HAS THE *BOWSHER* DOCTRINE SOLVED THE DEBATE?: THE RELATIONSHIP BETWEEN STANDING AND INTERVENTION AS OF RIGHT

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INTRODUCTION

Pursuant to the Rules Enabling Act of 1934,[1] Congress delegated its rulemaking power to the Supreme Court in order to unify the procedural rules governing the federal judiciary.[2] With this delegated authority, the Supreme Court developed the Federal Rules of Civil Procedure, which "govern the procedure in all civil actions and proceedings in the United States district courts" and are "construed and administered to secure the just, speedy, and inexpensive determination of every action."[3] Thus, when regulating judicial proceedings, courts apply the Rules with an eye toward achieving these objectives. However, the goals of facilitating fair, expedient, and inexpensive judicial actions must be interpreted in light of constitutional conditions such as the "case" and "controversy" requirements of Article III[4]—for "it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction."[5]

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1 28 U.S.C. §§ 2071–2077 (2006).

2 *See* 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 1.04[1][a], at 1–9 (Daniel R. Coquillette et al. eds., 3d ed. 2007).

3 FED. R. CIV. P. 1.

4 *See* U.S. CONST. art. III, § 2.

5 Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978); *see also* FED. R. CIV. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts.").

Intervention as of right pursuant to Rule 24(a) has created tension between the Federal Rules and Article III standing requirements as the circuit courts have struggled to clearly delineate the respective interests required to participate in a lawsuit. The circuits continue to disagree whether the interest required to confer Article III standing is greater, less than, or equivalent to the interest required to intervene in a dispute. Some courts recognize that, pragmatically, the interests required for standing and intervention are usually "equivalent."[6] In certain cases, however, the interests do not overlap. In this situation, a majority of courts argue that the interest required for intervention is not as weighty as the interest required for standing because once an Article III case or controversy has been established between the original parties, jurisdiction cannot be destroyed by an intervening party who does not possess a standing interest in the dispute. In contrast, a minority of courts asserts that because the intervenor wants to become a "suitor" and act on "equal footing" with the original parties, Article III requirements are not met unless the intervenor has an interest that would be sufficient to bring an independent claim in federal court.

Although the Supreme Court recognized in 1986 that the circuit courts were struggling with this issue, it has declined to resolve the dispute.[7] During that same Term, the Court developed what has become known as the *Bowsher*[8] doctrine, which stands for the proposition that a court will not analyze whether each individual party has standing to bring a claim, but will only ensure that one of the moving parties can meet the standing requirements.[9] In 2003, the Court extended the *Bowsher* doctrine to encompass potential Rule 24(a) intervenors, yet set an interesting limit on the doctrine in relation to intervention.[10]

This Note examines the implications of the extension of the *Bowsher* doctrine to intervention as of right. Additionally, this Note challenges the bright-line positions of the circuit courts and suggests a method of dealing with intervention and standing that examines the relative posture of the potential intervenor—bringing a claim or protecting an interest that is new or is already presented by a same-side

6 The use of the term "equivalent" throughout this Note does not take the meaning "exactly the same," but rather reflects the pragmatic recognition by some courts that the interests of standing and intervention overlap so substantially that satisfying one interest will almost always satisfy the other, making the intervention/standing dilemma a nonissue except in very rare cases.

7 *See* Diamond v. Charles, 476 U.S. 54, 68–69 (1986).

8 Bowsher v. Synar, 478 U.S. 714 (1986).

9 *See id.* at 721.

10 *See* McConnell v. FEC, 540 U.S. 93, 233 (2003).

party with Article III standing—and embraces the goals of both intervention and standing. The Note concludes that with the extension of the *Bowsher* doctrine, the overlap of interests that satisfy both standing and intervention as of right requirements, and the distinction between bringing a claim and protecting an interest, standing is only relevant for those individuals seeking to bring new claims before the court and who therefore create mini-trials that have Article III implications.

Part I of this Note examines Rule 24(a)(2) intervention as of right. Part II briefly reviews the Article III requirements of standing to be heard before a federal court. Part III summarizes the few Supreme Court cases that explore the relationship between standing and intervention. Part IV analyzes the three main positions of the circuit courts and the responses of various commentators. Finally, Part V reexamines the relationship between standing and intervention in light of the Court's relatively recent expansion of the *Bowsher* doctrine and analyzes what types of intervention remain problematic to the notion of an Article III case or controversy.

I. Intervention as of Right

Rule 24 of the Federal Rules of Civil Procedure is a self-help measure allowing absentees to protect themselves when they have questions of law or fact in common with the existing action and can meet certain criteria set forth by the Rule.[11] Before allowing intervention, a court must consider various competing goals of the judiciary system to ensure "the just, speedy, and inexpensive determination" of the action.[12] These goals include the interests of the original parties in controlling the litigation, the need for protection of third parties that have a stake in the litigation,[13] and efficiency concerns of the court.[14]

11 *See* Fed. R. Civ. P. 24. The function of the Rule, however is to protect the third parties and not to favor them. *See, e.g.*, Note, *Intervention and the Meaning of "Bound" Under Federal Rule 24(a)(2)*, 63 Yale L.J. 408, 417 (1954) (arguing that applying the original version of Rule 24 more liberally in favor of third parties would "only prove illiberal in its effect upon federal procedure and rights of original parties").

12 Fed. R. Civ. P. 1.

13 *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1290 (1976) ("[I]f the right to participate in litigation is no longer determined by one's claim to relief at the hands of another party or one's potential liability to satisfy the claim, it becomes hard to draw the line determining those who may participate so as to eliminate anyone who is or might be significantly (a weasel word) affected by the outcome—and the latest revision of the Federal Rules of Civil Procedure has more or less abandoned the attempt."); *see also* Raoul Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts*, 50 Yale L.J. 65, 65, 69 (1940) ("The basic problem of intervention practice is the adjustment between the need for

In order to establish a right to intervene under the original version of Rule 24, applicants were required to show both that they would be "bound" by an adverse judgment and that their interests were not represented adequately by the existing parties to the action.[15] While some courts interpreted "bound" to mean "practical prejudice," a majority of courts interpreted the term to require a showing of res judicata.[16] "That reading 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."[17] This narrow approach to intervention was upheld by the Supreme Court in *Sam Fox Publishing Co. v. United States*,[18] in which the Court denied intervention to music publishers in an antitrust suit since they would not

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[protection of third parties] and the traditional view that a law suit is a private controversy in which outsiders have no place.").

14 *See* 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, 700–01 (1998). The Court must allow intervention in order to prevent duplicitous litigation but deny intervention when it would result in a single case that has become unwieldy. *See, e.g.*, Kerry C. White, Note, *Rule 24(a) Intervention of Right: Why the Federal Courts Should Require Standing to Intervene*, 36 LOY. L.A. L. REV. 527, 555–57 (2002) (distinguishing between potential future claimants—that is, parties with interests "so intertwined with the subject matter of the action" that an unfavorable decision will likely provide a basis for standing in the future—and public interest claimants—that is, parties who tend to bring complex, general grievances and who "do not, and will not, have standing to litigate their asserted interests regardless of the outcome of the decision").

15 *See* Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 428–29 (citing FED. R. CIV. P. 24(a)(2) (1938) (amended 1966)).

16 *See id.* at 429. Pursuant to the doctrine of res judicata, or claim preclusion, courts give a claimant only "one chance to vindicate *all rights to relief encompassed in a single claim.*" RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE 589 (5th ed. 2008).

17 Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH. J. RACE & L. 263, 271–72 (1999) (footnote omitted); *see also* White, *supra* note 14, at 537 ("[U]nder the narrow construction of old Rule 24(a)(2), a party could only intervene if they could prove their interests *were not* adequately represented for the purpose of intervention while proving their interests *were* adequately represented for the purpose of res judicata so that they would be bound by any judgment in their absence. This catch-22 functioned 'as a virtual bar on intervention of right.'" (quoting Erik Figlio, *Stacking the Deck Against "Purely Economic Interests": Inequity and Intervention in Environmental Litigation*, 35 GA. L. REV. 1219, 1226 (2001))).

18 366 U.S. 683 (1961).

be bound by adjudication of the dispute, despite recognizing the interests of the publishers in the subject matter of the suit.[19]

Shortly after *Sam Fox*, the Advisory Committee on Civil Rules revised the Federal Rules,[20] and "some elasticity was injected" into the practice of allowing intervention.[21] Although the language of the Rules was again amended in 2007, the elasticity injected into Rule 24 in 1966 remains. Intervention into a suit is allowed either "of right" under Rule 24(a)[22] or permissively at the judge's discretion after balancing efficiency and prejudice concerns under Rule 24(b).[23] Rule 24(a)(2) governs intervention as of right and requires satisfaction of four distinct requirements: (1) the application for intervention must be timely, (2) the absentee must have an interest relating to the subject of the action, (3) disposition of the case without the absentee will impair or impede protection of the absentee's related interest, and

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19 *Id.* at 691. "We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it." *Id.* at 689.

20 This revision was in large part a result of the Supreme Court's decision in *Sam Fox*, and the Advisory Committee sought to "promote more flexible, practical judicial application generally." Tobias, *supra* note 15, at 429. Carl Tobias argues that the amendments to Rules 19, 23, and 24 did not contemplate public law litigation. *See id.* at 459. *But see* Chayes, *supra* note 13, at 1288–90 (suggesting that changes in the Federal Rules resulted from the transformation of litigation from private and individual to public and group based).

21 Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 134 (1967).

22 *See* FED. R. CIV. P. 24(a).

23 *See id.* 24(b). The Rule states:

> (1) *In General.* On timely motion, the court may permit anyone to intervene who:
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> (A) is given a conditional right to intervene by a federal statute; or
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> (B) has a claim or defense that shares with the main action a common question of law or fact.
>
> (2) *By a Government Officer or Agency.* On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:
>
> (A) a statute or executive order administered by the officer or agency; or
>
> (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.
>
> (3) *Delay or Prejudice.* In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Id. The focus of this Note will be on intervention as of right and, more particularly, the requirements under Rule 24(a)(2).

(4) the applicant is not adequately represented by the parties already involved in the suit.[24] If these requirements are met, the court *must* allow intervention.[25] The second and third prongs of the intervention as of right test require an "interest"; however, "there is no authoritative definition of precisely what kinds of interests satisfy the requirements of the rule."[26] Although noting a divisive circuit split regarding the relationship between intervention as of right and the justiciability issue of standing, the Supreme Court has declined to explicitly define what constitutes an interest sufficient to intervene.[27] As a result, the lower courts have continued to demand varying levels of "interests" by prospective intervenors.[28]

II. STANDING TO SUE

Article III of the Constitution limits the federal judicial power to deciding "Cases" and "Controversies."[29] Additionally, while declaring that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[30] thus establishing the right of judicial review, *Marbury v. Madison*[31] also stands for the propositions that Article III serves as a ceiling on the jurisdiction of federal courts and that there are limitations inherent in the concept of case or controversy itself.[32] These constitutionally mandated limitations on the federal judiciary are reflected in the justiciability doctrines, which include prohibitions against advisory opinions, mootness, ripeness, the political question doctrine, and standing.[33]

Although "the concept of 'Art[icle] III standing' has not been defined with complete consistency in all of the various cases decided

24 *See id.* 24(a)(2); 6 MOORE, *supra* note 2, § 24.03[1][a], at 24-23.

25 *See* FED. R. CIV. P. 24(a)(2) ("On timely motion, the court *must* permit anyone to intervene who: . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." (emphasis added)). Rule 24(a)(1) also allows intervention as of right where an individual "is given an unconditional right to intervene by a federal statute." *Id.* 24(a)(1).

26 6 MOORE, *supra* note 2, § 24.03[2][a], at 24–28.

27 *See* Diamond v. Charles, 476 U.S. 54, 68–69 (1986) (declining to detail the relationship between the respective interests required for standing and intervention as it was not necessary for disposition of the case).

28 *See* discussion *infra* Part IV.

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

30 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

31 5 U.S. (1 Cranch) 137.

32 *See id.* at 173–80.

33 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 49–50 (3d ed. 2006).

by [the Supreme] Court,"[34] standing is generally considered to be the determination of "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[35] The three constitutional requirements of standing are a concrete injury[36]: (1) that is distinct, palpable, undifferentiated, and particularized;[37] (2) that is fairly traceable to the defendant's conduct; and (3) that is likely to be redressed by a favorable decision.[38] Additionally, federal courts recognize prudential standing requirements which "are based not on the Constitution, but instead on prudent judicial administration."[39] As a result, unlike the constitutional barriers to standing, the prudential limitations can be overcome through legislation that creates judicial rights.[40] These prudential requirements include prohibitions against third-party claims, generalized grievances,[41] and claims falling outside of the zone of interest protected by the statute at issue.[42]

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34 Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982); *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882–83 (1983) (noting "[t]he sea-change that has occurred in the judicial attitude towards the doctrine of standing" that is apparent when comparing various Supreme Court opinions).

35 Warth v. Seldin, 422 U.S. 490, 498 (1975).

36 *But see generally* David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808 (2004) (arguing that injury is not related to standing's goal of concrete adverseness, especially in the context of public law litigation).

37 In his dissent in *FEC v. Akins*, 524 U.S. 11 (1998), Justice Scalia criticized the majority for ignoring the requirements that an injury be particularized rather than undifferentiated in its decision to allow a generalized grievance where the injury itself (deprivation of information) was considered to be concrete. *See id.* at 35–36 (Scalia, J., dissenting).

38 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Allen v. Wright, 468 U.S. 737, 751 (1984). Redressability is not a tight concept under current law, and "a plaintiff need not show narrow tailoring of the remedy to his injury." Juliet Johnson Karastelev, Note, *On the Outside Seeking in: Must Intervenors Demonstrate Standing to Join a Lawsuit?*, 52 DUKE L.J. 455, 460 (2002) (arguing that this more lenient redressability requirement is helpful for intervenors as they often present more indirect interests).

39 CHEMERINSKY, *supra* note 33, at 63.

40 *See id.*

41 Some commentators argue that in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, the ban on generalized grievances became a constitutional mandate. *See, e.g.*, Karastelev, *supra* note 38, at 459 (claiming that *Lujan* transformed the ban on generalized grievances "from a prudential concern to a constitutional mandate").

42 Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474–75 (1982).

In limiting who can bring certain claims in federal courts, standing promotes several important judicial values.[43] First, standing restricts the scope of judicial review and interference with other branches of the government, thus protecting the separation of powers and maintaining the structure of the federal government.[44] Second, standing promotes efficiency by limiting the number of suits that can be brought into federal courts. Third, standing promotes concrete adverseness, "which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[45] Finally, "standing requirements are said to serve the value of fairness by ensuring that people will raise only their own rights and concerns and that people cannot be intermeddlers trying to protect others who do not want the protection offered."[46]

III. SUPREME COURT PRECEDENT

Like the doctrine of standing, the judicial attitude toward the interest required for intervention as of right has fluctuated over the years. Initially, the Supreme Court expounded a liberal definition of intervention in dicta which it then adopted in a subsequent case. Then the Court moved toward a narrower view of the types of interests that would satisfy the standards of intervention under Rule 24(a). Since that time, however, the Supreme Court has reverted to a more liberal approach toward the doctrine, allowing intervention where the intervenor can "piggyback" on the standing of another party—at least where the intervenor's position is "identical" to that of the party with standing.

A. *Intervention Prior to* Bowsher

The Supreme Court faced its first interpretation of revised Rule 24(a)(2) in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*[47] and

43 For a general overview of the four judicial values discussed in this paragraph, see CHEMERINSKY, *supra* note 33, at 61–62.

44 *See, e.g.*, Allen v. Wright, 468 U.S. 737, 752 (1984); *see also* Scalia, *supra* note 34, at 894 ("There is, I think, a functional relationship [between the separation of powers and the doctrine of standing], which can best be described by saying that the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*.").

45 Baker v. Carr, 369 U.S. 186, 204 (1962).

46 CHEMERINSKY, *supra* note 33, at 62.

47 386 U.S. 129 (1967).

adopted a liberal definition of intervention.[48] In *Cascade*, the United States brought suit, challenging the substance of a divestiture decree by the U.S. District Court for the District of Utah, pursuant to a prior holding by the Supreme Court.[49] Three parties, the State of California, Southern California Edison Company, and Cascade Natural Gas Corporation, sought to join the antitrust litigation in support of the United States, but were denied intervention under Rule 24(a) by the district court.[50] The Supreme Court reversed, finding that the natural gas interests of the State of California and Southern California Edison were sufficient to warrant intervention even under a narrow interpretation of Rule 24(a) since the appellants were "'so situated' geographically as to be 'adversely affected' within the meaning of [the Rule]."[51] Based on the language in the Advisory Committee's notes to the revised Federal Rules, the Court rejected a rigid view of intervention that would bar involvement by Cascade, the third applicant and a supplier of natural gas who claimed an unfair division of gas reserves.[52] As a result, in its first interpretation of the revised Rule 24(a), the Court found that since the merits of the case had to be fully reopened

48 *Id.* at 133–35. In *Cascade*, the Court specifically adopted a liberal definition of intervention set forth in dicta in a 1941 case before its res judicata interpretation in *Sam Fox* and the resulting Rule revisions. *See* Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 506 (1941) (defining intervention as of right as a process "whereby an appeal is made to the court's good sense to allow persons having a common interest with the formal parties to enforce the common interest with their individual emphasis").

49 386 U.S. at 131–32. Three years earlier, the Court had found that a merger between Pacific Northwest Pipeline Corporation and El Paso Natural Gas violated the Clayton Act and directed the district court "to order divestiture without delay." *See* United States v. El Paso Natural Gas Co., 376 U.S. 651, 662 (1964).

50 *Cascade*, 386 U.S. at 132.

51 *Id.* at 135. The prior version of the Rule, which the district court had relied upon for denial of intervention, allowed intervention as of right upon timely application:

> "(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 which is in the custody or subject to the control or disposition of the court or an officer thereof."

Id. at 143–44 (Stewart, J., dissenting) (quoting FED. R. CIV. P. 24(a) (1963) (amended 1966)). The Court found that two of the appellants met the requirements of Rule 24(a)(3), which was generally interpreted strictly but had been greatly injected with elasticity during the 1966 revisions. *See id.* at 133–35 (majority opinion).

52 *Id.* at 134–36.

for the State of California and Southern California Edison,[53] the rule was "broad enough" to allow intervention by Cascade, especially considering that the "'existing parties' . . . f[ell] far short of representing its interests."[54]

A few years later, the Court narrowed *El Paso*'s broad intervention language in *Donaldson v. United States*[55] by requiring an applicant to possess a "significantly protectable interest."[56] The intervenor, Donaldson, worked for Acme Circus Operating Co., and as part of an investigation of Donaldson's income tax returns, IRS special agents issued summonses to Acme and Acme's accountant demanding their testimony and presentation of documents relating to Donaldson's tax liability.[57] Shortly before these summonses were issued, however, the district court had issued temporary restraining orders preventing the parties from complying with the IRS agents' requests or summonses absent a court order.[58] After issuance of the restraining orders, the United States filed suit with the district court to order compliance against Acme and Acme's accountant, and Donaldson sought to intervene in the dispute pursuant to Rule 24(a)(2).[59] In upholding the district court's denial of Donaldson's petition to intervene, the Court asserted that a taxpayer cannot "intervene as of right simply because it

53 The case was to be reopened since the Court found that the proposed divestiture decree by the district court did "the opposite of what [the Court's] prior opinion and mandate commanded." *Id.* at 142.

54 *Id.* at 136. In the opinion, the Court recognized Cascade's argument that it had "standing to intervene," but never explicitly addressed those arguments in its holding. *Id.* at 133. Some have suggested that the failure to discuss the standing argument provides evidence that standing is not necessary for intervention. *See, e.g.*, Hutchings, *supra* note 14, at 710 ("Although the Court did not explicitly state why Cascade satisfied Rule 24's interest requirement, it seemed to imply that an intervenor does not have to demonstrate a concrete right conferred by law as an interest."). *But see* White, *supra* note 14, at 541 ("Ironically, the factors implicating Cascade's interest were argued to provide 'standing to intervene,' although the Court never addressed whether Cascade had established standing or whether it was required." (footnotes omitted) (quoting *Cascade*, 386 U.S. at 133)). Others have suggested that *Cascade* should be limited to its specific facts based on the Court's dissatisfaction with the federal government's handling of an antitrust case with national consequences. *See* David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 757 (1968); Tobias, *supra* note 15, at 433.

55 400 U.S. 517 (1971).

56 *Id.* at 531. This term, however, has never become "a term of art in the law" as there is disagreement regarding its exact meaning. 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1908.1, at 307–08 (3d ed. 2007).

57 *Donaldson*, 400 U.S. at 518–19.

58 *Id.* at 519–20.

59 *Id.* at 520–21.

is his tax liability that is the subject of the summons."[60] Instead, the Court held that an applicant must have a "significantly protectable interest," such as a proprietary interest in the tax records or claims of privilege or abuse of process against the IRS.[61]

The next year, in *Trbovich v. United Mine Workers*,[62] the Supreme Court granted intervention to a union member seeking to challenge the legality of the election of union officers under the Labor-Management Reporting and Disclosure Act (LMRDA) of 1959,[63] despite statutory language limiting standing for such suits to the Secretary of Labor.[64] The union member, Trbovich, filed a complaint with the Secretary regarding the election of officers for the United Mine Workers of America (UMWA).[65] After an investigation, the Secretary filed suit, asking the district court to require that a new election be held under the Secretary's supervision.[66] Trbovich sought to intervene in the Secretary's action, but the district court denied his motion "on the ground that the LMRDA expressly stripped union members of any right to challenge a union election in the courts, and gave that right exclusively to the Secretary."[67] The Supreme Court reversed and granted Trbovich's application for intervention, finding that the legislative history of the Act provided "no evidence whatever that Congress was opposed to participation by union members in the litigation."[68] Instead, the Court made a distinction between intervention in and initiation of suits, and determined that Trbovich's intervention in the

60 *Id.* at 530. This holding resolved a circuit split, disagreeing with the interpretations of the Third, Sixth, and Seventh Circuits, while upholding decisions of the First, Second, and Fifth Circuits. *Id.* The Court did, however, note that in cases where "'the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution'" or the material is protected by attorney-client privilege, the district court could recognize the taxpayer's right to permissive intervention. *Id.* (quoting Reisman v. Caplin, 375 U.S. 440, 449 (1964)).

61 *Id.* at 523–24, 531. The Court noted that the IRS was merely seeking the routine business records of third parties and not of the individual taxpayer. *Id.* at 522–23. The IRS is now required to notify the taxpayer of any third-party summons and give the taxpayer the right "to intervene in any proceeding with respect to the enforcement of such summons." 26 U.S.C. § 7609(b)(1) (2006).

62 404 U.S. 528 (1972).

63 Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.).

64 *Trbovich*, 404 U.S. at 531–32.

65 *Id.* at 529.

66 *Id.*

67 *Id.* at 530.

68 *Id.* at 532–33.

suit "subject[ed] the union to relatively little additional burden."[69] The Court did, however, note limitations to union member participation: (1) intervention could not interfere with the purpose of the Act[70] and (2) intervention was limited to only those claims presented by the Secretary's complaint.[71]

In *Diamond v. Charles*,[72] the Supreme Court held that a defendant intervenor without an independent basis for standing in a dispute was unable to appeal an unfavorable decision without the original defendant.[73] Without discussing whether the intervention was permissive or of right or describing how Diamond, a physician and conscientious objector to abortion, met the requirements of Rule 24, the district court granted Diamond's motion to intervene as a defendant in a challenge to the constitutionality of the Illinois Abortion Law of 1975.[74] The district court permanently enjoined various provisions of the abortion law, a decision that was affirmed by the Seventh Circuit.[75] The State of Illinois decided not to appeal, but Diamond filed a notice of appeal with the Supreme Court, attempting to independently chal-

69 *Id.* at 536 ("Intervention by union members in a pending enforcement suit, unlike initiation of a separate suit, subjects the union to relatively little additional burden. The principal intrusion on internal union affairs has already been accomplished, in that the union has already been summoned into court to defend the legality of its election." (footnote omitted)).

70 *Id.* at 532 ("A review of the legislative history shows that Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election."). The Court found no interference at this stage. *Id.* at 536.

71 *Id.* at 536–37 ("[A]t least insofar as petitioner seeks only to present evidence and argument in support of the Secretary's complaint, there is nothing in the language or the history of the LMRDA to prevent such intervention."). Justice Douglas, on the other hand, felt that limiting the individual's intervention to those claims addressed by the Secretary ignored the purpose of the revised Rule 24 and the purposes of Title VI. *Id.* at 540 (Douglas, J., dissenting in part). Although the Court limited Trbovich's claims to those of the Secretary, the Court disagreed with the Secretary that Trbovich's interests were thus adequately represented under the meaning of Rule 24. *Id.* at 538–39 (majority opinion). Instead, a complaint about the adequacy of his representation "filed by the member who initiated the entire enforcement proceeding" was a sufficient interest to allow intervention under Rule 24. *Id.* at 539.

72 476 U.S. 54 (1986).

73 *Id.* at 68–69.

74 *Id.* at 57–58. The law imposed criminal liability on physicians who failed to meet certain standards for performing abortions and providing abortion-related information. *See id.* at 58–60.

75 *Id.* at 61.

lenge the Seventh Circuit's decision.[76] The Court noted that if the State of Illinois had sought review, Diamond would have had the "ability to ride 'piggyback' on the State's undoubted standing" and therefore could have remained as a valid party to the appeal.[77] Without the State, however, the Court held that Diamond could only appeal "upon a showing by the intervenor that he fulfill[ed] the requirements of Art[icle] III."[78] However, neither the interests that Diamond listed in his original petition to intervene—being a conscientious objector to abortions, a general physician, and a father of a daughter of childbearing years[79]—nor the fact that the district court had assessed attorney's fees against him were sufficient to confer an independent basis for standing in the dispute.[80]

In its analysis, the Court acknowledged the "anomalous decisions" of the courts of appeals regarding the relationship between the interest required for intervention as of right under Rule 24(a)(2) and the interest required under Article III standing.[81] The Court, however, declined to address that specific issue, finding it unnecessary to the determination that parties must possess standing in order to make an independent appeal.[82]

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76 *Id.*

77 *Id.* at 64.

78 *Id.* at 68.

79 *Id.* at 64–67.

80 *Id.* at 70–71 ("Art[icle] III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue . . . . Any liability for fees is, of course, a consequence of Diamond's decision to intervene, but it cannot fairly be traced to the Illinois Abortion Law.").

81 *Id.* at 68.

82 *Id.* at 68–69; *see also id.* at 74 (O'Connor, J., concurring in part and concurring in the judgment) ("Like the Court, I find it unnecessary to decide that question, because the challenge to Diamond's standing subsumes a challenge to the sufficiency of his interest as an intervenor for purposes of Rule 24."). Because of Dr. Diamond's "atypical procedural posture," Karastelev, *supra* note 38, at 463, confusion remains regarding the type of interest required to intervene, which has led commentators to cite *Diamond* on both sides of the argument. *See, e.g.*, Tobias, *supra* note 15, at 441 ("[I]n *Diamond*, the majority's phrasing of the relevant question as whether applicants 'must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Article III,' and its observation that Dr. Diamond might have relied on the state's standing, had Illinois chosen to appeal, could be endorsements of intervention at the trial court level by entities without standing." (quoting *Diamond*, 476 U.S. at 69)); Hutchings, *supra* note 14, at 714 ("*Diamond* seems to stand for the proposition that applicants must be able to claim a right protected under some law before they can satisfy the interest requirement of Rule 24(a)(2)."); White, *supra* note 14, at 543 ("[*Diamond*'s] black letter rule remains one of the strongest arguments in favor of standing to intervene.").

B. Bowsher *and Beyond*

During the same Term as *Diamond*, the Court developed the *Bowsher* doctrine—a doctrine applied initially to standing generally, but later expanded to encompass intervention as well. In *Bowsher v. Synar*,[83] the Supreme Court reviewed a challenge to Congress' delegation of several functions to the Comptroller General under the Balanced Budget and Emergency Deficit Control Act of 1985,[84] which was created to reduce the deficit in part through suspending certain cost-of-living benefit increases for union members.[85] Members of Congress, the National Treasury Employees Union (NTEU), and a member of the NTEU brought suit alleging that the delegation of congressional powers to the Comptroller General violated the separation of powers.[86] After establishing that members of NTEU would be injured by not receiving their benefit increases and had standing to sue, the Court held that it "therefore need not consider the standing issue as to the [NTEU] or Members of Congress" and kept all of the parties in the suit.[87] This holding has become known as the *Bowsher* doctrine and stands for the proposition that the Court will not analyze whether each individual party has standing to bring a claim, but will only ensure that one of the moving parties can meet the standing requirements.[88]

The Court explicitly applied the *Bowsher* doctrine to intervention in 2003 in *McConnell v. FEC*[89] when it refused to analyze the standing of the defendant-intervenors where the Federal Election Commission (FEC) clearly had standing as a defendant since it was charged with enforcing the Act at issue.[90] In *McConnell*, the Court generally upheld the Bipartisan Campaign Reform Act (BCRA) of 2002,[91] which had been attacked on numerous constitutional grounds,[92] in a complex

83 478 U.S. 714 (1986).

84 Pub. L. No. 99-177, tit. II, 99 Stat. 1038 (codified as amended at 2 U.S.C. §§ 901–922 (2006)), *invalidated in part by* Bowsher v. Synar, 478 U.S. 714.

85 *Bowsher*, 478 U.S. at 717–19.

86 *Id.* at 719–21 & n.2.

87 *Id.* at 721.

88 *See, e.g.*, Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 52 n.2 (2006).

89 540 U.S. 93 (2003).

90 *Id.* at 233.

91 Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 and 47 U.S.C.).

92 *See McConnell*, 540 U.S. at 171, 173, 184, 233.

case involving over ninety separate parties.[93] The district court allowed various members of Congress, who were the "principal sponsors and authors of BCRA," to intervene as defendants in order to support the constitutionality of the Act.[94] In affirming the district court's decision to allow this defendant intervention, the Court stated: "It is clear . . . that the Federal Election Commission (FEC) has standing, and therefore we need not address the standing of the intervenor-defendants, *whose position here is identical to the FEC's*."[95]

While the Supreme Court has wavered with regard to what constitutes a sufficient interest to warrant intervention, the Court appears to have developed a liberal stance to the rule. Notwithstanding this liberal approach, however, the Court has implicitly suggested some possible limits to the doctrine. In *Diamond*, an intervenor was only able to "piggyback" into the suit when a party with standing remained actively involved in litigation.[96] This suggests that intervenors might be limited in their ability to bring certain claims and take independent action in the suit. Additionally, the Court in *McConnell* specifically noted that the defendant intervenors had a position identical to that of a party with standing in the suit, again suggesting limits on the rights of potential intervenors regarding both the ability to intervene and the ability to act once the application for intervention has been granted.

IV. How Lower Courts and Commentators Have Addressed the Issue[97]

As an initial matter, one must ask whether the issue regarding the relationship between intervention and standing has become moot. Based on the *Bowsher* doctrine, the Supreme Court will likely allow intervention without even addressing standing as long as the inter-

93 *See* McConnell v. FEC, 251 F. Supp. 2d 176, 220–27 & n.55 (D.D.C. 2003) (providing information about the parties to the litigation), *aff'd in part, rev'd in part*, 540 U.S. 93.

94 *Id.* at 227.

95 *McConnell*, 540 U.S. at 233 (emphasis added) (citing Bowsher v. Synar, 478 U.S. 714, 721 (1986)). While the Court's language regarding the identical claims is potentially a limit on the *Bowsher* doctrine, Part V, *infra*, analyzes just how "identical" these positions likely were.

96 *See supra* text accompanying notes 77–78.

97 Courts and commentators have analyzed the relationship between intervention and standing numerous times throughout the years. As a result, this Note will not attempt to rewrite all of the previous scholarship, but will instead focus on the most relevant cases and arguments. For superb overviews of the history and implementation of Rule 24(a), see Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 Wash. U. L.Q. 215 (2000), and Shapiro, *supra* note 54.

venor is joining a side where a party has already established its Article III standing. As a result, an intervenor must only point to one other party on its side of the dispute to "piggyback" on the original party's standing into the federal court. This means that in a case involving dozens of original parties with several potential intervenors, likely only one plaintiff must possess the adequate standing to bring an original claim in a federal court.

Additionally, the number of standing cases that confronts the Supreme Court is relatively small at the outset since standing and intervention are factual, threshold determinations for the lower courts to which higher courts often accord great deference.[98] This small subset of cases available for disposition is only decreased by the fact that in many cases the intervenor's interest in the suit will satisfy both intervention and standing requirements.[99] As a result, the overlap of the standing and intervention interests and the extension of the *Bowsher* doctrine to at least some intervention situations reduce the chance that a case clearly framing the matter will be presented before the Supreme Court in the near future.

The issue, however, is by no means moot. First, lower courts responsible for crafting relief for the parties and determining who is bound by its judgments recognize the standing/intervention interest dispute as a live matter.[100] Furthermore, the Supreme Court has left open avenues through which cases raising the issue could be heard on certiorari. For example, considering the Court's history of imposing limits on intervenors, must an intervenor show independent standing in order to bring different claims, arguments, or different goals to the dispute? What exactly is the relationship between standingless intervention under *Bowsher* and placing limits on the role that the inter-

98 *See, e.g.*, Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 135 (1967) ("'[T]he circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court.'" (quoting Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 506 (1941))); United States v. Hooker Chems. & Plastics Corp., 749 F.2d 968, 991 (2d Cir. 1984) (discussing the relevant abuse of discretion standard for intervention decisions based on "the great variety of factual circumstances in which intervention motions must be decided, the necessity of having the 'feel of the case' in deciding these motions, and other considerations essential under a flexible reading of Rule 24(a)(2)").

99 *See infra* Part IV.B.

100 *See, e.g.*, Dillard v. Chilton County Comm'n, 495 F.3d 1324, 1337 n.10 (11th Cir. 2007) (noting the circuit split over the issue); Brook Vill. N. Assocs. v. Jackson, No. 06-cv-046-JD, 2006 WL 3308328, at *4 (D.N.H. Nov. 13, 2006) (same).

venor can play in the suit?[101] Additionally, if an original party dropped out of a suit during trial and the intervenor did not have Article III standing, could the intervenor continue the suit without the aid of the original party if the trial court had allowed intervention based on the original party's standing?[102] Is this situation factually distinct from *Diamond*, in which the defendant intervenor attempted to independently appeal a suit, allowing for a more lenient application of the standing requirements? The struggles of the lower courts to respectively define the interests required for intervention and standing, as discussed below,[103] and the important issues yet unresolved provide evidence that the standing/intervention issue is a live dispute. The Court should strive to settle the disagreement whenever possible in order to ensure that the constitutional mandates of standing and the goals of the Federal Rules of Civil Procedure are being given the appropriate weight and applied accordingly.

Both before and after Supreme Court recognition in the *Diamond* decision, the circuits have disagreed decidedly about the requisite interest for intervention as of right under Rule 24(a)(2). However, while "[j]udicial articulation of the interest requirement ranges across a broad spectrum,"[104] three general categories of interpreting the standing/intervention relationship emerge after an analysis of the various circuit holdings: standing is required for intervention as of right, standing is not required for intervention as of right, and the requirements of standing and the interest requirements of Rule 24(a)(2) intervention are equivalent. These classifications generally serve as bright-line rules for the courts, which follow the circuit classifications no matter the interests or posture of the parties involved.[105]

A strong minority of the commentators agrees with those courts that require intervenors to possess standing in order to preserve the Article III case or controversy before it. They further assert that *Diamond*'s restriction of appeals to individuals with standing raises due process concerns for standingless intervenors who participate at the trial court level but are denied independent appeals. A majority of the commentators weighing in on the issue has concluded that stand-

101 *See* Bethune Plaza, Inc. v. Lumpkin, 863 F.2d 525, 531 (7th Cir. 1988) (noting that *Bowsher* does not instruct lower courts about how to view the relationship between intervention and standing when an intervenor seeks to block settlement or receive attorneys' fees and is therefore "not simply along for the ride").

102 The argument for the rest of this Note assumes that the original Article III parties remain parties to the suit.

103 *See infra* Part IV.A–B.

104 Tobias, *supra* note 15, at 434.

105 *See infra* Part IV.A–B.

ing should not be required of potential intervenors. These commentators focus on the distinction between initiating and joining a suit and attack the assumption that intervenors are always acting on equal footing with the original parties. Additionally, several courts have noted that, at least practically, the interests required for standing and intervention are equivalent.[106] These three categories will be addressed in turn.

A. The Requisite Interests for Standing and Intervention Are Different

While circuits have changed position over time, prior to *McConnell*, the circuits had generally adopted one of two bright-line rules: standing was required for intervention as of right or standing was not required for intervention as of right. Prior to *McConnell*'s extension of the *Bowsher* doctrine to intervention as of right, the Eighth, District of Columbia, and possibly Fourth Circuits required standing for potential plaintiff intervenors.[107] Since *McConnell*, but without ever citing *McConnell*, these circuits have become silent on the issue, leaving their respective district courts in confusion. The Fifth, Sixth, Tenth, Eleventh, and possibly the Second and Ninth Circuits, on the other hand, have remained true to their pre-*McConnell* positions that standing is not required for intervention, again without ever citing *McConnell*.[108] While the circuits that required standing of potential intervenors prior to *McConnell* now seem uncertain about the validity of their prior holdings, this Note argues that *Bowsher* and *McConnell* in fact support a requirement of standing for some intervenors. As discussed in the next Part, this Note counsels against bright-line rules—demanding intervenor standing in all cases or never requiring standing at all—that ignore the claims and/or interests that intervenors seek to introduce to the dispute. Instead, this Note supports a procedure that injects flexibility into the analysis, as imagined by the Advisory Committee on Federal Rules, but is limited so as to preserve the integrity of constitutional standing concerns not contemplated by *Bowsher* and its progeny.

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106 *See supra* note 6.

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

108 *See infra* Part IV.A.2. Some commentators argue that there are at least six different categories of classification used by the lower courts, covering a spectrum of interest-requirement levels for intervention. *See* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 251 (1990). For the purposes of this Note, however, I have simply grouped the various classifications into three broader categories: (1) the interest levels for standing and intervention are equivalent, (2) an independent standing interest level is required for intervention, and (3) a non-standing interest level is necessary for intervention.

1. Standing Is Required for Intervention

A strong minority of courts and commentators takes the position that the interest required for standing is greater than that required for intervention and serves as an independent requirement that intervenors must demonstrate before any application for intervention can be considered.[109] The Eighth Circuit recognizes that "[a]n interest is cognizable under Rule 24(a)(2) only where it is 'direct, substantial, and legally protectable.'"[110] Additionally, prior to *McConnell*, the circuit repeatedly recognized that "[b]ecause an intervenor seeks to become a 'suitor,' and asks the court to 'decide the merits of the dispute,'"[111] "Article III standing is a prerequisite for intervention in a federal lawsuit."[112] Allowing intervention by an intervenor without Article III standing would therefore transform the disagreement from an Article III case or controversy into a nonjusticiable dispute.[113] While the circuit has not explicitly ruled on the relationship between standing and intervention since *McConnell*, the circuit court has declined to overrule its pre-*McConnell* precedent and has recognized that the circuit's district courts still require standing of potential intervenors.[114]

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109 As of the writing of this Note, it is not entirely clear where the Fourth Circuit generally falls on the issue; however, at least in the case of bankruptcy proceedings prior to *McConnell*, the circuit required standing plus something more before allowing intervention. *See* Richman v. First Woman's Bank (*In re* Richman), 104 F.3d 654, 658 (4th Cir. 1997). Additionally, the Seventh Circuit has historically required standing for intervention, but has more recently held that, pragmatically, the interests required for standing and intervention as of right are equivalent. *See infra* note 169 and accompanying text.

110 Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC, 485 F.3d 1006, 1008 (8th Cir. 2007) (quoting United States v. Union Elec. Co., 64 F.3d 1152, 1161 (8th Cir. 1995)).

111 Mausolf v. Babbitt, 85 F.3d 1295, 1300 (8th Cir. 1996) (quoting Allen v. Wright, 468 U.S. 737, 750–51 (1984)).

112 Standard Heating & Air Conditioning Co. v. City of Minneapolis, 137 F.3d 567, 570 (8th Cir. 1998); *see also* Curry v. Regents of the Univ. of Minn., 167 F.3d 420, 422 (8th Cir. 1999) (quoting *Standard Heating* for the same proposition).

113 *See* South Dakota v. Ubbelohde, 330 F.3d 1014, 1023–24 (8th Cir. 2003); *see also Mausolf*, 85 F.3d at 1300 ("[A]n Article III case or controversy, once joined by intervenors who lack standing, is—put bluntly—no longer an Article III case or controversy.").

114 *See, e.g.*, *Med. Liab. Mut. Ins. Co.*, 485 F.3d at 1008–09 (upholding the district court's denial of a motion to intervene where the potential intervenor did not have standing); *see also* Seger v. Ernest-Spencer Metals, Inc., No. 8:08CV75, 2008 WL 3875302, at *3 (D. Neb. Aug. 14, 2008) (citing *Curry*, 167 F.3d at 422, and *Medical Liability Mutual Insurance Co.*, 485 F.3d at 1008, for the proposition that standing is required for intervention); Sun Media Sys., Inc. v. N.Y. Television, Inc., No. 4:08CV00268 JMM, 2008 WL 2387325, at *1 (E.D. Ark. June 9, 2008) ("The Eighth

Likewise, prior to *McConnell*, the D.C. Circuit generally required a standing-level interest to satisfy the Rule 24(a)(2) interest for intervention.[115] According to the circuit, "the underlying rationale for th[e] requirement [that the intervenor have standing] is clear: because a Rule 24 intervenor seeks to participate on an *equal footing* with the original parties to the suit, he must satisfy the standing requirements imposed on those parties."[116] The circuit has recognized, however, that requiring a unilateral showing of standing gives rise to "several thorny issues."[117] For example, there is a tension between requiring standing for potential intervenors while, pursuant to the *Bowsher* doctrine, generally finding Article III satisfied when only one party has standing.[118] Similarly, the court has recognized that requiring a defendant-intervenor to establish standing "runs into the doctrine that the standing inquiry is directed at those who invoke the court's jurisdiction."[119] Again, since *McConnell*, the circuit has become largely silent on the issue,[120] leaving the district courts to interpret its pre-*McConnell* cases as good law.[121]

Beyond the argument that allowing standingless intervenors to act on equal footing as original parties destroys the case and controversy requirement of Article III, and thus provides an "end run[] around Article III of the Constitution,"[122] commentators have developed other arguments for requiring an independent basis of standing for potential intervenors. Kerry White has argued that courts must view standing as a doctrine concerned with each "party's relationship

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Circuit Court of Appeals has held that a party must have Article III standing in order to intervene as a matter of right." (citing *Curry*, 167 F.3d at 422)); Animal Prot. Inst. v. Merriam, 242 F.R.D. 524, 527 (D. Minn. 2006) ("Although Rule 24(a) does not address standing, our Court of Appeals has held that a party must have Article III standing in order to intervene as a matter of right." (citing *Mausolf*, 85 F.3d at 1300; *Curry*, 167 F.3d at 422)).

115 *See, e.g.*, Roeder v. Islamic Republic of Iran, 333 F.3d 228, 233 (D.C. Cir. 2003) ("[D]ecisions of this court hold an intervenor must also establish its standing under Article III . . . .").

116 City of Cleveland v. Nuclear Regulatory Comm'n, 17 F.3d 1515, 1517 (D.C. Cir. 1994) (emphasis added).

117 Jones v. Prince George's County, Md., 348 F.3d 1014, 1018 (D.C. Cir. 2003).

118 *Id.* (citing *Roeder*, 333 F.3d at 233).

119 *Roeder*, 333 F.3d at 233. Both of these concerns are addressed in Part V, *infra*.

120 *But see* City of Naples Airport Auth. v. FAA, No. 03-1308, 2004 WL 1080160, at *1 (D.C. Cir. May 13, 2004) ("Intervenors must have standing under Article III of the Constitution." (citing *Roeder*, 333 F.3d at 233)).

121 *See, e.g.*, Sierra Club v. Van Antwerp, 523 F. Supp. 2d 5, 9 (D.D.C. 2007); Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 519 F. Supp. 2d 89, 91–92 (D.D.C. 2007).

122 White, *supra* note 14, at 552.

to the injury alleged."[123] Those courts interpreting standing as merely "a threshold requirement with respect to each case," are, according to White, therefore using a flawed definition of standing for the basis of intervention.[124] In order to incorporate the ideas of practicality and flexibility into a mandatory standing approach, White includes "Potential Future Claimants"—individuals with a "concrete risk of future injury" based on an unfavorable outcome in the initial suit—into the definition of standing.[125] Additionally, as a subset of the Potential Future Claimaints, White includes defendant-intervenors who are "merely defending an interest threatened by the existing action" and would immediately possess standing to challenge an unfavorable outcome of the present suit.[126]

Another argument for requiring standing by potential intervenors is based on due process concerns stemming from *Diamond*. The Court in *Diamond* held that an independent appeal by an intervenor is only allowed "upon a showing by the intervenor that he fulfills the requirements of Art[icle] III."[127] Rodrick Coffey argues that "[b]ecause one of the fundamental rights of the American judicial system is the right to appeal, it seems unfair to deny that right to an intervenor who has been given party status at a trial."[128] According to White, this inability to appeal binding judgments may also result in inferior bargaining power at the settlement table, and the interests of standingless intervenors "may be more impaired by their participation

123 *Id.* at 554.

124 *Id.* at 553–54 (emphasis omitted).

125 *Id.* at 556 (noting that allowing Potential Future Claimants to intervene also promotes efficiency since "Potential Future Claimants pose the greatest risk of multiplying the amount of litigation in the federal courts due to reactive claims on virtually identical issues"). White contrasts Potential Future Claimants with "Public Interest Claimants"—individuals "represent[ing] the most problematic aspects in the rise of public law litigation with respect to . . . Article III" since these individuals "will not acquire standing by an unfavorable outcome." *Id.* at 556–57.

126 *Id.* at 560 (noting that "'[s]tanding is overwhelmingly a plaintiff's hurdle,'" as justification for inclusion of individuals with otherwise prospective claims (quoting Ellyn J. Bullock, Note, *Acid Rain Falls on the Just and the Unjust: Why Standing's Criteria Should Not Be Incorporated into Intervention of Right*, 1990 U. ILL. L. REV. 605, 641)).

127 Diamond v. Charles, 476 U.S. 54, 68 (1986).

128 Rodrick J. Coffey, Note, *Giving a Hoot About an Owl Does Not Satisfy the Interest Requirement for Intervention: The Misapplication of Intervention as of Right in* Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Department of the Interior, 1998 BYU L. REV. 811, 823; *see also* White, *supra* note 14, at 559 ("[T]he real dilemma created by the *Diamond* case is that it allows for fully-recognized parties to be bound by a judgment with no avenue to appeal, while other allegedly co-equal parties have that option. This result would seem to be a clear violation of due process.").

in a suit than by a judgment in their absence."[129] In order to prevent this inequitable result, White and Coffey argue that the only options are to push *Diamond*'s jurisprudence a step further and require standing for all parties in an action[130] or to overrule *Diamond* outright.[131]

2. Standing Is Not Required for Intervention

After recognizing and analyzing the circuit split and confusion produced by *Diamond*, a majority of circuit courts and commentators have concluded that while an analysis of standing may be helpful to determine whether an applicant satisfies the interest requirements of Rule 24(a)(2), such an analysis should not be obligatory.

The Fifth Circuit, for example, recognizes that the "Article III standing doctrine serves primarily to guarantee the existence of a 'case' or 'controversy' appropriate for judicial determination and . . . does not require each and every party in a case to have such standing."[132] Therefore, once an Article III case or controversy has been established, existing jurisdiction is not destroyed by the addition of parties that do not possess standing, even when these parties seek to advance new arguments.[133] Similarly, relying on *Trbovich v. United Mine Workers*, the Second Circuit has determined that "[t]he existence of a case or controversy having been established as between the [original parties], there [is] no need to impose the standing requirement upon the proposed intervenor."[134]

129 White, *supra* note 14, at 559.

130 Coffey, *supra* note 128, at 823; White *supra* note 14, at 559. White concludes by noting several remedies for individuals lacking standing: lobbying, state courts of general jurisdiction, amicus curiae briefs, permissive intervention pursuant to Rule 24(b), and limited intervention. White, *supra* note 14, at 560–62. White notes that permissive intervention and limited intervention still might provide an "end run around Article III standing," yet argues that these options are "highly preferable to allowing . . . full [standingless] participation." *Id.* at 561–62. *But see* Hutchings, *supra* note 14, at 736 ("[A]lternatives to intervention . . . are often inadequate because they do not allow the litigant to conduct discovery, participate in the negotiation of a consent decree or introduce evidence supporting their position.").

131 *See* Coffey, *supra* note 128, at 823.

132 Ruiz v. Estelle, 161 F.3d 814, 832 (5th Cir. 1998) (citation omitted); *see* Newby v. Enron Corp., 443 F.3d 416, 422 (5th Cir. 2006).

133 *Ruiz*, 161 F.3d at 832–33.

134 U.S. Postal Serv. v. Brennan, 579 F.2d 188, 190 (2d Cir. 1978) (citing Trbovich v. United Mine Workers, 404 U.S. 528, 536–39 (1972)). The court ultimately did deny intervention to the applicant, however, since it failed to show that its interest was not represented adequately by the parties already involved in the suit. *Id.* at 191. In a 1993 case, the circuit affirmed a denial of intervention for "substantially the reasons" stated by the lower court judge, who denied intervention since the party could not show an independent basis for standing. *See* Orange Env't, Inc. v. Orange County

The Sixth Circuit has held that proposed intervenors must show that they have a substantial interest in the litigation, but has "subscribe[d] to a 'rather expansive notion of the interest sufficient to invoke intervention as of right.'"[135] Like the Fifth Circuit, the Sixth Circuit has relied on the distinction between joining an established Article III case or controversy as opposed to initiating[136] or appealing[137] a lawsuit to allow participation by standingless intervenors.

Commentators argue that the Ninth Circuit is the most liberal circuit with regard to allowing intervention.[138] While the Ninth Circuit historically does not require an independent basis for standing when considering an application for intervention,[139] it remains unclear exactly how liberally the circuit allows intervention post *McConnell*.[140] The circuit has argued that "the standing requirement is at least implicitly addressed by [the Ninth Circuit's intervention] requirement that the applicant must 'assert[] an interest relating to the property or transaction which is the subject of the action.'"[141] In fact, because it considers the requirements for standing to be more difficult to meet than the requirements for intervention,[142] the circuit has historically used the standing doctrine to determine whether an applicant has met the Rule 24(a)(2) interest burden.[143]

Legislature, 2 F.3d 1235, 1236 (2d Cir. 1993). More recent intervention cases, however, have largely ignored standing, but have required a concrete intervention interest that is "'direct, substantial, and legally protectable.'" *E.g.*, Person v. N.Y. State Bd. of Elections, 467 F.3d 141, 144 (2d Cir. 2006) (quoting United States v. Peoples Benefit Life Ins. Co., 271 F.3d 411, 415 (2d Cir. 2001)).

135 Grutter v. Bollinger, 188 F.3d 394, 398 (6th Cir. 1999) (quoting Mich. State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997)).

136 *See* Providence Baptist Church v. Hillandale Comm., Ltd., 425 F.3d 309, 315, 318 (6th Cir. 2005); Purnell v. City of Akron, 925 F.2d 941, 948 (6th Cir. 1991) (citing *Trbovich*, 404 U.S. at 536–39).

137 *See* Associated Builders & Contractors v. Perry, 16 F.3d 688, 690 (6th Cir. 1994) (citing Diamond v. Charles, 476 U.S. 54, 68 (1986)).

138 *See* Tobias, *supra* note 15, at 434–35 (listing the Ninth Circuit at the most flexible end of the standing spectrum); White, *supra* note 14, at 545–46 (listing the Ninth Circuit as the most liberal circuit regarding intervention, yet suggesting that the circuit requires "some level of legally cognizable interest before granting intervention").

139 Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 308 n.1 (9th Cir. 1989).

140 *See* Prete v. Bradbury, 438 F.3d 949, 955 n.8 (9th Cir. 2006) (stating that the Ninth Circuit has not yet settled the issue of "whether an intervenor-applicant must independently establish Article III standing to intervene as of right" despite the claims of various sources).

141 *Hodel*, 866 F.2d at 308 n.1 (second alteration in original) (quoting County of Orange v. Air Cal., 799 F.2d 535, 537 (9th Cir. 1986)).

142 Yniguez v. Arizona, 939 F.2d 727, 735 (9th Cir. 1991).

143 *See, e.g.*, Sw. Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 814, 821 n.3 (9th Cir. 2001) (using associational standing as the basis for allowing intervention by the

In 2005, after analyzing the circuit split, the Tenth Circuit sided with those courts finding that Article III standing was not required for intervenors.[144] The court based its position on the *Diamond* decision, which made it "clear" that Diamond would have been able to appeal the decision and file a brief on the merits despite lacking Article III standing by riding "piggyback" on the original defendant who did possess standing.[145] This Tenth Circuit ruling was recently vacated, and an en banc court held that the interests of the potential conservation group intervenors were adequately represented by the federal government.[146] Despite denying intervention, the court explicitly adopted the original panel's reasoning on the relationship between standing and intervention:

> On rehearing en banc we adopt the panel's reasoning on this issue and hold that parties seeking to intervene under Rule 24(a) or (b) need not establish Article III standing "so long as another party with constitutional standing on the same side as the intervenor remains in the case." In that circumstance the federal court has a Case or Controversy before it regardless of the standing of the intervenor.[147]

Additionally, while holding that a standing inquiry might be relevant to determining whether an interest under Rule 24(a)(2) is sufficient, the Eleventh Circuit has adopted the position that "a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit"[148]—at least in the case where the claims being raised are the same as those already at issue.[149] In so holding, the court noted the distinction between the issues involved in bringing an original suit

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Southwest Center for Biological Diversity in a suit involving claimed violations of the Endangered Species Act); *Yniguez*, 939 F.2d at 735. Cindy Vreeland has championed the incorporation of the doctrine of associational standing into Rule 24(a)(2)'s requirements for public interest groups intervening in public law litigation. *See* Cindy Vreeland, Comment, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279, 303–05 (1990).

144 *See* San Juan County v. United States, 420 F.3d 1197, 1203–05 (10th Cir. 2005), *vacated on reh'g en banc*, 503 F.3d 1163 (10th Cir. 2007).

145 *Id.* at 1205 (quoting Diamond v. Charles, 476 U.S. 54, 64 (1986)).

146 San Juan County v. United States, 503 F.3d 1163, 1167, 1207 (10th Cir. 2007). The court also upheld the district court's denial of permissive intervention under Rule 24(b). *Id.* at 1207.

147 *Id.* at 1172 (citations omitted) (quoting *San Juan County*, 420 F.3d at 1206).

148 Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989).

149 *Id.* at 1213 n.17.

versus intervention: "'When one seeks to intervene in an ongoing lawsuit, [justiciability] questions have presumably been resolved.'"[150]

Like the circuit courts, commentators have noted the distinction "between the question whether one is a proper plaintiff or defendant in an initial action and the question whether one is entitled to intervene."[151] In this view, standing is a threshold issue, requiring that the original parties establish jurisdiction for the court to hear the case or controversy, rather than analyzing each party's relationship to the case or controversy.[152] Additionally, these commentators argue that since standing is a "plaintiff's hurdle," requiring defendant-intervenors to prove an Article III case or controversy is a misapplication of the standing doctrine.[153] Some commentators argue that while standing is not necessary for intervention it is still "crucial . . . to the intervention inquiry" since the respective "interests" overlap,[154] while others find the standing doctrine to be so "confused and complex [that it is] not easily transferable to such a different area of the law."[155]

Other evidence cited for the proposition that standing is not necessary for intervention is Rule 19(a)(1), which governs necessary joinder.[156] Pursuant to Rule 19(a)(1), the original parties must join

150 *Id.* at 1212 n.16 (alterations in original) (quoting Shapiro, *supra* note 54, at 726); *see also* Dillard v. Chilton County Comm'n, 495 F.3d 1324, 1336–37 (11th Cir. 2007) (citing *Chiles* for the proposition that intervention does not require a demonstration of standing where the original parties have already presented a justiciable case or controversy).

151 Shapiro, *supra* note 54, at 726; *see also* Karastelev, *supra* note 38, at 471 ("Given that the judicial machinery has already been mobilized, the consideration should be whether the would-be intervenor's interests could be prejudiced by the pending case's outcome and not whether he has standing to pursue a case of his own.").

152 *See* Tobias, *supra* note 15, at 428 (listing standing as a doctrine relating to the commencement of litigation and intervention as a doctrine relating to participation in litigation where the plaintiff has already proven standing); Karastelev, *supra* note 38, at 471–72.

153 Bullock, *supra* note 126, at 641–42 (arguing that the application of standing to defendant intervenors is a "gigantic extension" of the doctrine); *see also* Appel, *supra* note 97, at 285–86 ("[T]he question of standing—at least as to the injury-in-fact inquiry—focuses entirely on the plaintiff." (footnote omitted)). *But see* McConnell v. FEC, 540 U.S. 93, 233 (2003) (examining the standing of defendant FEC and defendant-intervenors).

154 Tobias, *supra* note 15, at 446 (suggesting that the policies that underlie both standing and intervention argue for courts to focus primarily on the quality of potential intervenors' contributions to issue resolution).

155 Bullock, *supra* note 126, at 643.

156 *See* FED. R. CIV. P. 19(a)(1). Karastelev also generally cites permissive intervention pursuant to Rule 24(b) for the proposition that the involvement of parties without standing does not destroy an Article III case or controversy. Karastelev, *supra* note 38, at 473. Instead, the Rule "exists precisely to accommodate those parties who do

necessary outsiders, and the language used in the Rule is almost identical to that in Rule 24(a)(2).[157] While noting that the procedural rights to intervention as of right and necessary joinder were developed to be counterparts of each other, the 1966 Advisory Committee failed to define the respective "interest" required for each rule.[158] Despite the similar language of the two rules and the identical "interest" ambiguity, however, commentators note that Rules 24(a) and 19(a)(1) have been treated differently by the courts[159] and that no courts have explicitly required standing of individuals joining a lawsuit pursuant

not have standing and do not have a sufficient interest to intervene as of right." *Id.* Furthermore, courts have used the Rule to allow intervention in a suit in some cases where the intervenor could not meet the more stringent requirement of intervention as of right. *See, e.g.*, Nuesse v. Camp, 385 F.2d 694, 706 (D.C. Cir. 1967). As discussed below, this Note does not take the position that standing by all parties is necessary for the maintenance of an Article III case or controversy. *See infra* Part V. Instead, this Note focuses on how the courts should apply the "interest" requirement of Rule 24(a)(2) to properly promote the judicial goals of intervention. Common sense argues that intervention as of right should be granted more stringently than permissive intervention. *See* Vreeland, *supra* note 143, at 309 ("[T]here is a difference between flexibility in allowing intervention under Rule 24(b) and flexibility in limiting intervention under Rule 24(a)."). As a result, this Note will merely contend that while permissive intervention is a very strong argument for the proposition that Article III standing is not necessary for every individual participant in every suit, it does not aid in the determination of what level of "interest" should be required for intervention as of right. *See id.* (noting that collapsing the two rules into one might actually work against public interest group intervenors by "establish[ing] a presumption that the public interest group may not belong in the litigation").

157 *See* FED. R. CIV. P. 19(a)(1)(B)(i). The Rule reads, in pertinent part:

> A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> . . . .
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest . . . .

Id.

158 *See* Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 73, 109–10 (1966) (advisory committee's note to Rule 24); *see also* Appel, *supra* note 97, at 254 (asserting that the Rules were meant to be counterparts).

159 *See* Shapiro, *supra* note 54, at 757 (correctly hypothesizing that the Rules would be treated differently by federal courts); Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C. L. REV. 745, 746–70 (1987) (noting the limited practicality of using Rule 19 in a public rights context); Karastelev, *supra* note 38, at 472–73 (noting the similarity between the language of the two rules). Note that the above authors refer to Rule 19(a)(2)(i) rather than Rule 19(a)(1), as their articles were written before the 2007 amendments to Rule 19.

to Rule 19.[160] Based on the text and history of Rules 24(a) and 19, Karastelev concludes that Rule 24(a) should follow the established jurisprudence of Rule 19 and courts should stop demanding that intervenors prove that they have standing to sue.[161] Others argue that Rule 19 is applied by courts in a narrower context than Rule 24(a) and in fact in a manner that "implicitly includes standing."[162]

Finally, commentators also attack the assumption that intervenors are necessarily coequal parties to the litigation.[163] While the language of Rule 24(a)(2) "does not anticipate conditioning participation of intervenors as of right," the 1966 Advisory Committee notes make clear that judges are free to use their discretion to limit the participation of intervenors.[164] These limits can be used to subordinate the intervenor to the original parties, explicitly putting the parties on unequal footing and possibly justifying different threshold standards for entry into the suit. The use of discretion to properly limit participation can also be used to overcome the efficiency concerns presented by complex public law litigation—allowing intervention by public

160 *See* Karastelev, *supra* note 38, at 472–73.

161 *Id.*

162 *See* White, *supra* note 14, at 539 & n.71 (arguing that Rule 19 is applied much more narrowly by the courts than Rule 24 and "implicitly includes standing"); *see also* Appel, *supra* note 97, at 258–59 ("[T]o the extent that the Advisory Committee saw intervention as simply a complement to joinder, the right to intervene now exceeds instances in which joinder would apply.").

163 *See* Karastelev, *supra* note 38, at 475. Despite requiring standing for intervention, the Seventh Circuit has recently noted that individuals need not always participate on equal footing as other parties, yet questioned whether this is still "intervention" under Rule 24(a). *See* Korczak v. Sedeman, 427 F.3d 419, 421–22 (7th Cir. 2005).

164 Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 73, 111 (1966) (advisory committee's note to Rule 24) ("An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."); *see also* Appel, *supra* note 97, at 278 (noting that "the committee provided no authority" for its statement that courts had the authority to limit intervention). Many courts have exercised this discretion. *See* Vreeland, *supra* note 143, at 307 ("[C]ourts have limited the issues that an intervenor may raise, denied intervenors the right to a jury trial, limited intervention to a particular stage of the trial, and required that multiple intervenors use restricted numbers of spokesmen and combine discovery and motion presentations."); *see also* Tobias, *supra* note 15, at 450 (listing excluding duplicitous data, restricting pretrial involvement, and limiting issue involvement as methods for limiting intervenor participation); Karastelev, *supra* note 38, at 481–83 (noting the number of options that courts have for "proactively limiting the potential disruption to an ongoing case by the addition of an intervenor, without blocking his participation completely").

interest litigants who are experts in the subject of the litigation while ensuring that the case does not become unwieldy for the court.[165]

B. The Interests Are Equivalent

Other courts argue that the interests required for standing and intervention are essentially equivalent for most cases, as a result of the comparative goals advanced by each.[166] The First Circuit, for example, has noted that "in the ordinary case, an applicant who satisfies the 'interest' requirement of the intervention rule is almost always going to have a sufficient stake in the controversy to satisfy Article III as well."[167] The court did note, however, that standing is a complex doctrine and that in unusual circumstances, the overlap between the standing interest and the intervention interest may not always be complete.[168] Similarly, while historically requiring an independent showing of Article III standing before allowing intervention, the Seventh Circuit has generally recognized that "[f]rom a pragmatic standpoint . . . '[a]ny interest of such magnitude [as to support Rule 24(a) intervention of right] is sufficient to satisfy the Article III standing requirement as well.'"[169]

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165 *See* Appel, *supra* note 97, at 295; Tobias, *supra* note 15, at 419; Hutchings, *supra* note 14, at 695, 733–34.

166 See *supra* note 6 for a discussion of the term "equivalent" for the purpose of this Note; *supra* notes 3–5, 11–14 and accompanying text for a discussion of the goals promoted by intervention; and *supra* notes 43–46 and accompanying text for a discussion of the goals promoted by standing.

167 Cotter v. Mass. Ass'n of Minority Law Enforcement Officers, 219 F.3d 31, 34 (1st Cir. 2000); *see also* White, *supra* note 14, at 531, 536 (noting that in private disputes under the traditional litigation model, the interest requirements of standing and intervention as of right will generally overlap, but that this is often not the case in public law litigation where "no specific cause of action has been granted to a group or individual party alleging injury").

168 *Cotter*, 219 F.3d at 34.

169 Sokaogon Chippewa Cmty. v. Babbitt, 214 F.3d 941, 946 (7th Cir. 2000) (second and third alterations in original) (quoting Transamerica Ins. Co. v. South, 125 F.3d 392, 396 n.4 (7th Cir. 1997)). The Seventh Circuit has fluctuated greatly on the matter of the relationship between the respective interests of standing and intervention. In 1972, the circuit stated that the "requirements for intervention . . . should generally be more liberal than those for standing to bring suit." United States v. Bd. of Sch. Comm'rs, 466 F.2d 573, 577 (7th Cir. 1972) (citing Shapiro, *supra* note 54, at 726). Later, but before the tightening of standing in *Lujan*, the circuit developed the view that an applicant for intervention must show a direct, substantial, and legally protectable interest greater than the interest required to satisfy standing. *See* United States v. 39.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985). Since *McConnell*, the circuit has adopted a more liberal form of intervention that does not require stand-

This relationship between standing and intervention results from the overlapping goals that both doctrines seek to accomplish, despite their different purposes.[170] Both standing and intervention promote efficiency in the judicial process by limiting the number of suits brought into the courts. By allowing intervenors to participate when their interests relate to the property or transaction at issue, courts are able to reduce the number of original suits while potentially making decisions that benefit from the increased participation of individuals and organizations with varying positions. Furthermore, the timeliness and inadequate representation requirements of Rule 24(a) inject discretion into an otherwise mandatory rule and allow courts to deny intervention or limit participation where a potential intervenor might actually reduce efficiency—for example, a large organization bringing many new arguments that actually impede the interests of the other parties and/or make the litigation prohibitively complex.[171] This discretion also facilitates standing's goal of concrete adverseness. By allowing the optimal number of parties to be involved, the court can take advantage of the education and resources of others to present varying perspectives and ensure concrete adverseness—a sharpening of the presentation of issues. When the court feels that the issues will become too complicated and/or generalized, the discretion inherent in Rule 24(a)(2) allows the court to limit participation in the dispute.[172]

Finally, both standing and intervention are concerned with the value of fairness. Standing operates so as to ensure "outward" fairness—protecting the rights and concerns of individuals that have no desire to become parties to the suit and do not seek judicial assistance.[173] Intervention, on the other hand, ensures "inward" fair-

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ing, yet has questioned whether this is true intervention under Rule 24(a). *See* Korczak v. Sedeman, 427 F.3d 419, 421–22 (7th Cir. 2005).

170 *But see* Tobias, *supra* note 15, at 442 ("The history and judicial application of standing and intervention of right show that they had different origins and were intended to serve dissimilar, albeit not totally distinct, purposes."); Bullock, *supra* note 126, at 640 (defining intervention as "a key to the courtroom, [and standing as] a bar or lock").

171 *See supra* note 164 and accompanying text; *see also* White, *supra* note 14, at 555–56 ("[T]he efficiency argument breaks down in the context of public law litigation where many parties do not, and will not, have standing to litigate their asserted interests regardless of the outcome of the decision.").

172 This focus on discretion and the furtherance of concrete adverseness is championed by Tobias' case-specific approach that focuses primarily on "whether an applicant promises to help resolve issues that warrant consideration before the court makes a decision on the merits of the dispute." Tobias, *supra* note 15, at 447.

173 *See* CHEMERINSKY, *supra* note 33, at 62.

ness—protecting those already involved in the suit and assisting those wanting to become involved in the suit.[174] Intervention, therefore, allows those on the outside of a suit who desire judicial protection to become involved while the requirements and discretion components ensure that original parties are not unjustly deprived of the right of structuring and controlling their own suits.

Despite all of the above similarities, there is one judicial value promoted by standing with which intervention arguably interferes: restricting the scope of judicial review in order to preserve the separation of powers. If the interests implicated by standing and intervention do not overlap, and standing is not required for intervenors, more individuals will participate in claims and the scope of judicial review will be potentially broadened. This problem has become more acute with the relatively recent flood of public law litigation—leading some to claim that liberal intervention interferes with "the democratic process in the legislative and executive branches,"[175] while others argue that the floodgates can be managed by court discretion to limit or condition the participation of intervenors.[176]

Courts have disagreed about the constitutional implications of allowing standingless intervenors to participate in a suit. A minority of courts has required standing in order to prevent the destruction of an Article III case or controversy before the court. The majority of courts, on the other hand, has criticized those requiring standing, pointing to other Federal Rules and the judge's discretion in limiting participation for justification that the Rules do not contemplate an injection of standing requirements into Rule 24(a)(2). There are strong arguments, however, that in a significant number of cases the interest required for intervention as of right will likewise satisfy Article III requirements. As a result, a bright-line rule taking one position or another might be overlooking the unique circumstances that prevent an overlap of the similar interests.[177]

V. How Courts Should Treat Potential Intervenors

As recognized by the First and Seventh Circuits, the interests required for intervention and standing will often be equivalent based on the overlapping goals of the doctrines.[178] Furthermore, since the

174 *See* Berger, *supra* note 13, at 65.

175 *See* White, *supra* note 14, at 557.

176 *See* Karastelev, *supra* note 38, at 481.

177 *See infra* Part V.

178 *See supra* Part IV.B.

interest for standing is often seen as the more difficult to meet,[179] a court finding that an intervenor can show that it would have been independently able to bring the original claim is an easy decision for the court with regard to the interest prong of the Rule 24(a)(2) test. If a court determines that an intervenor does not have standing in the underlying dispute, the court should determine whether the intervenor seeks to bring a claim or merely protect an interest. If an intervenor is bringing a new claim before the court, she should be required to make a showing of standing since she is creating a mini-trial for the tribunal to decide and therefore triggers the threshold requirements of standing. For intervenors merely protecting their interests in a defensive posture or seeking to bring claims identical to those already presented by the original parties, the intervenors should not be required to show an interest in the litigation rising to the level of standing.

A. Standing Is Not Required for All Intervenors

In *Bowsher*, the Supreme Court made clear that not all parties to a dispute must have standing to participate in a lawsuit.[180] As a result, the Court has debunked the notion that parties without standing necessarily destroy an Article III case or controversy and has adopted a view of standing as a threshold issue—ensuring that the original parties establish an Article III case or controversy for the court, rather than requiring each participant to defend her individual relationship to the dispute.[181] Since the writing of most of the articles cited in this Note, the Supreme Court in *McConnell v. FEC* adopted the *Bowsher* doctrine with respect to intervention.[182] As a result, the Court has firmly established that standing is not necessary for all intervenors. The *McConnell* Court did potentially limit the application of the *Bowsher* doctrine, however, to intervenors whose positions are "identical" to those of a party on the same side of the suit in which they are seeking to intervene.[183]

While limiting *McConnell*'s holding to intervenors with "identical" interests, the Court did not define what types of positions qualify as

179 *See, e.g.*, Cotter v. Mass. Ass'n of Minority Law Enforcement Officers, 219 F.3d 31, 34 (1st Cir. 2000); Yniguez v. Arizona, 939 F.2d 727, 735 (9th Cir. 1991).

180 Bowsher v. Synar, 478 U.S. 714, 721 (1986).

181 The Court has therefore rejected White's view of standing as an examination of each "party's relationship to the injury alleged" and adopted the threshold inquiry that White criticized. *See* White, *supra* note 14, at 553–54 (citing Flast v. Cohen, 392 U.S. 83, 99 (1968)).

182 540 U.S. 93, 233 (2003).

183 *Id.*

identical under the *Bowsher* doctrine. An analysis of the parties involved in *McConnell*, however, suggests that the term likely has a broader meaning than its colloquial use, particularly considering the requirement that the intervenors' interests cannot be adequately represented by the existing parties.[184] In *McConnell*, the Court allowed six members of Congress, who were the principal sponsors and authors of the Bipartisan Campaign Reform Act of 2002, to intervene as defendants to support the constitutionality of the Act since their collective position was "identical" to the FEC's.[185] It is true that the members of Congress, like the FEC, wanted the Supreme Court to hold that the Act was constitutional; however, their interests and motivations in the matter were likely not identical to those of the FEC. The FEC was in charge of enforcing the provision;[186] thus, the Act required activity on the part of the FEC to determine those groups or individuals in violation of the statute, proceed with investigations against them, and bring suit.[187] The members of Congress, on the other hand, as members of the legislative branch, could take no active part in the enforcement of the provision. Furthermore, their interests in upholding the Act more likely involved concern with election reform, pride in their work product, time and money devoted to getting the Act passed, avoidance of conflicts with lobbyists and constituents that pushed for the Act, political pressures, and reelection concerns.[188] Based on the disparate motivations and stakes in the litigation, by "identical positions," the Court probably meant the protection of the same interest—the constitutionality of the Bipartisan Campaign Reform Act—and nothing more.

The Supreme Court's *Trbovich* decision supports applying the "identical position" limitation to intervenors attempting to bring different claims before the court. In *Trbovich*, the Court allowed standingless intervention, yet limited the intervenor's claims to those set forth in the Secretary of Labor's complaint.[189] In his petition for intervention, Trbovich presented two additional claims for setting aside the

184 *See* FED. R. CIV. P. 24(a). If the potential intervenor's interest in the litigation were truly "identical" to the existing parties' interests, the intervenor would struggle to show that those interests were represented inadequately in the suit, as required by Rule 24(a). *See id.*

185 *McConnell*, 540 U.S. at 233. The seventeen defendants included Senator John McCain. McConnell v. FEC, 251 F. Supp. 2d 176, 220 n.55 (D.D.C. 2003), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003).

186 *McConnell*, 251 F. Supp. 2d at 227.

187 *See* 2 U.S.C.A. § 437g (West 2005 & Supp. 2008).

188 *McConnell*, 251 F. Supp. 2d at 227 (noting the reelection dates of several of the defendant intervenors).

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

disputed union election under the Labor-Management Reporting and Disclosure Act of 1959 in addition to his arguments and evidence in support of the Secretary's position.[190] While recognizing that it was "less burdensome for the union to respond to new claims in the context of the pending suit than it would be to respond to a new and independent complaint," the Court determined that allowing these additional claims would "circumvent the screening function assigned by statute to the Secretary."[191] The Court did note, however, that if the district court ordered a new election, the Court was not limited to those remedies proposed by the Secretary, as "there is no reason to prevent the intervenors from assisting the court in fashioning a suitable remedial order."[192] As a result, the limitation detailed in *McConnell* for protecting interests can be expanded to prevent intervenors from bringing claims before the court, but it likely does not limit intervenors in their suggestion to the court of certain remedies.[193] Again, "identical positions" is not used in a colloquial sense—the Court noted the different arguments, evidence, and motivations presented by the intervenor that led the Court to conclude that Trbovich's interests were not adequately represented by the Secretary of Labor.[194]

In order to recognize the broad definition of "identical," yet respect the limit incorporated by the Supreme Court, courts should interpret the phrase "identical positions," as meaning either an identical claim in a plaintiff's posture (*Trbovich*) or protecting an identical right or interest in a defensive posture (*McConnell*). Defining the scope of a claim has consistently troubled courts, at least in the con-

190 *Id.* at 529–30 & n.2 ("Petitioner alleged as additional violations of the Act (1) that the Union required members to vote in certain locals, composed entirely of pensioners, which petitioner claims are illegally constituted under the UMWA Constitution; and (2) that the incumbent president improperly influenced the pensioners' vote by bringing about a pension increase just before the election.").

191 *Id.* at 537. While the Court was engaging in statutory interpretation in *Trbovich*, limiting standingless intervenors to claims presented by parties with standing is a logical step based on *McConnell*, as bringing claims in court is more aggressive than merely protecting interests.

192 *Id.* at 537 n.8.

193 *See id.* at 530, 537–38. The issue is beyond the scope of this Note, but based on its ultimate conclusion that individuals seeking to bring new claims into the suit should be required to show that they have standing to bring the new claim and that the claim meets the interest requirements of Rule 24(a), one might argue that certain requests for individualized remedies are in fact new claims as they require the court to begin a new mini-trial to determine the intervenor's relationship to the underlying dispute.

194 *See id.* at 530, 537–39.

text of determining whether a party is precluded from bringing a claim;[195] however the task at hand is alleviated by the fact that a court can compare the intervenor's claim with that of the original party in real time rather than retrospectively. Additionally, the court can always use its discretion to limit or expand the involvement of the intervenor later in the suit if it feels that its initial judgment was incorrect.

B. The Various Positions of Intervenors

In *Trbovich* and *McConnell*, the Court seemed concerned with limiting intervenors with no independent basis for standing to arguing those claims brought by the original parties. Juliet Karastelev has noted the importance of making a distinction between bringing a claim and protecting an interest.[196] This distinction, however, must account for the blurring that can occur between parties—defendants can bring claims through counterclaims and cross-claims, and plaintiffs, in turn, can protect interests by defending against such claims.[197] Combining the positions of the parties with the "identical interest" limitation discussed above, therefore, suggests four possible positions of intervenors: (1) an intervenor seeking to protect interests that are the same as those of the same-side party with standing, (2) an intervenor seeking to bring claims that are the same as those of the same-side party with standing, (3) an intervenor seeking to protect interests that are different from those of the same-side party with standing, and (4) an intervenor seeking to bring claims that are different from those of the same-side party with standing.[198]

1. Standing Not Required

The above discussion of *McConnell* and *Trbovich* suggests that courts are free to grant intervention to the first two categories of intervenors. Merely because courts are free to grant intervention, however, does not necessarily mean that they should grant full party rights to

195 *See* FREER & PERDUE, *supra* note 16, at 591.

196 *See* Karastelev, *supra* note 38, at 479–80.

197 *See* FREER & PERDUE, *supra* note 16, at 666–75.

198 Judge Friendly, who once agreed that there were a "'multitude of possible intervention situations,'" might take issue with such a simplified four-category view of the possible intervenor positions. *See* United States v. Hooker Chem. & Plastics Corp., 749 F.2d 968, 983 (2d Cir. 1984) (quoting Restor-A-Dent Dental Labs., Inc. v. Certified Allied Prods., Inc., 725 F.2d 871, 875 (2d Cir. 1984)).

standingless intervenors.[199] Instead, courts must keep in mind the goals of the Federal Rules of Civil Procedure: ensuring "the just, speedy, and inexpensive determination" of actions.[200] The court can use its discretion to tailor roles for specific applicants—for example, it can limit participation to certain parts of the suit. Additionally, when a party is seeking to protect the same interests or bring the same claims as parties already involved in the suit, the court can take a stricter view toward the inadequate representation requirement, forcing standingless intervenors to make a heightened showing that their interests are not adequately represented by the existing parties to the suit.[201]

Additionally, the Court should allow standingless intervention to applicants in the third category—those intervenors, whether plaintiffs or defendants, defensively seeking to protect interests that are not represented by the original parties.[202] This is likely the most controversial argument in this Note, since the *Trbovich* Court explicitly limited Trbovich's claims to those in the Secretary's complaint.[203]

199 *See* Tobias, *supra* note 15, at 448–49; *see also* Appel, *supra* note 97, at 281 (noting that courts allowing intervention by intervenors merely making the same arguments as original parties may become overwhelmed and thus sacrifice the efficiency concerns of the Federal Rules). It is odd, however, to grant courts discretion to *deny* intervention as of right based on these concerns, as that would appear to collapse intervention of right and permissive intervention into one category. Instead, this Note suggests that such a balancing act should be performed after the intervenor has been allowed into the suit, assuming that the intervenor is able to meet the other requirements of Rule 24(a).

200 FED. R. CIV. P. 1.

201 *See, e.g.*, Sierra Club, Inc. v. Leavitt, 488 F.3d 904, 910 (11th Cir. 2007) (placing the burden on intervenors to produce evidence that the intervenors' interests are not adequately represented "'when an existing party seeks the same objectives as the would-be interven[o]rs'" (quoting Clark v. Putnam County, 168 F.3d 458, 461 (11th Cir. 1999))); Appel, *supra* note 97, at 273 ("The most difficult case to find inadequate representation is when an intervenor is seeking the same ultimate result as an original party.").

202 Take, for example, a hypothetical situation where the Congress of the United States passes a law mandating homosexual civil unions, and a Christian family group sues, challenging the law as outside of the power of the federal government to mandate such unions. The government defends on due process grounds. A gay rights group seeks to intervene as defendants in the suit and to have the statute upheld on equal protection grounds in order to set an equal protection precedent for the treatment of homosexuals. This Note takes the position that the gay rights group should be allowed to intervene and introduce the new defense to the suit, even if the group would not have "defendant standing."

203 I am tempted to argue that the *McConnell* Court's view of "identical" interests would be broad enough to encompass the gay rights group discussed in the hypothetical, *supra* note 202, since the group seeks the same end as the government—uphold-

However, as the intervenor in the third instance is not seeking to bring a claim and is instead "merely defending an interest threatened by the existing action," it is unlikely that a defendant intervenor would even be "capable of framing [her] asserted interests in such a way as to confer standing to sue."[204] In fact, many courts seem to assume that intervenors must seek to protect different interests in order to satisfy the inadequate representation requirement of Rule 24(a),[205] and courts and commentators specifically note the general impracticality of requiring defendants (or those in a defensive posture) to show standing.[206] Again, the court can use its discretion to limit the intervenor's participation in the rare case that such participation might indirectly result in a new claim before the court, such as in the case where an intervenor raises a new defense that in turn results in a new claim. The Court's adoption of standing as a threshold issue, focused primarily on plaintiffs who are asking the court to decide the merits of a specific claim, means that intervenors seeking to protect different interests need not demonstrate standing to intervene in an already existing case or controversy.

Commentators, relying on the implications from *Diamond*, argue that standing is a requirement of intervention as of right because of the due process concerns of freely allowing standingless intervenors into litigation. The commentators claim that there are only two means of remedying the due process concerns of denying the right to

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ing the constitutionality of the homosexual civil union statute. The district court in *McConnell* unfortunately did not parse out the arguments introduced by each of the various parties, likely because the suit involved seventy-seven plaintiffs and seventeen defendants after the deadline for intervention. *See* McConnell v. FEC, 251 F. Supp. 2d 197, 220 n.55 (2003 D.D.C.).

204 White, *supra* note 14, at 560. *But see* McConnell v. FEC, 540 U.S. 93, 233 (2003) (examining the standing of defendant FEC and defendant-intervenors).

205 *See, e.g.*, *Leavitt*, 488 F.3d at 910; California *ex rel.* Lockyer v. United States, 450 F.3d 436, 443–44 (9th Cir. 2006); Jansen v. City of Cincinnati, 904 F.2d 336, 342–44 (6th Cir. 1990).

206 *See, e.g.*, Wynn v. Carey, 599 F.2d 193, 196 (7th Cir. 1979); Appel, *supra* note 97, at 285–86 ("The standing inquiry usually focuses on a plaintiff and 'whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.' . . . A defendant need not prove standing to sue, and a person wishing to intervene as a defendant might have a concrete interest in the case but lack standing." (quoting Warth v. Seldin, 422 U.S. 490, 498–99 (1975))); Bullock, *supra* note 126, at 641–42 ("Standing is overwhelmingly a plaintiff's hurdle. Standing's requirements focus on the party bringing the action, and the action being brought. The only standing requirement that implicates defendants is causation, and there defendants are implicated only peripherally . . . ." (footnote omitted)); White, *supra* note 14, at 560.

appeal to parties that are bound by a judgment: (1) requiring standing of all individuals seeking to intervene in a suit or (2) overruling *Diamond*.[207] There is a third option, however, that has been adopted by at least one court: refusing to bind parties to a decision if they are not given the right to appeal an unfavorable decision.[208] Additionally, problems with the first two solutions abound: First, the Court has already made clear that standing is not a requirement for all intervenors.[209] Second, overruling *Diamond* would not solve the due process problem, but instead shift it onto the original parties to the suit—a shift that is arguably even more unfair to the original party than to any intervenor.[210] As Professor Appel explains, allowing standingless intervenors to appeal an unfavorable decision can unfairly bind an original party through stare decisis:

> If the intervenor appeals and is successful, the nonappealing party will get a victory that perhaps it does not want. If the intervenor appeals and loses, the nonappealing party will be stuck with an adverse decision from a higher court that will bind it in the future through principles of stare decisis.[211]

For those standingless intervenors who (1) seek to protect the same interests, (2) seek to bring the same claims, or (3) seek to protect different interests, the constitutional requirements of standing do not appear to apply. *McConnell* and *Trbovich* respectively cover the first two scenarios by adopting a view of standing as a threshold issue concerning those parties seeking to bring disputes before the court. Since the interests of the intervenors and original parties often substantially overlap in these circumstances, adequate representation is likely the most important factor for the court to determine before allowing intervention. Additionally, since the standing inquiry is generally focused at those individuals bringing disputes before the court, intervenors seeking to protect interests different than those presented by a same-side party in a civil action should be allowed to intervene without proving standing. With this third group of intervenors a court may need to be wary of the introduction of new defenses that will indirectly trigger new claims, which should require standing, as discussed below.

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207 *See supra* Part IV.A.1.

208 *See* Appel, *supra* note 97, at 278 (citing Sierra Club v. Babbitt, 995 F.2d 571, 575 (5th Cir. 1993)).

209 *See McConnell*, 540 U.S. at 233. As discussed in Part V.B.2, *infra*, this does not mean that standing should not be required for some intervenors.

210 *See* Appel, *supra* note 97, at 287–88.

211 *Id.*

2. Standing Required

Intervenors seeking to act as original plaintiffs by bringing new claims into a suit should have to meet the requirements of standing as well as prove that their new claims do not hinder the goal of Rule 24(a): to efficiently consolidate otherwise multiple suits. In allowing new claims by standingless intervenors, some courts have "rel[ied] on the proposition that successful applicants become parties" and therefore can assert new claims not contemplated by the original parties.[212] However, the Court in *Trbovich* made clear that a standingless intervenor's claims should be limited to those of the original plaintiff—even when such claims were intimately related to the underlying facts of the case.[213] As discussed previously, the interests of intervention and standing will often overlap, meaning that only a subsection of one class of potential intervenors will likely be required to make this higher showing of standing to intervene. By bringing a completely new claim for the court to decide, this kind of intervenor is creating a mini-trial within a trial, invoking the court's jurisdiction by asking it to "decide the merits of [a new] dispute or of particular issues,"[214] and acting as a coequal party in the judicial process.[215] In this posture, the intervenor is in reality acting as a plaintiff initiating an original suit and should therefore be forced to meet the threshold requirements of standing—no matter on which side of the dispute the intervenor actually resides.

Even if the individual has standing to make the claim, the court need not allow intervention where the claim is remote from the original subject matter of the suit. In this situation allowing the claim

212 *See* Tobias, *supra* note 15, at 445 & n.191 (citing Stewart-Warner Corp. v. Westinghouse Elec. Corp., 325 F.2d 822, 827 (2d Cir. 1963)).

213 Some argue that *Trbovich* "should be restricted to its facts and the peculiar statutory scheme involved." *Id.* at 433. But every case of intervention is inherently fact specific. *See* White, *supra* note 14, at 543 n.98 ("Perhaps the most problematic aspect of the Supreme Court decisions addressing the Rule 24(a) interest requirement is their fact-bound nature. While precedent surely exists, the application of these decisions is severely limited to narrow situations and provides minimal guidance to the lower federal courts."). To assist the lower courts with this factual analysis, the line must be drawn somewhere, and I suggest that after eliminating the majority of cases that involve an overlap of the standing and intervention interests, and eliminating the remaining majority of cases that involve intervenors from the first three groups discussed above, the courts are left with a small group of applicants that do not have standing yet seek to bring independent claims before the court. The court should either determine that these intervenors have standing to bring their claims or should limit their claims to those of the original parties to the suit.

214 Warth v. Seldin, 422 U.S. 490, 498 (1975).

215 7C WRIGHT ET AL., *supra* note 56, § 1921, at 619.

would in reality create a whole new suit by the intervenor, thus ignoring Rule 24(a)'s goal of "prevent[ing] a multiplicity of suits where common questions of law or fact are involved."[216] If the individual does not have standing to make a claim, but has a sufficient interest in the original dispute, the court should not deny intervention for lack of standing, but should instead use its discretion to limit the intervenor's claims to those already presented by parties with standing.[217]

Defendant intervenors seeking to take an offensive role by asserting counterclaims present an interesting case, as the authorities continue to disagree as to the "'proper treatment to be accorded counterclaims asserted by an intervenor.'"[218] Agreeing with Professor Wright, this Note recognizes a small exception to requiring standing for new claims in that intervenors should not have to show an independent basis of jurisdiction for compulsory counterclaims.[219] Calling this an exception is in fact an overstatement, as it is "[i]n accordance with the usual principles about compulsory counterclaims," for even original defendants are exempted from proving standing for the purpose of asserting compulsory counterclaims.[220] In contrast, a defendant seeking to assert a permissive counterclaim upon entry into the suit must have an "independent basis of jurisdiction for the counterclaim."[221] Allowing permissive counterclaims without standing would in fact grant the defendant intervenor greater rights than the original parties—"[s]o long as it remains the rule that an original defendant must have independent jurisdictional grounds for a permissive counterclaim, this should be true also of intervenors."[222]

Requiring standing for an intervenor bringing a new claim is in line with arguments of courts and commentators. The requirement of standing is still being used in a threshold manner, examining the relationship between the intervenor and the new claim that she seeks to bring—not examining the relationship of the intervenor to claims already before the court. Furthermore, by presenting new cases and

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216 Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co., 922 F.2d 92, 97 (2d Cir. 1990). In a situation such as this, the intervenor might struggle to show that her interest is related to the subject of the action in a manner that disposing of the action will impair or impede the interest. *See* FED. R. CIV. P. 24(a)(2).

217 *See* Trbovich v. United Mine Workers, 404 U.S. 528, 537 (1972).

218 7C WRIGHT ET AL., *supra* note 56, § 1921, at 614 (quoting Exch. Nat'l Bank v. Abramson, 45 F.R.D. 97, 103 (D. Minn. 1968)).

219 *Id.* at 618.

220 *Id.*

221 *Id.* at 618–19.

222 *Id.* at 619.

controversies for the court to decide, the intervenor is acting as a coequal party to the litigation—a posture assumed by those courts uniformly requiring standing. In this situation, there is no distinction between initiation of and intervention in a suit as assumed by the Court in *Trbovich*, because the intervenor is attempting both. By seeking to act as a full party, the intervenor should meet the requirements of full parties and be required to show that she has standing to be "entitled to have the court decide the merits of the [new] dispute."[223]

The argument that Rule 24(a) should be interpreted in the same manner as Rule 19(a)(1) is weak in relation to the framework provided in this Note. First, despite similar "interest" language, the Rules have been historically interpreted differently,[224] and it is unclear that Rule 19 has in fact been read to exclude standing requirements.[225] Moreover, this Note does not take the extreme position that standing should be required of all intervenors, as assumed by Karastelev's argument for identical treatment of the Rules.[226] Finally, Rules 24 and 19 are distinctly different rules, despite the similar language. Rule 24 involves an outsider seeking to "crash" an already-existing lawsuit without the permission of the existing parties.[227] Rule 19, on the other hand, requires the existing parties to pull certain outsiders into their case.[228] There is a large distinction between protecting a private lawsuit from being bombarded by unwanted outsiders and including an outside party that is needed for the effective disposition of a case already before the court; this distinction justifies different treatment of the respective outside parties.

Federal courts are continually confronted with petitions for intervention in civil suits, and the courts have little precedent for granting or denying intervention beyond the bright-line circuit rules that generally have remained constant despite the *McConnell* decision. *McConnell* made clear that not all applications must possess standing to intervene in a dispute. Relying on Supreme Court precedent and various policy arguments, this Note takes the position that intervenors from three groups—(1) those seeking to protect interests that are the same as the same-side party with standing, (2) those seeking to bring claims that are the same as the same-side party with standing, and (3) those seeking to protect interests that are different from those of the same-side party with standing—should be granted intervention with-

223 Warth v. Seldin, 422 U.S. 490, 498 (1975).
224 *See supra* note 159 and accompanying text.
225 *See supra* notes 160–62 and accompanying text.
226 *See* Karastelev, *supra* note 38, at 469–70.
227 *See* FED. R. CIV. P. 24(a).
228 *See id.* 19(a)(1).

out having to show standing (assuming that they are able to meet the other requirements of Rule 24(a)). The fourth group, intervenors seeking to bring claims that are different from the same-side party with standing, is the only group that presents an "end run" around Article III of the Constitution. And this problem can be remedied by limiting the intervenor's claims to those presented by original parties with standing. Judges must also remember that even though they are mandated to allow intervention under Rule 24(a), they have the discretion to shape and limit participation of the intervenors.

Conclusion

Early on, the Supreme Court recognized that the Federal Rules of Civil Procedure do not create standing[229] but as the definition of standing has ebbed and flowed, courts have recognized that the distinction between intervention and standing is not always apparent or helpful. The large overlap between the two doctrines and the general practice of ensuring only that the original plaintiff has standing simply decreases the opportunities for the Supreme Court to provide lower courts with a workable framework in the near future. Some courts, over time, have fluctuated in their opinions on the relationship between standing and intervention, but others have found a rather bright-line position and adopted that method no matter the status of the parties and potential intervenors or the relevant interests that they present to the court.

This Note presents an alternate way of looking at the issue of standing and intervention that falls between bright-line rules on the one hand and case-by-case analysis on the other. By combining a form of party status (bringing a claim or protecting an interest) with whether the claim or interest is already presented by one of the Article III parties, this Note attempts to aid courts in their classification of parties and examine how these classifications interact with the goals of standing and intervention. No matter what method a court decides to use to determine how it must decide the merits of the case and craft relief for the deserving parties, courts must remember the arsenal that they have at their discretion for cases that are just too difficult to classify or parties that present unique and extreme positions. By injecting discretion and equity into their classifications of intervenors, courts can be true to the respective values of Article III and Rule 24 while

229 Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978) ("[I]t is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction.").

also finding a balance between flexibility and uniformity in the Federal Rules of Civil Procedure.