over Third-Party Involvement in APA Cases Under Rule 19

It has been observed that “Rule 19(a)(2)(i), dealing with joinder of persons needed for a just adjudication, and Rule 23(b)(1)(B), dealing with class actions, as well as the new Rule 24(a)(2), contain substantially similar language establishing as a criterion the practical effect which the action in question will have on the absent parties.”²⁵⁰ Indeed, the drafters of both rules viewed them as counterparts: “Rule 19 address[ed] concerns of an existing party to a lawsuit, [whereas] Rule 24(a) [was] suited to protect one who is not yet a party to the [action].”²⁵¹ In either case, there are similar interests at stake that strongly support inclusion of a non-party in the litigation.²⁵²

Notably, in the context of APA judicial review proceedings, courts have repeatedly found that joinder of interested parties into the case is not required—invoking what has been labeled the “public interest exception.”²⁵³ This exception provides that when litigation seeks vindication of a public right, third persons who could be adversely affected by a decision favorable to the plaintiff are not indispensable parties.²⁵⁴ While “[t]he exact contours of the public interest exception have not been defined[,]” the exception generally applies where “what is at stake are essentially issues of public concern and the nature of the case would require joinder of a large number of persons.”²⁵⁵ Thus, according

250. Howard J. Alperin, *Construction of Federal Civil Procedure Rule 24(a)(2), as amended in 1966, Insofar as Dealing with Prerequisites of Intervention as a Matter of Right*, 5 A.L.R. Fed. 518, § 3 (1970); see also Katherine Florey, *Making Sovereigns Indispensable: Pimentel and the Evolution of Rule 19*, 58 UCLA L. REV. 667, 718 n.319 (2011) (explaining that the language in Federal Rule of Civil Procedure 24(a) tracks the language of Federal Rule of Civil Procedure 19(a)).

251. Robert K.G. Bollich, Comment, *Through an “Intervention,” the Court of Federal Claims Expresses Itself as the People’s Court of Our Nation*, 51 S. TEX. L. REV. 147, 154 (2009).

252. *Id.* See Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1970 (2007) (“Both Rules use similar open-ended language, such as “interest” and “impair or impede,” to define the circumstances under which an absentee should be joined (Rule 19(a)) or has a right to intervene in the lawsuit (Rule 24(a)(2)).”); Tobias, *supra* note 39, at 770 n.124 (“It is helpful to view the 1966 party joinder amendments as a package of different tools designed to solve similar problems.”). Indeed, some have gone so far as to suggest greater harmonization of Rule 19 and Rule 24 jurisprudence; see also Juliet Johnson Karastelev, *On the Outside Seeking in: Must Intervenor Demonstrate Standing to Join a Lawsuit?*, 52 DUKE L.J. 455, 472-73 (2002).

253. See Tobias, *supra* note 81, at 321.

254. See *id.*

255. *Sierra Club v. Watt*, 608 F. Supp. 305, 324 (E.D. Cal. 1985); see also Nat’l Wildlife Fed’n

to the Eleventh Circuit, “when litigation seeks vindication of a public right, third persons who could be adversely affected by a decision favorable to the plaintiff do not thereby become indispensable parties.”²⁵⁶

It has been noted that the Federal Rules themselves compel the reading of a public rights exception into Rule 19 as much as they are required to “be ‘construed [in a manner] to secure the just, speedy, and inexpensive determination of every action.’”²⁵⁷ Surely, if justice cannot be done if public interest litigation is hampered by the requirement of joinder,²⁵⁸ justice is equally impaired when Rule 24 intervention diminishes the effectiveness and efficiency of the administrative process, as envisioned by the APA. As one court observed, “[i]n sum, then, the public interest exception . . . just makes good sense.”²⁵⁹

V. RETHINKING INTERVENTION IN RULEMAKING CASES

In *Olenhouse v. Commodity Credit Corp.*,²⁶⁰ the Tenth Circuit Court of Appeals announced the sweeping proposition that, in reviewing agency actions under the APA, lower courts must refrain from using summary judgment and other procedural mechanisms available under the Federal Rules.²⁶¹ The court was dismayed that the lower court had abandoned the narrow scope of judicial review required by the APA.²⁶² Instead of focusing its inquiry to the administrative record, the lower court had instead relied on the arguments of counsel in the summary judgment proceeding to affirm the agency’s action.²⁶³ The Tenth Circuit felt compelled to “chastise[] the lower court’s use of ‘illicit’ procedures and emphasized the need to examine the actual administrative record and avoid reliance on extra-record information.”²⁶⁴ Moreover, the court

v. Burford, 676 F. Supp. 271, 276 (D.D.C. 1985).

256. Jeffries v. Ga. Residential Fin. Auth., 678 F.2d 919, 929 (11th Cir. 1982).

257. Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 457 (quoting FED. R. CIV. P. 1).

258. *Sierra Club*, 608 F. Supp. at 325.

259. *Id.*

260. 42 F.3d 1560 (10th Cir. 1994).

261. *Id.* at 1579-80.

262. *Id.* at 1580.

263. *Id.* at 1579-80.

264. Sam Kalen, *Federal Administrative Procedure Act Claims: The Tenth Circuit and the Wyoming District Court Should Fix the Confusion Attendant with Local Rule 83.7.2*, 11 WYO. L. REV. 513, 521 (2011); see also *Staso v. United States*, 538 F. Supp. 2d 1335, 1337 (D. Kan. 2008). The *Staso* court held:

It is clear from the Tenth Circuit’s decision in *Olenhouse* . . . , however, that the use of summary judgment is prohibited in administrative appeals such as this case . . . [because] the summary judgment procedure improperly allows the moving party . . . to define the

announced a striking new rule for the circuit: in APA proceedings, lower courts should “function[] like an appellate court and must [consider] these cases . . . in accordance with the Federal Rules of Appellate Procedure.”²⁶⁵

Olenhouse v. Commodity Credit Corp., provides a good look at the trouble associated with a court over-applying the more familiar adversarial processes embodied in the Federal Rules to the review of an agency’s informal rulemakings. In this Article, I have sought to make a similar case regarding application of Rule 24(a). In this final Part, I provide a few proposals to amend the APA, the Federal Rules, or both to address non-party involvement in informal rulemaking cases. While my principle suggestion is to eliminate the application of Rule 24(a) to APA rulemaking cases, I do so in realization that there are circumstances that can arise within these proceedings that call for participation of non-parties. Thus, I would allow limited, permissible intervention under Rule 24(b) when a court goes outside of the administrative record during its consideration of interim or permanent relief and where a third-party has a legitimate equitable claim of reliance on the agency’s informal action. Likewise, in cases where the party seeking judicial review reaches a settlement with the government agency, I would invite broader participation, in the form of public comment, to help ensure that resolution of the case is in the public interest.

A. *Eliminate Intervention of Right in APA Informal Rulemaking Cases*

There is no need for an intervention of right practice in APA cases. As already noted, the APA provides for the right to judicial review to any person adversely affected by the agency’s action.²⁶⁶ For this reason, any affected party can become a plaintiff in a case seeking judicial review as long as he or she does so within the limitations period, if any,

issues on appeal and erroneously invites the court to rely on evidence outside the administrative record.

Staso, 538 F. Supp. 2d at 1337.

265. Kalen, *supra* note 264, at 521. According to the court, in APA proceedings:

A district court is not exclusively a trial court. In addition to its *nisi prius* functions, it must sometimes act as an appellate court. Reviews of agency action in the district courts must be processed *as appeals*. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure. Motions to affirm and motions for summary judgment are conceptually incompatible with the very nature and purpose of an appeal.

Olenhouse, 42 F.3d at 1580. *Olenhouse* has certainly changed the way these cases are heard in lower courts within the circuit. Both U.S. District Courts for the Districts of Colorado and Wyoming have amended their local rules to revise the procedural posture of APA cases. D.C. COLO. L.A.P.R. 10.2(C); D.C. WYO. L.C.R. 83.7.2(b).

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

provided by Congress.²⁶⁷ The only real concern is where a party seeks to join a judicial review late in the court proceedings and threatens to cause delay in the outcome.²⁶⁸ This problem, however, could be handled in a more efficient and equitable manner than the denial of a Rule 24(a) motion. For instance, the APA or Federal Rules could place time limits on the right to join existing administrative review proceedings, as is the case under the Federal Rules of Appellate Procedure.²⁶⁹ Latecomers could then choose to file a new complaint seeking judicial review, and the court could be left to determine how to coordinate the two actions under Federal Rule of Civil Procedure 42.²⁷⁰

With regard to the substantive review of an agency rulemaking, for reasons discussed in great depth in Parts II and III of this Article, there is also just no justifiable role for defendant-intervenors in these cases. To ensure speedy resolution of public policy matters before administrative agencies, the APA or Federal Rules should be amended to provide a “public interest” exception to both Rule 19 and 24.

Of course, there will be those who argue that defendant-intervenors can improve public policy by bringing to the table arguments in support of a rule that were not fully considered by the agency during the administrative process. Indeed, critics of the administrative process have rightfully complained that participation in traditional agency “notice-and-comment rulemaking suffers from problems of quality.”²⁷¹ But it makes little sense to revert to an adversarial judicial process as a means of addressing the inadequacy of the administrative process. Instead, as I have argued elsewhere, we need to improve the quality of public

267. See FED. R. CIV. P. 24.

268. See Appel, *supra* note 3, at 260.

269. FED. R. APP. P. 15(d). The Rule states:

Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion—or other notice of intervention authorized by statute—must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.

Id. This rule does not explicitly set forth any specific requirements on a party seeking to intervene other than that it must explain its interest in the proceeding and grounds for intervention. *Id.* And although the rule uses the term “intervene,” courts have not scrutinized proposed-intervenors in the same manner as a Rule 24(a) motion. Instead, it is enough for the movant to explain how he or she has been affected by the agency’s action. See, e.g., *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 744–45 (D.C. Cir. 1986) (allowing intervention because petitioners were “directly affected by” application of agency policy).

270. FED. R. CIV. P. 42(a) states: “If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay.”

271. See, e.g., Beth S. Noveck & David R. Johnson, *A Complex(ity) Strategy for Breaking the Logjam*, 17 N.Y.U. ENVTL. L.J. 170, 177 (2008).

participation in the first instance, preferably in the form of a more discursive agency process.²⁷²

B. Permissive Intervention to Prevent Third-Party Inequities

In the course of civil litigation, a federal court is often asked to resolve matters related to interim or permanent relief in addition to ruling on the merits of the underlying claim(s). The same can be true in an action to review agency action under the APA. For instance, a plaintiff in an APA rulemaking case may seek a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure to enjoin an agency from implementing its rules pending a final decision by the reviewing court.²⁷³ In considering whether to grant such interim relief, the court will consider several factors, including: (1) the likelihood of success on the merits; (2) the likelihood that the movant will suffer irreparable harm in the event that injunctive relief is not granted; (3) the balance of equities between the parties; and (4) whether an injunction is in the public interest.²⁷⁴ It is not unusual, therefore, for the court to turn to evidence from outside of the administrative record in considering the equities in a decision to grant or deny relief.²⁷⁵

Similarly, while Section 706 of the APA purports to require that a court “set aside” an unlawful agency action,²⁷⁶ courts have recognized that in some cases, equitable consideration might require it to keep an agency’s decision in place while the agency is given a chance to reconsider the rule.²⁷⁷ Courts have identified the following factors controlling the equitable decision to vacate or retain the defective rule during remand: “(1) the purposes of the substantive statute under which the agency was acting; 2) the consequences of invalidating or enjoining the agency action; 3) the potential prejudice to those who will be affected by maintaining the status quo; and 4) ‘the magnitude of

272. Michael Ray Harris, *Environmental Deliberative Democracy and the Search for Administrative Legitimacy: A Legal Positivism Approach*, 44 U. MICH. J.L. REFORM 343, 373-74 (2011).

273. See FED. R. CIV. P. 65(a). “The court may issue a preliminary injunction only on notice to the adverse party.” *Id.*

274. See, e.g., *Attorney Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009).

275. See *id.*

276. 5 U.S.C. § 706 (2006). “Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid.” *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995). Therefore, “vacatur of an unlawful agency rule normally accompanies a remand.” *Alsea Valley Alliance v. Dep’t of Commerce*, 358 F.3d 1181, 1185 (9th Cir. 2004).

277. See, e.g., *Chem. Mfrs. Ass’n v. EPA*, 870 F.2d 177, 236 (5th Cir. 1989); *W. Oil & Gas Assoc. v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980).

administrative error and how extensive and substantive [the error] was.”²⁷⁸ Again, in these narrow cases where a court is asked to consider not setting aside the agency decision, a review outside of the record to examine the equitable considerations may be required.

In these two circumstances, it is plausible that a non-party could demonstrate an adequate legal interest in the relief being considered by the court. Moreover, unlike with regard to the underlying review of the agency action, because of the potential scope of discretion in deciding to grant the requested relief, the court would have the ability to both consider the third-party interest and, if appropriate, redress it. For example, courts have recognized that government regulations applicable to third parties are often put in place to protect the health and safety of specific classes of persons that would be at jeopardy in the event of a vacature (or injunction).²⁷⁹ In such a case, those in the protected class would meet the three-factor test proposed in Part IV for intervention.

To provide for meaningful participation by a third-party in these limited circumstances, the APA should provide for the right to seek permissive intervention under Rule 24(b).²⁸⁰ In doing so, the court would not have to allow the intervenor to enter into the proceeding as a full party with all rights to participate in the action.²⁸¹ Thus, the court would be able to allow the intervenor to make his or her equitable arguments regarding interim or permanent relief while maintaining a limited proceeding to review the agency action consistent with the APA.

C. Requiring Use of Consent Decrees with Public Comment to Settle APA Rulemaking Actions

The Supreme Court has long recognized that “[r]egulatory agencies do not establish rules of conduct to last forever.”²⁸² Agency policymaking is, in fact, often subject to the political changes brought about from “the election of a new President of a different political party.”²⁸³ “As long as the agency remains within the bounds [of its

278. *Natural Res. Def. Council v. U.S. Dep’t of Interior*, 275 F. Supp. 2d 1136, 1144 (C.D. Cal. 2002) (quoting *Endangered Species Comm. of the Bldg. Indus. Ass’n of S. Cal. v. Babbitt*, 852 F. Supp. 32, 41 (D.D.C. 1994)).

279. *See, e.g., Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991).

280. “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.” FED. R. CIV. P. 24(b).

281. Unlike Rule 24(a), the rights of a permissive intervenor may be limited at the discretion of the court. *United States v. Exxon Corp.*, 773 F.2d 1240, 1306 (Temp. Emer. Ct. App. 1985).

282. *Am. Trucking Ass’n, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967).

283. *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S.

statutory authority], it is entitled to . . . [re]evaluate its priorities in light of the philosophy of the [new] administration.”²⁸⁴

Of course, a new administration might choose to signal a change in policy direction another way: by not adequately defending the promulgated rules of a previous administration in an ongoing APA case.²⁸⁵ When this occurs, it is not wholly unfair to want those who would defend a rule that benefits their interest to be given the right to intervene to do so. But there are two arguments against allowing intervention of right where it can be argued that the government is not adequately defending its own administrative rulemaking. First, as long as the government is continuing to participate in the litigation as a defendant, the argument that it is doing a poor or inadequate job is somewhat subjective. Certainly, any party who thinks the government should be more rigorous in its efforts, or who believes its attorneys could do a better job, would be inclined to demand intervention. Second, as long as the case is continuing, the court is still obligated to uphold the rule unless the plaintiff can demonstrate that the decision is unreasonable in light of the existing administrative record. While this might not be the most reliable safeguard, it is the one required by the APA.²⁸⁶

On the other hand, when the government chooses not to defend the rulemaking by settling with the plaintiff, no check on the process exists at all. In such a case, there is the possibility that the government could make promises to the plaintiff to take policy in a different direction that would undermine Congress’s intent, or it could voluntarily vacate rules without following the procedures of the APA. In this situation, the government should be required to settle only in the context of a court-authorized consent decree that allows for public comment regarding whether the settlement is in the public interest.

29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part).

284. *Id.*

285. Government decisions to not defend its regulations are rare, but not uncommon. Professor Jack M. Beermann suggests that an incoming administration may not, due to politics, “enthusiastically defend [a challenged] rule, and the rule might be invalidated or limited when a better defense may have vindicated the rule.” Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 959 (2003); *see also* Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 471-72 (1989) (suggesting that the 1970 amendments to the Clean Air Act were intended to provide procedural protection to the President against agency drift). For examples of cases where the Executive Branch decided not to defend a challenged rule or law, *see* Letter from Andrew Fois, Assistant Attorney Gen., U.S. Dep’t of Justice, to Hon. Orrin G. Hatch, Chairman, U.S. Senate Comm. on the Judiciary (Mar. 22, 1996).

286. *See* 5 U.S.C. § 706 (2006).

Unlike typical settlement agreements, a consent decree carries “the earmarks of [a] judicial order[] because [it is] (1) entered by a court, (2) enforceable by the court through the use of a contempt of court citation, and (3) potentially modifiable by the court, even over the objection of a party to the agreement.”²⁸⁷ Consent decrees in the public interest are often made subject to public comment.²⁸⁸ In suits involving the public interest, the court’s role is more searching than in typical litigation between private parties.²⁸⁹ The adequacy and reasonableness of a consent decree involves consideration of a number of factors, including “whether the decree is technically adequate[,] . . . reflects the relative strength[s] or weaknesses of the government’s case[,] . . . is in the public interest[,] and [advances] the objectives of the [applicable statute].”²⁹⁰ Moreover, to measure procedural fairness, a court should ordinarily look to the negotiation process and attempt to “gauge its candor, openness, and bargaining balance.”²⁹¹ Thus, the consent decree process would provide a better check to ensure that valid rulemakings intended to carry out congressional mandates in the public interest are not improperly vacated by the agency.

VI. CONCLUSION

The political reality of today is that more often than not, we depend on administrative processes to make the value-laden policy decisions that bear on everyday American life. Indeed, “[a]nyone concerned with the state of our democracy and the performance of our government must be concerned with . . . rulemaking. We can [certainly] be no less demanding about this process than we are about any other, and certainly no less aware.”²⁹² Thus, for decades legal scholars have been correct to scrutinize the role of the courts in this process. Judicial review can, and most likely does, impose a barrier to the speedy promulgation and implementation of agency rules. But it is time to question whether the focus should only be on the “standard of review” that courts utilize in these cases. The scope of the court’s review may only be part of the problem. It is time that we also evaluate whether the procedures courts

287. John R. Thomas, Note, *United States v. Fisher: “Posner’s Dilemma” and the Uncertain Triumph of Outcome Over Process*, 21 ENVTL. L. 427, 434 (1991).

288. See, e.g., *Utah v. Kennecott Corp.*, 801 F. Supp. 553, 561 (D. Utah 1992).

289. *United States v. Telluride Co.*, 849 F. Supp. 1400, 1402 (D. Colo. 1994).

290. *Id.*

291. *Kennecott Corp.*, 801 F. Supp. at 567 n.13 (quoting *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 86 (1st Cir. 1990)) (internal quotation marks omitted).

292. CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 278 (2d ed. 1999).

use today to resolve these cases has restored the adversarial process of public policymaking we long ago sought to abandon for the sake of efficiency. And if so, we can correct it by reducing the role of intervenors who often seek only to remake their cases for particular agency rules in the courtroom.