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QUESTIONING INTERVENTION OF RIGHT—TOWARD A NEW METHODOLOGY OF DECISIONMAKING

Gene R. Shreves*

Legal thinking about intervention, as about rules of procedure and evidence generally, has dwelt too much in the middle latitudes of appellate judicial doctrine. There is too great a tendency to examine and evaluate the process of intervention decisionmaking according to the viewpoint and function of appellate courts.1 Definitive articles on the procedural phenomenon of intervention are few,2 and intervention may have attracted the most attention as a vehicle for comparing the merits of public versus private law enforcement.3 The inquiry should be

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1 See Clark, The Proper Function of the Supreme Court’s Federal Rules Committee, 28 A.B.A. J. 521 (1942) and note 88 and accompanying text infra.


Other commentators have attempted to treat intervention as one of several subjects under a multiparty theme, e.g., Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874 (1958) [hereinafter cited as HARVARD Developments]. This approach enjoyed particular popularity for a brief period after the federal intervention, joinder, and class action rules were simultaneously amended in 1966. Cohn, The New Federal Rules of Civil Procedure, 54 Geo. L.J. 1204 (1966); Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356 (1967); Comment, The Litigant and the Absentee in Federal Multiparty Practice, 116 U. Pa. L. Rev. 531 (1968) [hereinafter cited as PENNSYLVANIA Comment].

broadened by probing the jurisprudential values that appellate judges
infrequently—perhaps almost never—explore in their intervention
decisionmaking, and by probing the particular stress and flavor of in-
tervention controversies that comprise a vital part of the trial court
process, which are often beyond the accessibility of appellate judges.

This article will propose a structure and method of intervention
decisionmaking that seems most realistically calculated to produce
good procedure in a jurisprudential sense. The proposed model would
require the amendment of rule 24 of the Federal Rules of Civil Proce-
dure for two purposes: to subject all intervention controversies to a
common framework of decisionmaking criteria that is clearly articu-
lated in the rule itself, and to commit most intervention decisionmaking
to the discretion of the federal district courts. Nonstatutory interven-
tion of right, as administered in paragraph (a)(2) of the present rule, is
functionally incompatible with this model; therefore, this article pro-
poses its abolition.

The functional examination of intervention of right and the impli-
cations of its abolition provide a cutting edge for the broad examina-
tion in this article of concerns that underlie rule 24 as well as satellite
doctrines. At the same time, the article is intended to provide a model
of critical methodology for examining questions of civil procedure.
Prior attempts have been made to explore themes of jurisprudence and
legal process in the context of procedure, but the tendency has been to
speak in generalities. This article undertakes to fashion a system of
values by which one may critically examine the welter of case data and
conventional assumptions about the nature and purposes of interven-
tion decisionmaking in federal courts. Thus, this work is intended to
enhance simultaneously an understanding of intervention and the
range and applicability of the values themselves.

**INTERVENTION OF RIGHT—FUNCTIONALLY DEFINED AND
EXEMPLIFIED**

Intervention is a procedure by which a person may become a party
to an ongoing lawsuit on his own initiative. An absentee's need to
intervene is traditionally measured by the possible adverse conse-
quences of the adjudication upon his interests. Intervention incentives
range from the possibility that the adjudication might impair or destroy

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4 See text accompanying notes 55-137 infra.
5 For a survey of methods by which the number of parties in the litigation can be expanded at
the initiative of the existing parties or the court, see Kennedy, supra note 2, at 329.
6 Need was first stated in terms of the harm that might befall the applicant from the litigation.
Berger, supra note 3, at 65, 69; Moore & Levi, supra note 2, at 573; Harvard Developments, supra
note 2, at 897-98.
a property interest of the absentee\textsuperscript{7} to the opportunity to litigate a claim more quickly or inexpensively as an intervenor\textsuperscript{8} than would be possible if the absentee commenced an independent suit.\textsuperscript{9}

Rule 24 of the Federal Rules of Civil Procedure provides for both "intervention of right"\textsuperscript{10} and "permissive intervention" in the discretion of the court.\textsuperscript{11} Intervention of right is a conceptual device that identifies the more deserving applications for intervention and vouchsafes them through the gauntlet of party objections and trial court concerns by which less deserving applications—those made on permissive intervention grounds—will be judged and perhaps rejected. The intervention of right concept proceeds on four assumptions: (1) that in some situations an absentee's need to intervene will be greater than in others; (2) that it is possible to generalize about situations of greater need by creating a category that distinguishes them from other intervention circumstances where the possible adverse consequences of the litigation on the absentee's interest will not be as great; (3) that it is desirable to increase the probability that applications falling within the category of greater intervention need will be granted; and (4) that this can be accomplished by using the category to invoke decisional standards weighted more in favor of granting intervention than those standards that might otherwise be applied in intervention decisionmaking.

The standards by which nonstatutory intervention of right is to be determined are contained in paragraph (a)(2)\textsuperscript{12} of rule 24,\textsuperscript{13} which pro-

\textsuperscript{7} See note 53 infra.

\textsuperscript{8} There appears to be no consensus on whether the term should be spelled "intervener" or "intervenor." See, e.g., New Jersey v. New York, 345 U.S. 369 (1953), where both spellings appear in the opinion. I have selected the "er" spelling because it seems closer to plain English usage. For a review of the matter and similar conclusion, see Shapiro, supra note 2, at 725 n.18.

\textsuperscript{9} See note 65 infra.

\textsuperscript{10} FED. R. Civ. P. 24(a).

\textsuperscript{11} FED. R. Civ. P. 24(b).

\textsuperscript{12} Section 24(a)(1) also provides for intervention of right but does nothing more than affirm the validity of unconditional rights to intervene granted by other statutes. . . . The inclusion of this provision in Section 24(a) was apparently an attempt by the court to complete the section as a catalogue, if only by reference, of the situations where a person may intervene by right.

Note, Intervention of Private Parties Under Federal Rule 24, 52 COLUM. L. REV. 922, 922-23 (1952) [hereinafter cited as COLUMBIA Note]. Statutory intervention of right is beyond the focus of this article because its operation is substantially independent of rule 24.

\textsuperscript{13} In its entirety, the rule is as follows:

Rule 24. Intervention

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

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of
(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action. . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. 14

The rule does not state expressly that situations described in paragraph (a)(2)—intervention of right—reflect a greater need to intervene than the circumstances of convenience and judicial economy that are described for permissive intervention in paragraph (b)(2). Nonetheless, the rule provides that timely placement of one's case within the cate-

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Although the primary model in this article will be intervention in federal district court, the discussion applies equally to state practice where the procedural device of intervention of right is utilized.
category described by paragraph (a)(2) "shall" entitle an applicant to intervene, whereas timely satisfaction of the description of paragraph (b)(2) "may"15 (or may not) result in intervention. Moreover, paragraph (b)(2) suggests decisional standards for the trial court "in exercising its discretion"16 that may support either the granting or the denial of intervention. In contrast, paragraph (a)(2) provides the trial court with no authoritative basis for denying a conforming application except untimeliness.17

15 See note 13 supra. The function of "shall" and "may" in rules and statutes is to aid in determining when lower court decisions are open to redecision ("shall") and when the matter is committed to the lower court's discretion ("may"). Interpreting "shall" and "may" as they appeared in FED. R. CIV. P. 25(a) providing for the substitution of parties, the Supreme Court stated, "When the same Rule uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory." Anderson v. Yungkau, 329 U.S. 482, 485 (1947). Cf. Jameson v. Jameson, 176 F.2d 58, 60 (D.C. Cir. 1949) (construing "shall" in FED R. CIV. P. 56(e) as "mandatory"). Professor Maurice Rosenberg has reported a strong tendency among state trial judges he surveyed to infer discretion from the words "may permit" in a hypothetical intervention rule.

They adopted a similar interpretation of the words "in the interest of justice" in other rules, viewing that phrase as another form of discretionary grant. It was only when the rule specifically provided that the court "shall direct" or "shall order" particular acts when criteria are satisfied that they doubted the existence of discretionary power. Rosenberg, Judicial Discretion of the Trial Court, Viewed From Above, 22 SYRACUSE L. REV. 635, 657 (1971).

At the same time, the significance that can be derived from the words alone is limited. While it is true in construction of statutes, and presumably also in the construction of federal rules, that the word "may" as opposed to "shall" is indicative of discretion or a choice between two or more alternatives, the context in which the word appears must be the controlling factor. United States v. Cook, 432 F.2d 1093, 1098 (7th Cir. 1970), cert. denied, 401 U.S. 996 (1971). See also Thompson v. Clifford, 408 F.2d 154, 158 (D.C. Cir. 1968). For a similar view of the significance of the terms in English statutory interpretation, see 36 HALSBURY'S LAWS OF ENGLAND 433 (3d ed. 1962).

Intervention of right requires that the initial trial court decision denying intervention be viewed as nondiscretionary, see notes 23-24 and accompanying text infra. Hence, there should be a necessary link between "shall" and intervention of right in § (a) of rule 24 and "may" and permissive or discretionary intervention under § (b). The terms appear especially capable of contributing to a clear "right-permissive" distinction because § (b) of rule 24 itself articulates the purpose of conferring discretion and some of the circumstances under which it is exercised. See Rosenberg, supra, at 659-60.

16 "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." FED. R. CIV. P. 24.

17 The appropriate limits of the untimeliness exception have been set as follows:

[The prejudice to the original parties to the litigation that is relevant to the question of timeliness is only that prejudice which would result from the would-be intervener's failure to request intervention as soon as he knew or reasonably should have known about his interest in the action. . . . [T]o take any prejudice that the existing parties may incur if intervention is allowed is account under the rubric of timeliness would be to rewrite Rule 24 by creating an additional prerequisite to intervention as of right.

Stallworth v. Monsanto Co., 558 F.2d 257, 265 (5th Cir. 1977) (emphasis in original). See also note 73 and accompanying text infra.

The conclusion that the applicant fits the category of intervention of right is tantamount to a conclusion that the intervention must be granted. This result comes in part from the operative
The most significant functional characteristic of intervention of right may be the large degree to which it implicates federal appellate courts in routine intervention decisionmaking. In practice, the federal district court is almost always a court of first and last resort when it decides to grant intervention applications grounded on either paragraphs (a)(2) or (b)(2). Denials of intervention are reviewable as final orders. The functional implication of the discretion conferred

language employed in §§ (a) and (b), see note 15 supra, and in part from the absentee concern that is behind the distinction. Prior to the adoption of the original rule 24, it was said that "[t]he absolute right to intervene connotes that the intervener's interest in the proceeding is so great that in justice he must be allowed to protect his interest in the case." Levi & Moore, supra note 2, at 902. This means that, according to the rule, one intervening of right "should be permitted to intervene without consideration of the hardship thrust upon the litigants." Pennsylvania Comment, supra note 2, at 542-43. See Cohn, supra note 2, at 1232; Harvard Developments, supra note 2, at 902.

Orders granting intervention are not immediately appealable under 28 U.S.C. § 1291 (1976) by parties opposing the application since they do not finally conclude the interests of any of the new or old parties to the litigation. See Kennedy, supra note 2, at 368 n.128; Shapiro, supra note 2, at 748 n.121. See also In re Estelle, 516 F.2d 480, 484 (5th Cir. 1975), cert. denied, 426 U.S. 925 (1976) (Rehnquist, J., joined by Burger, C.J. and Powell, J., dissenting from the denial of certiorari); Roach v. Churchman, 457 F.2d 1101, 1105 (8th Cir. 1972). Cf. Pacific Union Conference of Seventh Day Adventists v. Marshall, 434 U.S. 1305, 1306 (1977) (denial of summary judgment not a final order under § 1291).

Appeal of an order granting intervention is technically available through § 1291 as an included point of review from final judgment subsequently concluding the case. See 9 Moore's Federal Practice ¶ 110.13[7] (2d ed. 1975); Columbia Note, supra note 12, at 930. Appeal of an order granting intervention after trial is largely illusory, however. "[S]ince lower courts generally hedge with a statement that the granting of the petition was based on an exercise of discretion as well as on the determination that petitioner had an absolute right, a reversal is virtually confined to the abuse of discretion situation." Id. Compare Southwest Ga. Prod. Credit Ass'n v. Wainwright, 241 Ga. 355, 245 S.E.2d 306 (1978) (trial court's allowance of intervention on strength of a state rule similar in relevant respects to federal rule 24, note 14 supra, was affirmed upon a conclusion that the trial court had not abused its discretion) with Stockton v. United States, 493 F.2d 1021 (9th Cir. 1974) (reversing an order granting intervention of right on appeal from a subsequent final judgment). For a discussion of the limited reach of abuse of discretion as a reviewing standard, see notes 20 & 21 infra.

Delay in the opportunity of parties opposing intervention to obtain review of the matter also works against reversal. As a practical matter . . . since petitioner will have already established his claim in a trial on the merits and since any disruption of the original action will already have been suffered, a determination that intervention was improper will serve no useful purpose and no case has been found in which an order granting intervention has been reversed. Columbia Note, supra note 12, at 930-31. See also 7A C. Wright & A. Miller, Federal Practice and Procedure § 1923 (1972) [hereinafter cited as Wright & Miller]. But see Stockton v. United States, 493 F.2d 1021 (9th Cir. 1974). The decision in Stockton seems incorrect. Plaintiffs' attorney in a tax refund case was permitted to intervene to protect his fee on an application based upon § (a)(2) of rule 24. While the court's conclusion that the intervener lacked a basis under § (a)(2) for intervention is open to question, see Gaines v. Dixie Carriers, Inc., 434 F.2d 52 (5th Cir. 1970), the decision in Stockton is most troublesome since it appears to nullify a jury verdict in favor of the intervener because there was a means other than intervention available to press his claim.

Denials of intervention are reviewable as "final" orders under § 1291. New York Pub. In-
upon trial judges under paragraph (b)(2) is that, within broad limits,\textsuperscript{21}
the decision of the trial judge denying intervention will be accepted upon appeal whether or not the court of appeals would have reached the same conclusion had it elected to redecide the case. Federal appellate courts do not, however, exhibit comparable restraint when reviewing denials of applications for intervention of right. Trial court denials of intervention sought under paragraph (a)(2) have not enjoyed the relative insulation from review accorded discretionary decisions. Rather, federal appellate court judges typically make a de novo determination whether the intervention of right claimed by the applicant should be granted. Thus, intervention of right amounts to the right of the applicant to appellate redecision of his motion to intervene, should that motion be denied.

HISTORICAL DEVELOPMENT

Elements of intervention of right may be found in English and

Register Co., 322 U.S. 137, 142 (1944). The standard has also been applied to uphold denial of applications for statutory intervention held to be permissive under \( \text{§}\) (b)(1) of rule 24 rather than of right under \( \text{§}\) (a)(1). United States v. Marion County Sch. Dist., 590 F.2d 146, 149 (5th Cir. 1979); Cisneros v. Corpus Christi Indep. Sch. Dist., 560 F.2d 190, 191 (5th Cir. 1977), cert. denied, 434 U.S. 1075 (1978).

The reversal of federal trial court orders denying rule 24(b)(2) interventions as an abuse of discretion is so difficult that authorities have questioned whether any case has been reported resting reversal solely on that ground. 7A WRIGHT & MILLER, supra note 18, \$ 1923; Levi & Moore, supra note 2, at 905. Professors Wright and Miller exclude from their search those cases in which an additional ground supported reversal, or when the trial court erroneously failed to exercise discretion. 7A WRIGHT & MILLER, supra note 18, \$ 1923 nn.83 & 84. A case has finally appeared that seems to fit their description, Crumble v. Blumthal, 549 F.2d 462 (7th Cir. 1977), but the strength of their conclusion remains unchanged.

22 In Brewer v. Republic Steel Corp., 513 F.2d 1222 (6th Cir. 1975), the appellant, a state civil rights commission, sought review of the denial of its application to intervene based, inter alia, on \( \text{§}\) (b)(2). The court cited several cases where intervention of state civil rights commissions had been granted under \( \text{§}\) (b)(2) in similar circumstances, but refused to reverse the denial in the instant case. Finding no abuse of discretion, the court stated, "Rule 24(b) contemplates that judges may properly reach different decisions in generally similar circumstances." Id. at 1225. See 7A WRIGHT & MILLER, supra note 18, \$ 1913.

23 "[T]he appellate court can substitute its judgment for that of the trial court if it regards the urgency great enough to warrant a determination that intervention should be of right." F. JAMES & G. HAZARD, CIVIL PROCEDURE 514 (2d ed. 1977).

24 Even if rule 24 designated the category of situations described in \( \text{§}\) (a)(2) as more deserving but committed all decisions to the sound discretion of the trial court, applicants appearing to fall within the description would doubtless still enjoy some relative advantage over others seeking to intervene. Yet, because of the trial court's authority under the mantle of discretion, the implications of satisfying the description would not be so authoritative as to be considered intervention of right. Demonstration that the application fell within the preferred category would be no more than persuasive authority for granting the intervention. If disregarded, the distinction would become lost in the folds of the trial court's discretion. See Clark, Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 VAND. L. REV. 493, 497, 501 (1950).

American decisions prior to the original adoption of rule 24 in 1938. Chief credit for developing and articulating the distinction between discretionary intervention and intervention of right belongs, however, to Professors Moore and Levi, who authored a seminal article in 1936 that strongly influenced the original shape of rule 24.

Moore and Levi divided into two categories cases where appellate courts were willing to reverse lower court denials of intervention nominally for "abuse of discretion." The first category represented situations where a possible judgment between the original parties would, by res judicata, bind the absentee in any subsequent attempt to protect his interest, and where representation of the absentee's interest by an original party was inadequate. The second category included situations where the absentee claimed an interest in property under actual control of the court, and where distribution of the property without the participation of the absentee would impair the subsequent value of the absentee's claim.

The authors observed that "[i]n referring to that large class of cases in which permission to intervene must be granted and where denial thereof is always an abuse of discretion, it seems artificial to talk in terms of discretion, the right being, rather, absolute." In thus distinguishing these two categories from what was seen as discretionary intervention, the authors presented an analysis that valued intervention applications and articulated consequent decisional standards in a manner more complete and methodical than that reflected in the literature and in most opinions up to that time. These two catego-

26 See Levi & Moore, note 2 supra; Moore & Levi, note 2 supra. For discussions of the history of intervention practice generally, see F. JAMES & G. HAZARD, supra note 23, at 512; Moore & Levi, supra note 2, at 568-76.
28 Id. at 581, 591-95. The authors offer as an example the stockholder who may have wished to intervene to protect his interest in the corporation when the corporate directors were already parties. Id. at 592-94.
29 Id. at 581, 582-91. One of the authors' examples is the absentee who had an interest in property that was the subject of a foreclosure proceeding. Id. at 583.

Justice Stewart's dissent in Cascade Natural Gas Corp. v. El Paso Natural Gas Co. is also illuminating.

Intervention to assert an interest in property within the court's control or custody derives from the English doctrine of appearance pro interesse suo. When a court acquired in rem jurisdiction over property, by admiralty libel, sequestration, receivership, or other process, a person claiming title or some other legal or equitable interest was allowed to come in to assert his claim to the property. Otherwise, he would have been subject to the obvious injustice of having his claim erased or impaired by the court's adjudication without ever being heard. Elements of this procedure were gradually assimilated in this country... and provided the foundation for intervention doctrine in the federal courts.

30 Moore & Levi, supra note 2, at 581. These categories became the basis for nonstatutory intervention of right in ¶ (a)(2) and (a)(3) of the original rule 24. See note 34 infra. Thereafter, discretion was associated with permissive intervention under the original ¶ (b), and abuse of discretion took on its present, more restricted meaning as a reviewing standard. See note 21 supra.
31 Earlier commentators were more concerned with the threshold question of the competence
ries became the basis for nonstatutory intervention of right as codified in paragraphs (a)(2) and (a)(3) of the original rule 24.35

The structure and approach of the original rule34 in delineating and weighing intervention applications established fully the elements of intervention of right as distinct from permissive intervention standards. Paragraph (a)(2) stated that timely interventions of persons who might be bound and are not adequately represented "shall" be granted,35 and paragraph (a)(3) gave the same preferred treatment to absentees claiming an interest in property within the control of the courts to grant intervention. See Eliot, Interventions in the Federal Courts, 31 AM. L. REV. 377 (1897); Note, The Usefulness of Intervention as a Remedy in Attachment, 20 MICH. L. REV. 96 (1921).


33 Curiously, while the article of Professors Moore and Levi is cited liberally in the Advisory Committee Notes to original rule 24, the committee cites authority for the distinction between discretionary intervention and intervention of right solely from English practice. Advisory Committee Notes to original rule 24, Fed. R. Civ. P. 24, 28 U.S.C. app. (1976). This statement is taken at face value by Professors Wright and Miller, 7A WRIGHT & MILLER, supra note 18, § 1903, but it seems difficult to do so. Whatever uncertainty of labels or lack of methodological self-consciousness was evident from the American cases they collected, the research of Professors Moore and Levi establishes the existence of the distinction in American jurisprudence prior to the adoption of rule 24. See note 30 and accompanying text supra. Cf Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 508 (1941) (referring to "the codification of general doctrines of intervention contained in Rule 24(a)").

34 The original rule read as follows:

Rule 24. Intervention
(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

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

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in the Act of August 24, 1937, c. 754 § 1.

1 F.R.D. xciv-xcv (1938).

For a review of federal intervention procedure before adoption of rule 24, see Moore & Levi, supra note 2, at 577-80. For a discussion of federal procedure before the rules generally, see Clark & Moore, A New Federal Civil Procedure I. The Background, 44 YALE L.J. 387 (1935).

35 For a discussion of cases where the applicant was considered sufficiently susceptible to being bound by the judgment to be entitled to intervene under this paragraph, see text and footnotes appearing in COLUMBIA Note, supra note 12, at 923-24.
By contrast, the trial court was free in its discretion to deny any application for intervention grounded on paragraph (b)(2) if in its view the absentee’s participation would be too burdensome on original parties or the court.

Yet, the apparent confines of intervention of right were not uniformly respected. Some federal appellate courts were unable to resist reversing trial court denials of applications to intervene although the applications appeared to represent situations lying outside categories created by either paragraphs (a)(2) or (a)(3). Such appellate redressions might have been justified as a reversion to prerule practice and an expansion of the concept of abuse of discretion. Courts chose instead to expand the meanings of paragraphs (a)(2) and (a)(3) beyond their apparent textual limitations. Federal appellate courts reversed intervention denials on the strength of paragraph (a)(2) when the absentee, though not in danger of being bound by res judicata, might nonetheless be bound by the judgment in a practical sense. Intervention denials were reversed on the strength of paragraph (a)(3) when an absentee’s property interest was jeopardized by the litigation, even though the property was not subject to the control of the court.

36 For a review of cases decided under this paragraph, see 7A WRIGHT & MILLER, supra note 18, § 1907.

37 Paragraph (b)(2) appeared in the original rule in substance as it does in the present rule 24. Compare the original rule 24, note 34 supra, with the present rule, note 13 supra.

The paragraph was amended to bring it in line with the Supreme Court’s decision in SEC v. United States Realty & Improvement Co., 310 U.S. 434, 458-59 (1940). See Nuesse v. Camp, 385 F.2d 694, 706 (D.C. Cir. 1967). In United States Realty, the Supreme Court allowed the SEC to intervene under § (b)(2) although it appeared to lack a claim or defense in common with the main action. For a discussion of the case and the uncertainty over the meaning of § (b) that followed prior to the adoption of the amendment, see 1951 HARVARD Note, supra note 3, at 323-28.


39 See note 30 supra.

40 See Cohn, supra note 2, at 1229 & n.101. A good example of the extension of § (a)(2) from its res judicata base was Atlantic Ref. Co. v. Standard Oil Co., 304 F.2d 387 (D.C. Cir. 1962). Small refiners who were the beneficiaries of a regulation issued by the Secretary of the Interior sought to intervene in an action brought by large refiners to invalidate the order. The court concluded that invalidation of the order would be as prejudicial to the applicants for intervention “as if they were bound by it under the doctrine of res judicata,” id. at 394, and ruled they were entitled to intervene as of right under § (a)(2). For other examples, see generally 7A WRIGHT & MILLER, supra note 18, § 1907, n.91. See Berger, supra note 3, at 69.

At the same time, a number of decisions continued to adhere to a strict res judicata test. See, e.g., Sutphen Estates, Inc. v. United States, 342 U.S. 19, 21 (1951).

41 “[S]ome decided cases virtually disregarded the language of this provision.” Advisory Committee Notes on 1966 Amendments to rule 24, FED. R. CIV. P. 24, 28 U.S.C. app. (1976). See also Kaplan, supra note 2, at 400-01 n.169. The Advisory Committee Notes cite Formulabs, Inc. v. Hartley Pen Co., 275 F.2d 52 (9th Cir.), cert. denied, 363 U.S. 830 (1960), as an example. There, a licensor of a secret formula was found to have a right under § (a)(3) to intervene in order to protect the secret against disclosure by the licensee, who was already a party. The secret was being sought by the opposing party through discovery.
At the same time some appellate courts were placing an expansive gloss on paragraph (a)(2), the United States Supreme Court gave the paragraph a construction so narrow as to suggest its invalidity. In *Sam Fox Publishing Co. v. United States,* the Court equated the “may be bound” language of paragraph (a)(2) with res judicata, and found this requirement to be at odds with the rule’s further requirement that an applicant’s interests be inadequately represented by the existing parties. If the applicant’s interests in fact were represented inadequately, he could not possibly be threatened by res judicata. In short, the dual requirements of inadequate representation and the prospect of being bound by res judicata were mutually exclusive, and the rule was thus impossible to satisfy.

If the dilemma posed in *Sam Fox* was not inevitable, it did serve as an impetus for the 1966 amendment of paragraphs (a)(2) and (a)(3) of rule 24. Paragraph (a)(2) of the present rule continues to require a showing by the absentee of possible inadequate representation by existing parties, but no longer requires that the absentee run the risk of being bound by the litigation. It is enough that the applicant have “an interest . . . [and be] so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest.” The amendment also attempted to bring the rule in line with earlier cases that had stretched the concepts of “may be bound” and of “property in the custody of the court.”

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43 *Id.* at 691. Here, the Court relied upon Hansberry v. Lee, 311 U.S. 32 (1940).
44 The case probably dampened the continued effectiveness of ¶ (a)(2), see R. FIELD, B. KAPLAN & K. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 1004 (4th ed. 1978); however, “[l]ower courts were somewhat incredulous about the dilemma interpretation of the rule and showed a distinct tendency to balk at it.” Kaplan, *supra* note 2, at 402 & n.173.
45 Criticism of *Sam Fox* was based upon a reading of original ¶ (a)(2) as addressing more situations than those where the applicant ran a formal risk of being bound in a res judicata sense. Cohn, *supra* note 2, at 1229 & n.103; Note, *Intervention of Right in Class Actions: The Dilemma of Federal Rule of Civil Procedure 24 (a)(2),* 50 CALIF. L. REV. 89, 91-92 (1962). The alternative of a broader interpretation of ¶ (a)(2) had been raised before *Sam Fox.* See Berger, *supra* note 3, at 85; HARVARD DEVELOPMENTS, *supra* note 2, at 900. *See also* note 40 *supra.* The Court’s decision seems accurate, however, in light of the history of intervention of right preceding the rule and of the confining language of original ¶ (a)(2). It is difficult to fault the Court for declining to rewrite the rule by judicial interpretation and leaving the task to be undertaken and completed by the draftsmen in 1966. *See* Clark, *supra* note 1, at 523; Weinstein, *Reform of the Federal Rule-Making Process,* 63 A.B.A.J. 47, 48 (1977). For a description of the rulemaking process, see Kaplan, *supra* note 2, at 357-58.
47 *See* text accompanying note 14 *supra.*
48 *See* notes 40 & 41 *supra.*
49 There is no question that a purpose of the amendment was to bring the rule in line with cases that had gone beyond the text of ¶ (a)(3). *See* Kennedy, *supra* note 2, at 337; note 46 *supra.* The new rule also legitimated earlier cases under ¶ (a)(2) that had found an interest supporting
intervention of right represented by paragraphs (a)(2) and (a)(3) of the original rule were incorporated into the broader category of the present rule 24 (a)(2).

The Need to Reassess Intervention of Right

From the preceding historical overview, it is possible to conclude that elements of intervention of right predated rule 24; that the original rule centered and systematically arranged these elements by delineating categories of intervention applications and weighing decisional standards to be applied to the categories according to the need of the absentee to intervene; and that the concept of intervention of right is preserved in the present form of the rule. It is also possible to conclude that the operation of rule 24 generally achieves the functional purpose of intervention of right. In cases where the interest of the absentee is most likely to be adversely affected, paragraph (a)(2) provides an initial trial court directive and a mechanism for appellate redecision that, together, enhance the probability that intervention will be granted.

One may concede the legitimate value of protecting the especially deserving absentee by intervention of right, and the substantial realization of this value by the present operation of rule 24. Absentees facing the possibility of prejudice from the stare decisis effect of the litigation may be able to intervene by right under paragraph (a)(2), as may those whose opportunity to obtain future injunctive relief might be prejudiced by the possible shape of a decree in a pending case.

Those with an interest in property within control of the court continue to be able to intervene as of right. So may those whose interests are not intervention other than the possibility of being formally bound and that had been eclipsed by Sam Fox. For a survey of these cases, see F. James, Civil Procedure 502-03 (1965).

On the nature and effect of cases as precedent, see B. Cardozo, The Nature of the Judicial Process 149-67 (1921); H. Hart & A. Sacks, supra note 20, at 587-88; Pound, Some Thoughts About Stare Decisis, 13 NACCA L.J. 19 (1954).


By the same token, the significance of a decision as adverse precedent will not invariably suggest a right to intervene, even under the amended rule.

E.g., Stallworth v. Monsanto Co., 558 F.2d 257, 268 (5th Cir. 1977). See Kaplan, supra note 2, at 405; 1976 HARVARD Note, supra note 3, at 1183.

literally within the reach of the court and who can neither be bound nor prejudiced by *stare decisis* because their interests may not be cognizable against any of the parties in future litigation, but only so long as the practical harm possible to them from the litigation is sufficiently great.  

Nonetheless, I believe that one must balance the positive effects of intervention of right against an assessment of the adverse consequences of such intervention on the overall function of rule 24 as a decision-making tool for resolving intervention controversies. The quality of intervention decisionmaking under the rule is limited by intervention of right, and a reassessment of the continuing desirability of the rule is thus in order.

**The Frustration of Procedural Values by Intervention of Right**

The foremost quality of good procedural rules is fairness. A good procedure should be designed to be equally accessible to all litigants, expeditious, and capable of presenting a sufficiently unobstructed view of the rights of the parties so that the court can decide fairly the merits of the case.  

This article posits that, in the context of intervention

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54 *See* Ford Motor Co. v. Bisanz Bros., 249 F.2d 22, 28 (8th Cir. 1957). In this case, a railroad was sued on the ground of private nuisance by neighboring landowners seeking to abate operation of a spur to Ford's plant. Ford sought to intervene on the ground that it would be unable to continue to operate the plant if unable to use the spur. The trial court's denial of Ford's application was reversed by the court of appeals, which held Ford entitled to intervene of right. While it is questionable whether Ford could place its application within § (a) as then written, the facts of the case suggest Ford would be able to intervene of right under the present rule. *See* United States v. Reserve Mining Co., 56 F.R.D. 408, 412 (D.C. Minn. 1972); United States v. Simmonds Precision Prod., Inc., 319 F. Supp. 620, 621 (S.D.N.Y. 1970). "In *Simmonds* it is not clear that the union had a legally cognizable claim or defense against anyone . . . ." *Note, Private Participation in Department of Justice Antitrust Proceedings*, 39 U. CHI. L. REV. 143, 171 n.13 (1971) [hereinafter cited as CHICAGO Note].  

55 Professor Rosenberg described eloquently why a value-centered approach to procedure is important. In a democracy, process is king to a very large extent, and this is especially so in the judicial branch. Even though substantive laws command attention, procedural rules ensure respect. Why is this true? One powerful reason is that when people end up in court, their case typically is not a matter of right against wrong, but of right against right. Decent process makes the painful task of deciding which party will prevail bearable and helps make the decision itself acceptable. Rosenberg, *Devising Procedures That are Civil to Promote Justice That is Civilized*, 69 MICH. L. REV. 797, 797 (1971). *See* P. CARRINGTON & B. BABCOCK, CIVIL PROCEDURE: CASES AND COMMENTS ON THE PROCESS OF ADJUDICATION 2 (1977).  

As one might expect, approaches in the description of procedural values differ. Professor Rosenberg offers a longer list than I have. Rosenberg, *supra*, at 802-04. Professors James and Hazard appear to ascribe only "secondary" importance to the list of values presented. F. JAMES & G. HAZARD, *supra* note 23, at 2-3. *But see* FED. R. CIV. P. 1: "These rules. . . . shall be construed to secure the just, speedy, and inexpensive determination of every action."  

Yet, I suspect that at the bottom of most efforts to wrestle with procedural jurisprudence is a
decisionmaking,56 these procedural values will be best advanced by three elements of decisional methodology. First, the framework of decisionmaking criteria should be fully developed and made applicable to all intervention controversies. Second, the standards for intervention decisionmaking should be clearly articulated in the rule itself. Finally, with a few exceptions, intervention decisionmaking should be committed to the discretion of the district courts, with limited opportunity for appellate court redetermination. The continuing desirability of the present intervention of right procedure should be analyzed in terms of its functional compatibility with these elements. It is the thesis of this article that nonstatutory intervention of right under rule 24 is functionally incompatible with this methodology. Therefore, in the interest of fair procedure, the rule should be amended.

The Decisionmaking Framework

General Intervention Concerns.—Standards for intervention decisionmaking must be derived from an appreciation of the consequences to the original parties, the applicant, and the court of granting or denying applications. A grant of intervention may adversely affect the original parties in a number of ways. Intervention forces the nominal co-party to relinquish partial management of the case.57 Moreover, the intervener may complicate the original parties' preparation and litigation of the case by maintaining a separate position on existing issues58 or by adding new claims, parties, or witnesses.59 Thus, the existing parties' expectations of an expeditious adjudication and an orderly resolution of their claims, unobstructed by complexity or confusion, may be defeated by the delays and complications accompanying intervention.
In addition, the complications resulting from intervention may so strain the resources of the original parties that their continued ability to participate is jeopardized, and the forum becomes correspondingly less accessible.\textsuperscript{60}

In times of crowded dockets, the court may also have a concern in keeping the case from becoming too burdensome and, in the interests of justice, seeing that the reasonable concerns of existing parties are protected.\textsuperscript{61} Related are the interests of the original parties and the court in settling cases, and the concern that an intervenor might effectively block settlement.\textsuperscript{62}

Whether these factors should, on balance, defeat intervention depends in part on how they register and combine in a given case. With reference to each disputed intervention application, such elements of the case as the litigation resources of the parties, the urgency of the parties' need to conclude the litigation, the complexity of existing issues, and the press of other matters on the court's docket must be examined. Courts should also seriously consider opportunities provided by intervention to obtain data making possible a more just or accurate decision.\textsuperscript{63} One cannot generalize. Only a particularized examination of each case will reveal how existing parties and the court will be poorly treated if intervention is granted.

The other half of the intervention inquiry must focus on the ques-

\textsuperscript{60} As noted in HARVARD Developments, supra note 2, at 902:

Introducing an additional plaintiff or defendant may result in undesirable consequences: it may introduce an additional party whose participation may result in tactical disadvantages to the original parties; it may delay and complicate the trial procedurally; and it may lead to complication and confusion of substantive issues to the prejudice of one or both original parties. See Tone & Stifler, Joinder of Parties and Consolidation of Multiparty Actions, 1967 U. ILL. L.F. 209; 1951 HARVARD Note, supra note 3, at 320.

\textsuperscript{61} See 1976 HARVARD Note, supra note 3, at 1175, concluding: "The court and the judicial system have an interest in the efficient and fair administration of justice."

\textsuperscript{62} Opportunities for settlement usually diminish as the number of parties to the litigation increases. See R. POSNER, supra note 55, at 435. An illustration is provided in the examination of the effect of private intervention in government antitrust proceedings appearing in CHICAGO Note, supra note 54, at 154.

It should be noted that the consequences of granting intervention are not necessarily adverse to the court or the existing parties. Intervention may actually enhance the capacity of the court to determine the rights of existing parties, as when the intervener is able to shed new light on issues already before the court. See Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 578 F.2d 1341, 1346 (10th Cir. 1978); New York Pub. Interest Research Group, Inc. v. Regents of the Univ. of the State of New York, 516 F.2d 350, 352 (2d Cir. 1975); General Motors Corp. v. Burns, 50 F.R.D. 401, 406 (D. Hawaii 1970); see also Trbovich v. UMW, 404 U.S. 528 (1972).

\textsuperscript{63} Professors James and Hazard note the existence of a "strong common law tradition that the judge who conducts the trial should play an active part in directing it so that, within the issues made by the parties, the true facts of claims and defenses will emerge and the appropriate law be applied to them." F. JAMES & G. HAZARD, supra note 23, at 6. The same concern should be a motivating factor in decisions before trial, including the decision whether to grant interventions.
tion: how poorly treated will the applicant be if intervention is
denied? The answer turns on the procedural value of accessibility—
thus, the question becomes whether it is fair to deny the absentee
the opportunity to influence the litigation, although he will be required to
live with its result. Again, generalizations fall short of providing an
answer. In each case, it is necessary to examine the potential adverse
consequences to the applicant that are the measure of his need to inter-
vene. The examination should consider, inter alia, the precise effects
feared from the litigation, the value or tangibility of interests asserted
to be endangered, the existence and relative desirability of alternative
means, if any, to protect the applicant’s interest, and perhaps the appli-
cant’s financial ability to commence his own suit.

The Need for a Common Framework.—The permutations of possi-

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64 This characterization presumes that the existing parties and the court have other procedural
means of their own to bring the applicant for intervention into the lawsuit if they choose to do so.
This is generally true. See note 5 supra. An exception may exist, however, for the absentee per-
mitted to intervene who also qualifies as “indispensable” under FED. R. CIV. P. 19(b). See note 66
infra.

If indispensability is the conclusion of the inquiry directed by rule 19(b), the court is required
to dismiss the lawsuit if the indispensable absentee cannot be joined. See California v. Arizona,
440 U.S. 59, 62 & n.3 (1979). Ordinarily, one satisfying rule 24(a) as an intervener of right may
intervene without regard to the requirements of subject matter jurisdiction. See note 171 infra. A
dichotomy arises, however, when an absentee appears capable of satisfying rule 24(a) but also
appears to be an indispensable party incapable of being joined under rule 19. In a number of
decisions, the intervention has not been permitted. 7A WRIGHT & MILLER, supra note 18, § 1917
& n.65. Unsuccessful interventions are not without effect in this context since the surfacing of the
unsuccessful applicant provides the court with data requiring dismissal of the suit. Id. § 1917
n.66. Yet, dismissal will not always be the result sought by the applicant for intervention, and the
two rules appear to be at odds.

Professor Fraser’s resolution of the dichotomy is persuasive. He would have the status of the
intervener settled by applications of the doctrine of ancillary jurisdiction, regardless of the appli-
cant’s status under rule 19. Fraser, Ancillary Jurisdiction of Federal Courts of Persons Whose Inter-
est May be Impaired if Not Joined, 62 F.R.D. 483, 483, 485 (1964); see Provident Tradesmens
Bank & Trust Co. v. Patterson, 390 U.S. 102, 113-14 (1968); Shapiro, supra note 2, at 760. But see
McCoid, A Single Package for Multiparty Disputes, 28 STAN. L. REV. 707, 719 n.82 (1976); P.
SYSTEM 1078 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]: “An intervention which is
needed to cure an otherwise fatal defect of parties can scarcely be regarded as ancillary.”

To the extent that the “indispensable” absentee can intervene without aborting the lawsuits,
the absentee can add himself to the litigation in a situation where existing parties and the court
would have been without the power to add him by other procedural means. For further discus-
sion of the significance of the doctrine of ancillary jurisdiction to interventions under rule 24, see
text accompanying notes 171-77 infra.

65 The applicant’s interest in litigating a claim less expensively as an intervener than would be
possible if he commenced suit on his own is considered a relatively unconvincing reason for grant-
ing the application. See, e.g., SEC v. Everest Management Corp., 475 F.2d 1236, 1239 (2d Cir.
1972); United States v. Carrols Dev. Corp., 454 F. Supp. 1215, 1220 (N.D.N.Y. 1978). This inter-
est may be critically important, however, when the applicant for intervention has marginal re-
sources and will be unable to afford commencing his own suit. See 1976 HARVARD Note, supra
note 3, at 1184.
Questioning Intervention of Right

 battles factors for and against intervention and the variety of configurations in which they may appear are endless. This article advances the position that the best federal court intervention rule would subject all cases to a common framework of decisional criteria that can be weighed for and against intervention, and authorize a method of variable treatment in intervention decisionmaking. Such a rule would guide advocates in the preparation of their positions in intervention controversies, and would permit courts to respond to the manifestation of opposing concerns particular to each case.

Such advertent juxtaposition of opposing interests within one decisional framework is exemplified in paragraph (b) of rule 19 of the Federal Rules of Civil Procedure. Paragraph (b) guides the court in deciding whether to dismiss or proceed with a suit when a person whose joinder is required “if feasible” under paragraph (a) of rule 19 cannot be joined. Paragraph (b) reads in part:

The factors to be considered by the court include: first, to what extent a judgment rendered in the person’s absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person’s absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

66 Rule 19 provides in pertinent part:


(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person’s absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person’s absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

67 Id. Paragraph (b) was rewritten in the 1966 amendment to the rule. The Advisory Committee stated that the old rule “did not point clearly to the proper basis of decision.” Advisory Committee Notes on 1966 Amendments to Rule 19, FED. R. CIV. P. 19, 28 U.S.C. app. (1976). “The original rule did not state affirmatively what factors were relevant in deciding whether the action should proceed or be dismissed when joinder of interested persons was infeasible.” Id.
The first and third considerations of the rule probe for reasons to dismiss; the second and fourth considerations probe for reasons to continue the action. The court is encouraged to vary the manner and force with which it applies the considerations in each case and to balance the results in order to reach a decision.\textsuperscript{68} The considerations are intended to serve as a guide to the court and to permit the court flexibility in weighing the opposing interests in each case.\textsuperscript{69}

A similar list of considerations for and against intervention could be developed for rule 24. Unfortunately, the list of possible concerns one can extrapolate from the present rule is not complete,\textsuperscript{70} and the concerns that can be found in the rule are not always well-articulated.\textsuperscript{71}

The most serious defect of rule 24, however, is its bifurcation of intervention concerns in order to maintain the separate concepts of intervention of right and permissive intervention. This bifurcation stands in the way of a common decisional framework for all federal court intervention controversies.

The language of paragraph (a)(2) of rule 24 provides a basis for the court to gauge any possible prejudice the litigation may cause an absentee should intervention be denied.\textsuperscript{72} But the only means in paragraph (a)(2) for gauging the adverse consequences that may flow from a grant of intervention is the requirement that applications be “timely.”\textsuperscript{73} Thus, under the intervention of right standards of rule 24, only one-half of the intervention inquiry is provided.

\textsuperscript{68} See Kaplan, supra note 2, at 365-71.

\textsuperscript{69} The Supreme Court stated in Provident Tradesmens Bank & Trust Co. v. Patterson:

The decision whether to dismiss (i.e., the decision whether the person missing is “indispensable”) must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests. Rule 19 does not prevent the assertion of compelling substantive interests; it merely commands the courts to examine each controversy to make certain that the interests really exist. To say that a court “must” dismiss in the absence of an indispensable party and that it “cannot proceed” without him puts the matter the wrong way around: a court does not know whether a particular person is “indispensable” until it has examined the situation to determine whether it can proceed without him. 390 U.S. 102, 118-19 (1968).

\textsuperscript{70} See note 143 and accompanying text infra.

\textsuperscript{71} See note 144 and accompanying text infra.

\textsuperscript{72} See notes 50-54 and accompanying text supra.

\textsuperscript{73} See note 17 and accompanying text supra. The timeliness requirement parallels identical language at the beginning of \S{} (b) of rule 24. Determinations of timeliness are generally committed to the discretion of the trial court. There has been some pressure felt to read the timeliness requirement more sympathetically if the requirements of \S{} (a)(2) are otherwise satisfied than if the application was made under \S{} (b)(2). COLUMBIA Note, supra note 12, at 928-29. See Natural Resources Defense Council v. Costle, 561 F.2d 904, 907-08 (D.C. Cir. 1977). But the more frequently held and probably more sensible view is that decisions on the timeliness of \S{} (a)(2) interventions are also committed to the sound discretion of the trial court. See, e.g., United States v. Marion County Sch. Dist., 590 F.2d 146, 148 (5th Cir. 1979); McClain v. Wagner Elec. Corp., 550 F.2d 1115, 1120 (8th Cir. 1977); State Farm Mut. Auto. Ins. Co. v. Paynter, 118 Ariz. 470, 471, 577 P.2d 1089, 1090 (Ct. App. 1978); Bryant v. Lake County Trust Co., 334 N.E.2d 730, 735 (Ind. Ct. 912
By contrast, under the permissive intervention provision of the rule, the district court is encouraged to consider in its discretion the possibility that "the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Prior to the 1966 amendment to the rule, some balancing was possible under paragraph (b)(2) between this admonitory language and the need of the absentee to intervene. Upon the expansion of intervention of right by the

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74 See note 13 supra. The applicant under ¶ (a)(2) may place his case beyond the reach of an assessment of general costs to existing parties and the court possible from the intervention. This is because of the tradition associated with intervention of right and the mandatory language of the paragraph. See notes 29-33 and accompanying text supra; note 15 supra.

75 While the primary purpose of permissive intervention under ¶ (b) has been to achieve judicial economy, see Harvard Developments, supra note 2, at 903, prior to the amendment it was also seen as a means of protecting interests of the absentee not strictly within the language of subparagraphs (2) and (3) of ¶ (a). See also Columbia Note, supra note 12, at 927. The interest of the applicant in the outcome of the suit was combined with considerations of judicial economy to justify intervention under ¶ (b)(2), see, e.g., Cutler v. American Fed'n of Musicians, 34 F.R.D. 253 (S.D.N.Y. 1963); Brotherhood of Locomotive Eng'r v. Chicago, M., St. P. & P.R.R., 34 F.
amendment, however, applicants with a cognizable practical need to intervene began to choose the more tactically favorable ground of paragraph (a)(2) for their applications. Paragraph (b)(2) was relegated to applications based on judicial economy. Consequently, it is only against interventions justified on this limited basis that the concerns of delay and prejudice in paragraph (b)(2) are brought into play.

As a result of this bifurcation, the full range of decisional criteria in the rule cannot be activated at the same time. The judge who wishes to consider interests both for and against intervention must consider two separate applications, and even then there is no provision for a balancing of interests. Paragraph (a)(2) directs the judge to consider the need of the absentee to intervene, but does not authorize him to balance that need against the potential adverse consequences of intervention, except insofar as such consequences are attributable to an untimely application. Paragraph (b)(2) requires the judge to consider the possible adverse consequences from intervention of prejudice and delay to original parties, but the results of this measurement can be used as a basis to deny only those applications to intervene that are argued on a theory of judicial economy.

Notwithstanding the bifurcated decisionmaking structure of rule 24, a few courts have considered the possible adverse consequences from granting timely interventions under paragraph (a)(2). The incentive to do so became especially strong after the 1966 amendment when the range of interests capable of supporting intervention of right became so broad \textsuperscript{78} that it was no longer difficult to conceive of situations

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\textsuperscript{76} 7A WRIGHT & MILLER, supra note 18, § 1911. But see Henry v. First Nat'l Bank of Clarksdale, 50 F.R.D. 251, 259 (N.D. Miss. 1970), cert. denied, 405 U.S. 1019 (1972) (combining judicial economy and the desire of the applicant to avoid \textit{stare decisis} consequences from the suit to justify \textsuperscript{77} (b)(2) intervention).

\textsuperscript{77} As the court in Stallworth v. Monsanto Co. observed:

Whether allowing intervention will delay the progress of the case or prejudice the rights of the original parties is a factor which the district court must consider in exercising its discretion to permit intervention under section (b) of rule 24. . . . Since a similar provision is not included in section (a) of the rule, it is apparent that prejudice to the existing parties other than that caused by the would-be intervener's failure to act promptly was not a factor meant to be considered where intervention was sought under section (a).

558 F.2d 257, 265 (5th Cir. 1977). For a similar interpretation prior to the 1966 amendment, see International Mortgage & Inv. Corp. v. Von Clemm, 301 F.2d 857, 865-66 (2d Cir. 1962) (Hays, J., concurring). In support of the conclusion that general concerns of prejudice from timely interventions are relegated to consideration of applications under \textsuperscript{77} (b), see also Cohn, supra note 2, at 1232; HARVARD Developments, supra note 2, at 902; PENNSYLVANIA Comment, supra note 2, at 542-43.

\textsuperscript{78} For an examination of interests that may now be recognized as supporting intervention of right, see notes 51-55 and accompanying text \textit{supra}. For a discussion of the nature and purpose of the textual alterations of nonstatutory intervention of right in the 1966 amendment that made expansion possible, see notes 106-09 and accompanying text \textit{infra}. 

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where the costs from intervention would outweigh the applicant's need to intervene.\textsuperscript{79} The courts that balance interests under the present rule may do more justice to the parties before them, but they create decisions that are troublesome in that they distort the plain meaning and function\textsuperscript{80} of the rule. Some courts have expanded the timeliness requirement of the rule from a measure of the prejudice resulting from a delayed application to prejudice per se.\textsuperscript{81} Other courts, more improbably, have used the requirements that the absentee may not be adequately represented\textsuperscript{82} or that he will be practically impaired by the outcome of the lawsuit\textsuperscript{83} to support an examination of possible prejudice to the parties if intervention of right is granted. Such distortions of the rule call to mind the importance of the craftsman's motto for selecting a tool appropriate to the task at hand: if the wrong tool is selected, the task may be done poorly and the tool may be damaged for its subsequent intended use.

Tradition, the text of the rule, and most scholarly explications of it suggest that the concept of intervention of right is incompatible with an approach to intervention decisionmaking that weighs the interests of all principals.\textsuperscript{84} However undesirable this may be, many courts will sim-

\textsuperscript{79} Circumstances where the burdens created by interventions of right outweighed the values of intervention occurred even under the more limited form of original \$ (a)(2). See note 40 supra. Expansion of the concept of being "bound" led commentators to conclude correctly that invocation of intervention of right deprived courts of the authority to balance costs to existing parties from the intervention against the benefit to the applicant from being able to intervene. HARVARD Developments, supra note 2, at 902; Note, Intervention and the Meaning of "Bound" Under Federal Rule 24(a)(2), 63 YALE L.J. 408, 414 (1954) [hereinafter cited as YALE Note].

\textsuperscript{80} The meaning and function of these standards are summarized elsewhere. Timeliness, see note 73 supra; adequacy of representation, see notes 106 & 107 infra; interest, see notes 105 & 106 infra.


\textsuperscript{82} See Virginia v. Westinghouse Elec. Corp., 542 F.2d 214, 217 (4th Cir. 1976); Rios v. Enterprise Ass'n Steamfitters Local 638, 520 F.2d 352, 357-58 (2d Cir. 1975). For further criticism of this misuse of \$ (a)(2), see note 73 supra.

\textsuperscript{83} See United States v. City of Jackson, 519 F.2d 1147 (5th Cir. 1975): "The issue of 'practical impairment' is necessarily one of degree . . . . It requires . . . . a consideration of the competing interests of the plaintiff and defendant in conducting and concluding their lawsuit without undue complication and of the public in the speedy and economical resolution of legal controversies." Id. at 1150-51.

\textsuperscript{84} The author of a recent law review note reached a contrary conclusion, stating that "[t]he commentators who have discerned in rule 24(a) a requirement that all interests be weighed appear to be correct." 1976 HARVARD Note, supra note 3, at 1175 n.3 (citing 3B J. MOORE'S FEDERAL PRACTICE \$ 24.09-1 [I] (1975); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE \$ 1902 (1972); Cohn, The New Federal Rules of Civil Procedure, 54 GEO. L.J. 1204, 1232 (1966). But see International Mortgage & Inv. Corp. v. Von Clemen, 301 F.2d 857, 865 (2d Cir. 1962) (Hays, J., concurring); Comment, The Litigant and the Absentee in Federal Multiparty Practice, 116 U. PA. L. REV. 531, 542-43 (1968)). The statements of the commentators cited by the author, however, are unsupported by cases and inconclusive at best.

The reference of the author of the note to Professor Cohn's article is puzzling. It may be
ply refuse to consider adverse consequences from paragraph (a)(2) interventions until the rule is changed.\textsuperscript{85} In the interests of a fair procedure, the rule should be amended to allow a balancing in all intervention controversies of all concerns for and against intervention.

\textit{The Importance of Clear Criteria in Rule 24}

One generally accepted principle of modern procedure has been that the criteria for procedural decisionmaking should be clear and gleaned easily from the civil rules themselves. Case law expertise was probably never widespread among members of the bar during the period of common law pleading and procedure.\textsuperscript{86} This created an unfair element of risk for the party in selecting his attorney.\textsuperscript{87} Even those conversant with appellate opinions found them to be uncertain repositories of procedural rules,\textsuperscript{88} and questions over the nature and applica-

\textsuperscript{85} The issue was squarely presented in Stallworth v. Monsanto Co., 558 F.2d 257, 265 (5th Cir. 1977). The court held that prejudice to existing parties not attributable to a delay in the application for intervention was a concern entirely outside \textsuperscript{\(a\)}(a) of rule 24. \textit{Id.} at 267. Portions of the opinion appear in notes 17 & 77 \textit{supra}.

\textsuperscript{86} C. Clark, \textit{supra} note 14, at 54-55.

\textsuperscript{87} Id.

\textsuperscript{88} Later, four years after the Federal Rules of Civil Procedure were originally adopted, Dean Clark wrote:
tion of procedural case law sometimes assumed proportions that made procedure an end rather than a means in litigation. Progress was made first through code reforms and later, more extensively, through the modern civil rules, by surveying the interests at stake in particular procedural disputes and posing them as decisional standards within the rule. Ideally, one should be able to read the rule governing a particular procedural controversy and understand what interests are entitled to recognition and how they ought to be weighed. Rules cannot be self-applying, but they are likely to work most efficiently and fairly when there is a minimal need to rely on case authority.

The procedural values presented previously would be best advanced if this principle was reflected in the text and application of the civil rule governing interventions. Knowledge of the criteria by which intervention decisions will be made would generally be clearer and more manageable when collected in the rule itself than when available through extrapolations from judicial doctrine. Knowledge would be more uniformly accessible to attorneys for appraising and preparing their cases, whether they urge or oppose the application for intervention; the procedure itself would therefore be more accessible. A functional and relatively self-contained rule diminishes both the

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One should not be misled by the number of decisions upon the rules. That so many precedents seem available is due in part to the enterprise of law publishers, with their various editions of rules decisions, and in part to the desire of the judges themselves to participate in the new movement. Nevertheless these decisions in the main reiterate the broad authority of the rules themselves, and are not really necessary for a correct interpretation of the new system.

See Clark, supra note 1, at 522.

89 See generally C. Clark, supra note 14, at 28. Cf. Hyde, From Common Law Rules to Rules of Court, 22 Wash. U. L.Q. 187, 204 (1937) ("Whenever a rule operates to prevent bringing . . . a dispute promptly to an issue it ought to be abolished.").

50 This approach implies rejection of the use in procedural codes or rules of language that depends heavily upon judicial interpretation. Writing of reforms needed in the New York Civil Practice Act of 1920, Dean Clark observed that revision should not mean simply the transfer of the present provisions from the statutes to the rules. Improvement in the statement of the provisions themselves is most desirable. It is only an unsubstantial dream to think that constant attempts at definition have made these provisions clear; they merely served to make the blindness of the provisions more apparent. The original framers of the code desired to lay down rigid rules that would leave nothing to discretion and the operation of which could always be definitely foretold. Even in taking over equity principles of convenience and flexibility, they attempted a precise statement with a seemingly definite content, as in the case of joinder of parties and of actions. This was most unfortunate, as it has turned out in practice. It does not seem possible to apply mechanical rules to pleading, where the enforcement of such rules is not the end in view in the litigation. The terms used by the codifiers proved hopelessly indefinite. The rules may be reframed to indicate the purpose sought to be achieved. They may give the guiding principle to the court, but this must be worked out by the court itself, and a large measure of discretion is necessary.

C. Clark, supra note 14, at 34-35 (emphasis in original).

91 Cf. E. Levi, An Introduction to Legal Reasoning 6 (1949) ("It is only folklore which holds that a statute if clearly written can be completely unambiguous and applied as intended to a specific case.").

92 See text accompanying note 63 supra.

93 See notes 88-90 and accompanying text supra.
uncertainty of procedural case law\textsuperscript{94} and the prospect that the meaning of the rule will be revised by review in each new case. Confinement of decisional criteria to the rule itself would thus make intervention procedure more expeditious and less likely to obscure the merits of the case.

In 1966, the draftsmen of the Federal Rules of Civil Procedure approached the task of amending rules 19, 23, and 24 with the spirit of reform suggested by this analysis. They intended to follow Judge Clark's admonitions to "shy away as much as possible from abstractions"\textsuperscript{95} and to draft rules that, by their content, would guide the court in understanding the rules and their application.\textsuperscript{96} There is substantial feeling that this goal was realized in the amendment to rule 24,\textsuperscript{97} and that the rule has worked well since.\textsuperscript{98} A closer examination, however, suggests that the work of the draftsmen remains unfinished, and that the success of rule 24 as a stable and flexible decisionmaking tool has been exaggerated.

The circumstances of the 1966 amendment to rule 24 have already been described.\textsuperscript{99} The original rule contained formalistic references to possibilities that the absentee might be "bound," or might have an interest in "property" within control of the court.\textsuperscript{100} Application of the rule depended on the extrinsic judicial meanings that had become attached to these terms. This cultivated a continued dependence on case law, and the case law was not clear.\textsuperscript{101} The 1966 amendment to rule 24 was laudable in that it purged the rule of these terms and presented a new description of interests capable of supporting intervention, which is both practical in terms\textsuperscript{102} and close to the roots of the historic purpose of the device.\textsuperscript{103} Paragraph (a)(2) provides the court with thought-

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Clark, \textit{supra} note 24, at 501.
\item Professor Cohn described the revision of the three rules as "a restructuring of major proportions to eliminate formalistic labels that restricted many courts from an examination of the practical factors of individual cases." Cohn, \textit{supra} note 2, at 1204.
\item Id. at 1229; \textit{Pennsylvania Comment, supra} note 2, at 554-55.
\item \textit{See} 7A \textit{Wright & Miller, supra} note 18, \S 1903.
\item \textit{See} notes 39-49 and accompanying text \textit{supra}.
\item For the text of the original rule, see note 34 \textit{supra}.
\item A number of decisions appeared to read the original \S (a)(2) to require that the absentee run a risk of being bound in a res judicata sense. Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961); Sutphen Estates, Inc. v. United States, 342 U.S. 19 (1951). \textit{See generally} 7A \textit{Wright & Miller, supra} note 18, \S 1907 n.92. Other decisions expanded the concept of "being bound" to include the possibility of harm in a practical sense. \textit{See note} 40 \textit{supra}. Similarly, some decisions appeared to confine the reach of original \S (a)(3) to absentees interested in property actually within control of the court. Sutphen Estates, Inc. v. United States, 342 U.S. 19 (1951). \textit{See generally} 7A \textit{Wright & Miller, supra} note 18, \S 1907 n.98. Other courts extended the category to absentees who might suffer damage to a tangible property interest as a result of the litigation. \textit{See note} 41 \textit{supra}.
\item \textit{See text} accompanying note 47 \textit{supra}.
\item \textit{See text} note 6 \textit{supra}. Professor Berger describes the "prevention of harm to third persons" as the "animating principle of intervention." Berger, \textit{supra} note 3, at 69.
\end{enumerate}
\end{footnotesize}
ful and fairly complete criteria for determining whether the applicant needs to intervene. First, is there an "interest" held by the absentee that "as a practical matter" may be impaired? In other words, can the absentee be hurt by the outcome of the lawsuit? Second, is there at least a possibility that the absentee's interest will not be "adequately represented by existing parties;" that is, is it possible that none of the existing parties will go as far in their own representation as would be required to represent fairly the interests of the absentee in the out-

104 FED. R. CIV. P. 24(a)(2). According to the full text of this portion of the rule, the standard is met "when the applicant claims an interest relating to the property or transaction that is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest." Id. It seems artificial to separate the concept of the absentee's interest from the possibility of impairment of the interest by the litigation, and it is not profitable to treat interest and impairment as tests that must be satisfied separately.

The effect of this part of the amendment has been to increase substantially the number of cases within the concept of intervention of right. Cohn, supra note 2, at 1232. See, e.g., Smuck v. Hobson, 408 F.2d 175, 178-81 (D.C. Cir. 1969); Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967); Atlantis Dev. Corp. v. United States, 379 F.2d 818, 825-26 (5th Cir. 1967). But see Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 154 (1967) (Stewart, J., dissenting); Kaplan, supra note 2, at 405. Attempts have been made at more exacting definitions in order to establish the minimum stake the absentee must have in the outcome. Donaldson v. United States, 400 U.S. 517, 531 (1971) ("a significantly protectable interest"); Toles v. United States, 371 F.2d 784, 786 (10th Cir. 1967) ("a specific legal or equitable interest"); Hobson v. Hansen, 44 F.R.D. 18, 24 (D.C. Cir. 1968), rev'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) ("a direct, substantial, legally protectable interest in the proceedings"). As one court observed correctly, however, "[T]he amendments made the question of what constitutes an 'interest' more visible without contributing an answer." Smuck v. Hobson, 408 F.2d at 178. An uncertain definition of the absentee's interest in relation to the lawsuit seems appropriate. "The range of possible interests may defy adequate classification, spreading over a spectrum that is extremely hard to chart." Shapiro, supra note 2, at 740. Accord, 7A WRIGHT & MILLER, supra note 18, § 1908; Kennedy, supra note 2, at 346, 349-52. Attempts by courts to impose a narrower meaning are likely to produce "significant contradictions and confusion in the case law." 1976 HARVARD Note, supra note 3, at 1176 & n.10.

105 The 1966 amendment changed the adequate representation provision in the original rule in two ways. First, adequate representation could bar any nonstatutory claim for intervention of right after the amendment, see note 13 supra, while ¶ (a)(3) of the original rule permitted intervention of right without reference to the question of representation by existing parties, see note 34 supra. This change did not really broaden the restrictive effect of the inadequacy requirement, since ¶ (a)(3) interveners were, by definition, without representation. See note 107 infra. The second change was in the wording of the adequate representation provision as it had appeared in the original version of ¶ (a)(2). See note 34 supra. The effect of this change may have been to place the burden on the parties opposing intervention to demonstrate that the representation by existing parties was adequate, Nuesse v. Camp, 385 F.2d 694, 702 (D.C. Cir. 1967), and to minimize applicant's hurdles. Trbovich v. UMW, 404 U.S. 528, 538 n.10 (1972); R. FIELD, B. KAPLAN & K. CLERMONT, supra note 44, at 1005. But see Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 155-56 (1967) (Stewart, J., dissenting); Sierra Club v. Froehlke, 359 F. Supp. 1289, 1337 (S.D. Tex. 1973). The number of recent cases denying intervention on the basis of adequate representation, however, suggests the requirement is still formidable. See, e.g., McClune v. Shamah, 593 F.2d 482, 486 (3d Cir. 1979); United States Postal Serv. v. Brennan, 579 F.2d 188, 191 (2d Cir. 1978); Shump v. Balka, 574 F.2d 1341, 1345 (10th Cir. 1978); Blanchard v. Johnson, 532 F.2d 1074, 1077 (6th Cir.), cert. denied, 429 U.S. 869 (1976).
As they appear in the rule, neither "interest" nor the idea of adequate representation suggests precise categories of application. The meanings of the terms are uncertain, although this uncertainty may have been intended by the draftsmen in order to compel courts to address the particular circumstances of each case when answering the question of intervention. And it seems unlikely that the confusion under the amended rule is any greater than that under its predecessor.

The problem is that the draftsmen did not go far enough. Instead of entirely revising rule 24, they simply affixed their pragmatic criteria for measuring intervention need to the concept of intervention of

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107 The concern of adequate representation is closely tied to the concern of the applicant's interest in the outcome of the lawsuit. Kennedy, supra note 2, at 343; Shapiro, supra note 2, at 748.

For situations that are contemporary survivors of ¶ (a)(3) of the original rule, see note 53 supra, the answer posed in the text can quickly be answered in the affirmative. All existing parties will be claimants of property subject to the control of the court in competition with the applicant for intervention. The applicant's interest will be entirely unrepresented. Cohn, supra note 2, at 1231 n.113. The difficult cases are those where the applicant for intervention seeks to have the litigation conclude in the same way as does an existing party, see, e.g., notes 51, 52 & 54 and accompanying text supra, and that party does not appear to be in collusion with the other side or to lack adversary competence. If the existing party has less to lose by an adverse result in the case than the applicant, then that party is not as likely to be as tenacious in spending money on the case, resisting settlement, taking appeals, and the like as the applicant would be in protecting his interest, and thus should be permitted to intervene. See Ford Motor Co. v. Bisanz Bros., 249 F.2d 22, 27-28 (8th Cir. 1957). On the other hand, if the existing party's stake in the outcome is commensurate with or greater than that of the applicant, then the applicant should not be permitted to intervene under ¶ (a)(2). See Ionian Shipping Co. v. British Law Ins. Co., 426 F.2d 186 (2d Cir. 1970).

108 See notes 95 & 96 supra. Another way of looking at it would be to see in the approach of the draftsmen postponement of the decision about what rule 24 would mean until it was applied in the particular circumstances of each case. See H. Hart & A. Sacks, supra note 20, at 156-57.


110 It might be interesting to speculate why the revision of rule 24 did not match in scope the companion revisions of rules 19 and 23. Professor Kennedy wrote:

The main thrust of the 1966 amendments focused on Rules 19 and 23. Once their revision was accepted, the revision of Rule 24 was a necessary consequence. . . . It is too early to evaluate the operation of the new Rule. However, a theoretical criticism may be raised that the amendment of Rule 24 did not remain totally faithful to the revision theory of new Rules 19 and 23. That theory is that the rules should express factors for decision rather than definitive categories.

right in paragraph (a)(2). This created two basic problems for decision-making under the rule.

The first problem, discussed previously,\(^{111}\) is that a court became required to conduct a searching examination of the possible need of the applicant to intervene, but was not authorized to consider the adverse consequences of granting the intervention, except insofar as they might be attributable to an untimely filing. The second problem is that the rule draws federal appellate courts into the vortex of intervention controversies. As the courts of appeals have routinely become more involved in intervention controversies, there has emerged an increasing body of case law\(^{112}\) that cannot be ignored in resolving future controversies. This limits the procedural ends that rule 24 could otherwise serve if the standards for intervention decisionmaking were clear from the rule itself.

The limited value of case law as a guide for intervention decision-making becomes clear when one considers the appropriate role of appellate courts. By tradition, courts generally explain their decisions by referring to a *ratio decidendi*—a governing rule intended both to explain and to Authoritatively direct the result in that case and in other factually similar cases.\(^{113}\) The central function of an appellate court is to review the soundness of the trial court's selection of a *ratio decidendi*.\(^{114}\) The trial court's decision about the governing rule that is

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\(^{111}\) See text accompanying notes 72-73 *supra*.

\(^{112}\) Caseload pressures on federal courts of appeals have resulted in the adoption of internal measures that make it impossible to assume that a published opinion will accompany every decision. At least three circuits have adopted rules that permit decisions without opinion. *Hearings of the Commission on Revision of the Federal Court Appellate System* 451 n.3 (1974) (statement of the Seventh Federal Circuit Bar Ass'n). All circuits have rendered unpublished decisions, and at least nine have adopted rules barring citation of unpublished opinions or orders. *Id.* at 526-27. Statistics for the first 11 months of 1973 reveal that less than half of federal circuit decisions fall into the unpublished category. *Id.* at 526. The practice of deciding cases in federal circuit courts without published opinions has been forcefully criticized. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 31-39 (1976). The result of the trend appears to be to complicate rather than reduce dependence on federal appellate case law.

\(^{113}\) See R. POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 56-57 (rev. ed. 1954); Rosenberg, *supra* note 15, at 643 ("the constraint of consistency").

The relationship and governing effect of the *ratio decidendi*, even on like cases is, of course, limited. See H. HART & A. SACKS, *supra* note 20, at 139; Armour & Co. v. Wantock, 323 U.S. 126, 132-33 (1944).

It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the court. General expressions transposed to other facts are often misleading.


most appropriate to the facts of the case may be thoughtful and one
with which we agree, but it should be open to appellate redcision. Ap-
pellate courts have a responsibility to see that the rules used to decide
controversies are applied appropriately and uniformly. They have
the power to generalize authoritatively about the types of factual situa-
tions or relationships that ought to be affected by the rule. Appellate
redcision, then, is a means of rectifying inappropriate applications of
the rule and of making and enforcing precedent to advance the court's
interpretation of the rule. This is the essence of the appellate judicial
process in the federal courts.

The procedural costs of appeals may be substantial. These costs
must be balanced against the institutional importance of redcision.
Procedural costs also may be in a sense offset by the settling effect the
appellate court's decision has on future controversies concerning the
meaning of the governing rule. Intervention controversies, however,
cannot be resolved with reference to a rule of general application. The
case to case permutations and varying configurations of concerns for
and against intervention make these controversies rule-resistant.
The circumstances that serve as a basis for decision are so varied and
random that the court would virtually need to create a new rule to de-

116 The lawmaking function of the United States Supreme Court cannot be doubted. Betten,
Institutional Reform in the Federal Appellate Courts, 52 Ind. L.J. 63, 68 (1976). See P. Carr-
gington, D. Meador & M. Rosenberg, supra note 112, at 210-11. Federal courts of appeal also
have a substantial lawmaking function. This was probably an acknowledged factor in the some-
what controversial legislation creating federal courts of appeals. See F. Frankfurter & J. Land-
dis, The Business of the Supreme Court 258 (1928). The importance of the lawmaking
function grew thereafter. "The Supreme Court is no longer capable of providing the supervision
of federal judicial law making that it once provided." Carrington, Crowded Dockets and the
Courts of Appeals: The Threat to the Function of Review and the National Law, 82 Harv. L. Rev.
542, 553 (1969). Federal courts of appeals have consequently developed "the ability to create and
to balkanize national law." Betten, supra, at 68. See F. Frankfurter & J. Landis, supra, at
33, 50 (1973).
117 Costs from the process of taking an appeal may be measured in several ways. For Professor
Carrington's survey of elements contributing to the cost of appeals to the parties, which he states is
"expensive," see Carrington, supra note 116, at 567.
118 While the Supreme Court "has managed to keep completely current in its disposition of the
workload," R. Stern & E. Gressman, Supreme Court Practice 43 (5th ed. 1978), federal
courts of appeals have not. In fact, the rapid rise in filings and resultant overcrowding of the
dockets of federal courts of appeals has been described as a crisis. H. Friendly, Federal Juris-
diction: A General View 31-33 (1973); Carrington, note 116 supra.
119 See R. Posner, supra note 55, at 422. Consider, for example, the Supreme Court's decision
in Mitchum v. Foster, 407 U.S. 225 (1972), holding that suits brought in federal court under 42
U.S.C. § 1983 (1976) were not subject to the restraint of the Anti-Injunction Act, 28 U.S.C. § 2283
(1976), or its decision in Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970), that federal
common law provided a remedy in admiralty for wrongful death.
119 See text accompanying notes 27-56 supra.
It is therefore apparent that appellate redecision of intervention controversies will rarely be warranted. Because review of intervention denials is not within the federal appellate court's regime of rule elaboration and enforcement, the only question that can be reviewed is whether the trial court did "justice" in the particular case. Except in the occasional outrageous case, the benefits of appellate review based on this standard do not justify the costs inherent in appeal. More important, because the decision must be pegged to criteria in paragraph (a)(2) for establishing intervention need, and because intervention controversies are inherently lacking in material for a ratio decidendi, the settling effect of federal appellate case law on new intervention controversies is questionable. Even the most interesting and thoughtful of the federal appellate decisions are valuable more for the methodological example they set for district court judges than for any new light they shed on the meaning of rule 24. Many other decisions, especially those of the United States Supreme Court, reflect an attitude that rule 24 is a mechanism for reaching or avoiding other issues raised on appeal.

120 Findings of fact provide another, more commonplace example of rule-resistant decision-making. Where, for example, the trial court, sitting without a jury, hears evidence concerning the disability and diminished earning capacity of A as the result of an automobile accident, it would be improper for the court to generalize from its past observations of other injured plaintiffs as to what A's damages should be. The court can rationally explain how it evaluated the evidence in A's case to determine his damages and can even call its decision "the rule of A." The concept of a governing rule in this context is meaningless, however, since A's case will never come up again. See generally Rosenberg, supra note 15, at 662.


"[T]o come to the very heart of the issue, is there any reason to suppose that the result an appellate court reaches . . . is more likely to be 'just' than was the opposite result reached by the trial court?" Wright, supra, at 781. Professor Wright was not directing his statement to intervention review, but the point would seem to apply. A case may produce circumstances where it is both unjust to grant intervention and unjust to deny it, creating the kind of dilemma aptly described by Professor Rosenberg as "right against right." Rosenberg, supra note 55, at 797.

122 See note 117 supra.

123 Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967). These cases have been discussed extensively elsewhere. Regarding the Atlantis case, see Kaplan, supra note 2, at 407; Kennedy, supra note 2, at 344; Duke Note, supra note 51. Regarding the Smuck case, see 7A Wright & Miller, supra note 18, § 1908; Note, Federal Rule of Civil Procedure 24(a)(2) and the "Interest" Necessary for Intervention as of Right on Appeal, 1969 Duke L.J. 821.

Significantly, the court in Smuck refused to find precise meaning in the 1966 amendment, 408 F.2d at 178, and the court in Atlantis recommended that the amendment be individually tailored to future controversies, 379 F.2d at 829.

124 Three Supreme Court cases offer examples. Each reveals manipulation of rule 24 to reach other issues on appeal and has been justly criticized. Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 132-36 (1967), criticized in Kaplan, supra note 2, at 403-07; Kaufman v. Societe Internationale pour Participations Industrielles et Commerciales, 343 U.S. 156,
The results in these cases may be understandable as expedients, but they undermine the meaning and authority of rule 24.

**Eliminating Nonstatutory Intervention of Right**

Thus far, this article has suggested that the structure and method of intervention decisionmaking that is most realistically calculated to produce good procedure in a jurisprudential sense is one that subjects all intervention controversies to a common framework of decisional criteria that is clearly articulated in the rule itself and can be administered with minimal dependence on case law. This can be achieved, however, only if intervention decisionmaking is committed to the discretion of the district courts, with limited opportunity for appellate court redetermination. Taken together, these proposed elements of methodology suggest the abolition of nonstatutory intervention of right in rule 24.

The reasons for reducing the role played by federal appellate judges in intervention decisionmaking may already be evident. First, the only means by which rule 24 can categorize and designate some intervention denials for redetermination on appeal is through a bifurcation of decisional criteria. This bifurcation is an inevitable consequence of the maintenance of intervention of right as a discrete concept in rule 24. This means that the full range of intervention criteria present in the rule cannot be activated at the same time. Second, federal appellate opinions, which are a byproduct of redetermination, have obscured decisional criteria.

126 In Donaldson v. United States, 400 U.S. 517, 527-30 (1971), the Supreme Court contracted the meaning of rule 24 as one ground for preventing the appellant from challenging investigative proceedings of the Internal Revenue Service. This case has also been justly criticized. 7A WRIGHT & MILLER, supra note 18, § 1908.

127 "[A]ny attempt to extrapolate from Cascade or from Donaldson, and to deduce from those cases rules applicable to ordinary private litigation, is fraught with great risks." 7A WRIGHT & MILLER, supra note 18, § 1908.

On the general tendency of appellate courts to manipulate procedure to reach a desired substantive end and its adverse effects, see F. JAMES & G. HAZARD, supra note 23, at 3; Clark, supra note 14, at 163-64.

128 See notes 20-23 and accompanying text supra.

129 See notes 72, 73 & 77 and accompanying text supra.
sional standards for intervention under rule 24(a)(2).\textsuperscript{130}

The role of federal appellate judges can be significantly reduced by a rule that commits all decisionmaking with reference to nonstatutory\textsuperscript{131} interventions to the sound discretion of the district courts.\textsuperscript{132} The individualized approach to decisionmaking necessary to resolve intervention controversies provides an appropriate occasion for conferring such discretion.\textsuperscript{133} Discretionary decisionmaking is already well-established with reference to permissive interventions under paragraph (b)(2)\textsuperscript{134} of rule 24, and the thinking that is presently required for individualized decisionmaking under paragraph (a)(2) has been described, accurately, as a kind of a \textit{sub rosa} discretionary phenomenon.\textsuperscript{135}

Under the formulation of rule 24 proposed in this article, the standard of review in appeals from denials of intervention should be whether the denial was an abuse of discretion. This would change what appears now to be an obligation of appellate courts to redecide denials of paragraph (a)(2) intervention applications\textsuperscript{136} into an acknowledgment of the authority to review, but with a request in the rule for self-restraint.\textsuperscript{137} Appellate courts would be expected to accept the trial court’s denial of intervention unless that decision was palpably unjust,\textsuperscript{138} or the trial court, in deciding the case, failed to follow the

\textsuperscript{130}See notes 82-84, 107, 124 & 128 and accompanying text supra.

\textsuperscript{131}While statutory interventions lead something of a separate life from their nonstatutory counterparts in rule 24, see note 12 supra, it is at least arguable that statutory intervention of right could also be abolished by amending rule 24 so as to make such statutes “in conflict with” the new rule and thus “of no further force or effect.” See Rules Enabling Act, 28 U.S.C. § 2072 (1976). I am not prepared to suggest that this would be desirable. Whether particular federal substantive law creates idiosyncratic procedural needs that must be accommodated outside the Federal Rules of Civil Procedure is an interesting question, but one beyond the scope of this article.

\textsuperscript{132}For an explanation of how discretion functions to insulate trial decisions from appellate redecision, see note 20 supra.

\textsuperscript{133}“Almost all of the problems of jurisprudence come down to a fundamental one of rule and discretion, of administration of justice by law and administration of justice by the more or less trained intuition of experienced magistrates.” R. Found, supra note 113, at 54.

The rule, mechanically applied, works by repetition and precludes individuality in results. . . . On the other hand, in the handmade as distinguished from the machine-made product, the specialized skill of the workman gives us something infinitely more subtle than can be expressed in rules. In law some situations call for the product of hands, not of machines, for they involve not repetition, where the general elements are significant, but unique events, in which the special circumstances are significant.

\textit{Id.} at 70. See J. Frank, \textsc{Courts on Trial} 409 (1949); Rosenberg, supra note 15, at 662.

\textsuperscript{134}See Rosenberg, supra note 15, at 659; note 22 supra. District court decisions granting intervention are usually considered discretionary as well. See note 20 supra.

\textsuperscript{135}Smuck v. Hobson, 408 F.2d 175, 178 (D.C. Cir. 1969); Shapiro, supra note 2, at 758.

\textsuperscript{136}See notes 15, 23 & 27 and accompanying text supra.

\textsuperscript{137}In other words, the standard for review of discretionary decisionmaking under the present rule 24 would apply. See notes 20-23 supra.

\textsuperscript{138}It is likely that courts will also continue to manipulate intervention review in order to reach other issues. See notes 124 & 126 supra. But, as exercises of discretionary authority, neither manipulative appellate decisions, nor those under an inchoate “justice” standard, would be as likely to haunt subsequent cases as precedent.
The drafting necessary to amend rule 24 would not be difficult. Nonstatutory intervention of right could simply be eliminated, and cases now falling within paragraph (a)(2) could be consolidated with nonstatutory permissive interventions under paragraph (b)(2). One of a series of amendments to rule 24 proposed by Professor Shapiro would broaden substantially the category of cases committed to trial court discretion consistent with this analysis. While Professor Shapiro appears to disagree with the conclusion of this article that all nonstatutory intervention of right should be abolished, the language he has proposed nonetheless illustrates how a complete abolition could be accomplished. He suggests the following amendment to rule 24:

The factors to be considered by the court in exercising its discretion . . . include, where relevant: (1) the nature and extent of the applicant's interest in the subject matter of the action and the degree to which the disposition of the action may as a practical matter impair or impede his ability to protect that interest; (2) the adequacy of the representation of the appli-

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139 As Professor Rosenberg states:

To play fair, a trial judge relying upon discretionary power should place on the record the circumstances and factors that were crucial to his determination. He should spell out his reasons as well as he can so that counsel and the reviewing court will know and be in a position to evaluate the soundness of his decision.


At present, federal trial judges are not required to make findings and conclusions when adjudicating motions to intervene. Fed. R. Civ. P. 52. See Edmonson v. Nebraska ex rel. Meyer, 383 F.2d 123, 126 & n.1 (8th Cir. 1967). But see Calhoun v. Cook, 487 F.2d 680, 683 (5th Cir. 1973). On the other hand, circuit courts have been willing to consider on review whether criteria in the rule elaborating the trial court's present discretion were utilized. Nuesse v. Camp, 385 F.2d 694, 704-06 (D.C. Cir. 1967). Cf. Doris v. Montgomery County Bd. of Educ., 426 F.2d 249 (5th Cir. 1970) (appellate court indicates what path of reasoning discretionary judgment should follow on remand). See also note 21 supra. This review of the methodology of discretionary decisionmaking should be preserved and amplified.

140 Shapiro, supra note 2, at 761-63. His amendments would also clarify and broaden the device of limited intervention, id. at 762, and clarify the finality of all intervention denials for purposes of appeal. Id. at 762-63.

141 Professor Shapiro retains intervention of right in his rule when created by statute, or . . . when the applicant is a member of a class by or against which an action has been brought under rules 23, 23.1, or 23.2, or is a person described in rule 19(a)(2)(i), unless in either case it is clearly established that the applicant's interest is adequately represented by existing parties.

Id. at 761. Granted, it may be undesirable to alter statutory intervention of right by amending rule 24, see note 131 supra, but I am unable to agree that nonstatutory intervention of right should be retained in rule 24, even when used to describe situations of relatively high intervention need. I am particularly troubled by the inclusion of persons claiming "an interest relating to the subject of the action and . . . so situated that the disposition of the action in his absence may . . . as a practical matter impair or impede his ability to protect that interest." Fed. R. Civ. P. 19(a)(2)(i). This category may be narrower than that created by substantially similar language in rule 24(a)(2), but the former is still an adenvently flexible characterization of interest. See Advisory Committee Notes on 1966 Amendments to Rule 19, Fed. R. Civ. P. 19, 28 U.S.C. app. (1976). Thus, it may invite problems of appellate redecision of the type of the present rule 24, though not on the same scale.
cant’s interest by existing parties; (3) the relationship of the applicant’s claim or defense, if any, to the subject matter of the action; (4) the avoidance of multiplicity of actions; (5) whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties; and (6) the contribution the applicant may make to the just determination of the issues.\textsuperscript{142}

Judged by the values advanced in this article, these criteria emerge as exceptionally good work. Under this language, all applicants would be subjected to a common framework of concerns favoring and opposing intervention that would register and combine differently, depending upon the case. Professor Shapiro’s factors reflect a judicious combination of old and new characterizations of intervention concerns. The list appears complete, avoiding the gaps\textsuperscript{143} and problems of obscurity\textsuperscript{144} that plague the present rule. The text seems free of the formalism that invites dependence on case law; it embraces a variable range of intervention applications, and it can be administered authoritatively by trial judges.\textsuperscript{145} In short, the language provides an excellent model for eliminating nonstatutory intervention of right, and thereby improving the methodology for intervention decisionmaking in the federal courts.\textsuperscript{146}

It remains, however, to consider the possible costs of adopting such a proposal, and it is to this purpose that the balance of the article is directed.

\begin{footnotes}
\item \textsuperscript{142} Shapiro, \textit{supra} note 2, at 761-62.
\item \textsuperscript{143} Professor Shapiro introduces the capacity of the intervener to contribute as a factor, \textit{id.} at 762, bringing the rule in line with a number of cases. \textit{See} note 64 \textit{supra}.
\item Judicial economy is recognized as a possible factor in all cases, rather than as a factor limited to the consideration of permissive interventions in the present rule. Shapiro, \textit{supra} note 2, at 762. Here, too, amendment would bring rule 24 in line with case law. Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm’n, 578 F.2d 1341, 1346 (10th Cir. 1978); Smuck v. Hobson, 408 F.2d 175, 179 (D.C. Cir. 1969); Atlantis Dev. Corp. v. United States, 379 F.2d 818, 823 (5th Cir. 1967).
\item The third factor above eliminates past confusion over what restriction, if any, was placed on \textsection{} (b)(2) interventions from the statement in the paragraph that the “applicant’s claim or defense and the main action have a question of law or fact in common.” \textit{Fed. R. Civ. P. 24 (b)(2)}. There is presently no such requirement in \textsection{} (a)(2).
\item It might be also desirable to require judges to place on the record the method by which the factors in the proposal were weighed. This would probably require an amendment to either rule 24 or rule 52. \textit{See} note 139 \textit{supra}.
\item For his actual purpose in using the language to broaden the category of permissive interventions, Professor Shapiro offered the following rationale:
\begin{quote}
I would favor express recognition of the discretionary nature of the judgment, of the interrelationship of the many factors involved, and of the difficulty of focusing in advance on any one or two controlling considerations. Recognition that the matter is one of discretion, of course, should not and need not mean an abdication of the reviewing function. But it does suggest that there will be many instances in which a decision either way will be acceptable—instances in which the appellate court should not substitute its judgment for that of the trial court.
\end{quote}
Shapiro, \textit{supra} note 2, at 759.
\end{footnotes}
Three questions might be raised about the proposal outlined above. First, to what extent does it diminish the protection an applicant for intervention should receive under rule 24? Second, how significant would the disruption of satellite doctrines presently grounded on intervention of right be? Finally, how susceptible is the proposal to judicial manipulation?

**Applicant Protection**

Uncertainties in the meaning and application of the present rule make it difficult to conclude that applications of greatest need will invariably be granted through invocation of intervention of right. But it is fair to say that in most, if not all cases, a tangible need to intervene will trigger the favorable decisional criteria of paragraph (a)(2) and the possibility of appellate redecision for the absentee should his application for intervention be denied. The applicant’s prospects for ultimate success in intervening would seem greater in this setting than under the proposed revision of rule 24. A concern against adoption of the proposal might then be: Why not prefer the present rule, since it maximizes the likelihood that interventions will be granted to those applicants whose need to intervene is greatest?

One answer to this question appears from the thesis of this article. The costs of maintaining the device of intervention of right in the rule are excessive. There are, in addition, reasons to believe that the consequences from application of the proposed amendment on future applicants might not be as dire as they first appear.

A thoughtful reading of the decisional criteria in the proposal that favor intervention against the background of the applicant’s own circumstances will provide a measure of protection. A pragmatic and sympathetic characterization of absentee interests is retained from the present rule. The proposal may even increase the likelihood that certain applications will be granted. Under Professor Shapiro’s language, the applicant may combine an interest argument with an argument based on judicial economy, now technically impossible under the language of the bifurcated rule. The language also adds to the rule a basis for the argument that the participation of the intervener may enhance the fair adjudication of issues between existing parties and broadens the applicant’s basis for intervening when the applicant does not appear to possess a claim or defense growing out of the litigation.

Success in intervening under the proposal would, however, require

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147 See text accompanying notes 141-44 supra.
148 See note 143 supra.
149 Id.
150 See note 144 supra.
the applicant to deal with the spectres of prejudice to existing parties and to the court that may result from the addition of the applicant as a party. Therefore, it might be useful to review some of the points that applicants for intervention can presently raise to discourage harmful speculation about prejudice, which should become more significant under the proposal. An applicant may point to means possibly available later in the suit for dealing with any prejudice that should materialize due to expansion of the suit. At least when the status of an intervener is viable without a co-party, the court may either adjudicate the claim of a nominal co-party without also adjudicating the intervener’s claim, or sever the claim of the nominal co-party to make a separate trial possible. Of wider application is the technique of limiting the role that the intervener may play in the litigation. The idea of limited intervention may originate with the court. At the same time, there is no reason why the idea of limited intervention, and the terms by which the participation of the intervener will be confined, cannot be suggested by the applicant himself. The applicant who voluntarily limits the internal expansion of the litigation by promising to call only two additional witnesses at trial, or who limits external expansion by foregoing a counterclaim in his proposed answer, can forestall disadvantageous conjecture about the consequences of the intervention. The usefulness of this strategy is limited, of course, by the need of the intervener to retain a sufficient number of party prerogatives to protect his interest lest his purpose in intervening be defeated.

Even if the decisional mechanism of the proposal is sensitive to the deserving and well-argued case for intervention, some may be troubled by the implications of giving federal trial judges discretionary authority over so many applications. While appellate review is not wholly

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153 Particular limitations on the nature and degree of the applicant’s participation in the suit may be conditions upon which the intervention is granted. The alternative of limited intervention is frequently overlooked. The best approach may be to give the device express sanction in rule 24. See Shapiro, supra note 2, at 762.


155 For further discussion of the particular ways that participation by interveners can be limited, see Kennedy, supra note 2, at 367; Lederleitner & Nolan, Criteria for Intervention, 1967 U. ILL. L.F. 299, 303.

156 Professor Shapiro lists as traditional “rights of a party . . . full rights of discovery and cross-examination, the ability to veto a settlement of the case, and the right to appeal from a final decision.” Shapiro, supra note 2, at 727. He adds: “It is both feasible and desirable to break down the concept of intervention into a number of litigation rights and to conclude that a given person has one or some of these rights but not all." Id.

157 Distrust of discretionary decisionmaking has been historic because of the lack of reference to a governing rule, and the consequent independence of one decision from another. Dean Pound
lacking, adoption of the proposal would require a measure of trust that trial judges would be thoughtful and fair in the exercise of their considerable authority. That trust, it seems to me, is warranted. Sufficient time has passed since the amendment of paragraph (a)(2) that a searching and pragmatic examination of interests capable of supporting intervention has become a decisional tradition among federal trial judges, as well as appellate judges.

The weighing of considerations for and against intervention in each case under the proposal would be a traditional exercise of discretion, as fully a “judicial” function as any other the trial court is called upon to perform. Particularized decisionmaking, which is characteristic of discretion and necessary under the proposal, does not release the court from its responsibilities to be thoughtful, fair, and consistent in its decisional methodology. Unless one questions the intellect or fairness of trial judges, however, only the third element of the discretionary decisionmaking process can be consistently subject to appellate review. The methodology for discretionary intervention decisionmaking is presented in the proposal. It would not be too great a

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158 For standards of review under the proposal see notes 137, 138 & 146 supra. Professor Fraser has suggested that in some cases the need of the applicant to intervene may be so great that “to prevent him from intervening may constitute a denial of due process.” Fraser, supra note 64, at 483. This concept may not have been thought or written about greatly because the expansive category of intervention of right invariably included such cases, but it should be more significant under the proposal. Due process should provide an additional curb on the trial court’s power to deny interventions. On the other hand, it is questionable whether due process provides a constitutional right to appeal per se. See Rosenberg, supra note 15, at 641 n.16. See generally Wilner, Civil Appeals: Are They Useful in the Administration of Justice? 56 Geo. L.J. 417 (1968).


Federal district courts can be more trusted to administer thoughtfully the factor in the proposal measuring “the nature and extent of the applicant’s interest,” Shapiro, supra note 2, at 762, because of their experience since 1966 in administering a similar criterion under ¶ (a)(2) of rule 24. This avoids a problem that can occur when new decisional criteria and discretion are presented to judges simultaneously. “[W]ithout a tradition for the exercise of discretion, a general grant of power is likely to accomplish little. . . . If left to their own devices, without any precise guide beyond a general authorization, they will stick to what they have known in the past.” Clark, supra note 24, at 501. In this respect, the passage of time since 1966 has improved the climate for the proposal.

160 See notes 132-35 supra.

161 See Rosenberg, supra note 15, at 643.

162 “If trial judges are carefully selected, as in the federal system, it is hard to think of any reason why they are more likely to make errors of judgment than are appellate judges.” Wright, supra note 121, at 781. See H.L.A. Hart, The Concept of Law 139 (1961). See also Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”), quoted in Wright, supra note 121, at 782. But see Carrington, supra note 121, at 527; Carrington, supra note 116, at 551; Redish, The Pragmatic Approach to Appealability in the Federal Courts, 75 Colum. L. Rev. 89, 96-97 (1975).
step to add a requirement that trial courts place on the record at least a summary description of the manner in which the factors in the proposal were weighed. Review of decisional methodology—rather than result—should be available in every case.163

**Disruption of Satellite Doctrines**

Several judicial doctrines arising out of federal intervention practice depend currently on the distinction between intervention of right under rule 24(a) and permissive intervention under rule 24(b). The doctrines govern questions of appellate jurisdiction over intervention denials, jurisdiction over claims brought into the suit by the intervener, and the propriety of limited intervention. These satellite doctrines would not survive the proposal. On balance, this result is desirable. Examination will reveal that distinctions based on mandatory and permissive intervention provide only an artificial basis for resolving these ancillary issues, and that abolition of nonstatutory intervention of right would provide a more unobstructed view of each problem.

**Appellate Jurisdiction Over Intervention Denials.**—Federal appellate courts reverse denials of intervention when convinced that the applicant has a right to intervene under rule 24(a).164 But when the appellate court agrees with the trial court that the applicant has no right to intervene, the action taken traditionally is not to affirm the denial, but to dismiss for lack of jurisdiction.165 The reason is that if the applicant is not entitled to intervene of right, the appellate court lacks the jurisdiction to review the denial, absent the exceedingly rare case of abuse of trial court discretion in denying an application for permissive intervention under rule 24(b). Naturally, for the appellate court to reach its jurisdictional conclusion, it must review the denial on its merits.166 The formality of associating appellate jurisdiction with improper denials of rule 24(a) applications has been questioned by commentators167 and by numerous courts,168 while other courts have simply af-

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164 See note 23 supra.


167 See, e.g., 9 Moore's Federal Practice, supra note 18, ¶ 110.13 [7]: "There seems to be no basis for that distinction"; Shapiro, supra note 2, at 748: "One of the most fertile sources of difficulty . . . ." But see Moore & Levi, supra note 2, at 585 n.103.

168 E.g., Stallworth v. Monsanto Co., 558 F.2d 257, 263 (5th Cir. 1977); Blake v. Pallan, 554 F.2d 947, 951 n.5 (9th Cir. 1977); Ionian Shipping Co. v. British Law Ins. Co., 426 F.2d 186, 188-89 (2d Cir. 1970); Levin v. Ruby Trading Corp., 333 F.2d 592, 594 (2d Cir. 1964).
firmed the denials.169

It is difficult to rationalize why denials of intervention currently sought under paragraph (b) of rule 24 should be any less "final" and open to review than denials under paragraph (a). This article's proposal to consolidate the situations described in the two paragraphs into one category should eliminate the continuing basis for this pointless doctrine. Moreover, courts could take the additional step of making all denials of intervention final judgments that are reviewable as within the jurisdiction of appellate courts.170

Jurisdiction Over the Intervener's Claims.—It is generally held that an intervener who is not capable of satisfying independently the requirements of federal jurisdiction, yet who wishes to raise a separate claim, may nonetheless raise the claim if the intervention is granted under rule 24(a), but not if the intervention rests on rule 24(b).171 It may be, as suggested, that the claim of an intervener of right should be permitted because an intervener fitting the description of paragraph (a) of rule 24 will bear such a relation to the parties and the litigation as to be able to support introduction of the new claim under a theory of ancillary jurisdiction.172 This does not mean, however, that rule 24(a) alone is capable of supporting jurisdiction over the intervener's claim. That conclusion would appear to violate rule 82 of the Federal Rules of Civil Procedure.173 It is questionable whether the distinctions based on paragraphs (a) and (b) of rule 24 provide a wholly reliable shorthand mechanism for deciding questions of ancillary jurisdiction over the new claims of the intervener.174 A freer, more unobstructed operation of the

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169 In re Grand Jury Proceedings, 568 F.2d 555, 556 (8th Cir. 1977), cert. denied, 435 U.S. 999 (1978); SEC v. TIPCO, Inc., 554 F.2d 710, 712 (5th Cir. 1977); Fred Harvey, Inc. v. Mooney, 526 F.2d 608, 613 (7th Cir. 1975); Brennan v. Silvergate Dist. Lodge, 503 F.2d 800, 808 (9th Cir. 1974).
170 Professor Shapiro has proposed language to be added to rule 24 to bring this about. Shapiro, supra note 2, at 762-63. This would return practice, apparently, to its form prior to the adoption of rule 24. Levi & Moore, supra note 2, at 906.
171 "First, jurisdictional grounds must be established for the permissive intervention in the first instance, and second, they must be shown to support any newly raised causes of action." Blake v. Pallan, 554 F.2d 947, 956 (9th Cir. 1977). See generally 7A Wright & Miller, supra note 18, § 1921. The distinction predates rule 24. See Moore & Levi, supra note 2, at 581-82; Levi & Moore, supra note 2, at 902-03, 927.
172 It is probably more appropriate in this context to apply the concept of ancillary rather than pendent jurisdiction. See 7A Wright & Miller, supra note 18, § 1917 n.24. An intervenor claiming an interest in property subject to the control of the court has traditionally had the support of ancillary jurisdiction. Eliot, supra note 31, at 381.
173 7A Wright & Miller, supra note 18, § 1917 & n.22; Fraser, supra note 64, at 483. See Hart & Wechsler, supra note 64, at 1078.
doctrine of ancillary jurisdiction would be facilitated by the proposal.

Limited Intervention.—Limited intervention\textsuperscript{175} is common when applications are granted under paragraph (b) of rule 24, yet the propriety of limiting a paragraph (a) intervener has frequently been questioned.\textsuperscript{176} Of the three satellite doctrines that would be affected by the proposal, this doctrine would seem to reflect most accurately the distinction between intervention of right and permissive intervention as the concepts appear in the rule itself. The power of the district court to deny paragraph (b) interventions altogether suggests a lesser included power to lay down conditions of participation.\textsuperscript{177} The assumption regarding the paragraph (b) intervener is that, if the terms of participation are unsatisfactory, he can simply wait to present his "claim or defense" in another lawsuit. The restricted authority of the court to deny paragraph (a) interventions, and the absence of references in the paragraph to balancing considerations of prejudice and judicial economy, suggest less power to limit intervention. Still, it seems undesirable to deprive courts or applicants of the opportunity to opt for limited intervention in situations that presently fall under rule 24(a),\textsuperscript{178} and the proposal represents an advance over present doctrine in raising for most applicants the possibility of at least limited intervention.

Susceptibility to Judicial Manipulation

In the last analysis, the success of the proposal will depend on whether federal appellate courts accept it as intended—as a release from the requirement of redeciding by appellate review a broad spectrum of intervention controversies—or reassert their role through manipulative interpretation of the new rule.

\textsuperscript{175} See note 153 supra.

\textsuperscript{176} See Kennedy, supra note 2, at 366; Shapiro, supra note 2, at 759. For refusals to limit the intervener of right, see Spangler v. United States, 415 F.2d 1242 (9th Cir. 1969); Exchange Nat'l Bank v. Abramsen, 45 F.R.D. 97, 103-05 (D. Minn. 1968).

Two cases do appear to limit the \( \frac{1}{3} \) (a) intervener. Trbovich v. UMW, 404 U.S. 528 (1972); Harris v. General Coach Works, 37 F.R.D. 343 (D. Mich. 1964). See also Smuck v. Hobson, 408 F.2d 175, 179-80 (D.C. Cir. 1969).

\textsuperscript{177} See Van Hoomissen v. Xerox Corp., 497 F.2d 180, 181 (9th Cir. 1974).

\textsuperscript{178} "It should not follow from the right to intervene on a given issue that the intervener obtains all the rights of a party with respect to every issue." Shapiro, supra note 2, at 754. Cf: Moore & Levi, supra note 2, at 580 ("It is convenient and theoretically sound to distinguish between the right to intervene and the rights of the intervenor."). \textit{But see} Kennedy, supra note 2, at 358 (court should not be allowed to strike intervener's counterclaim or cross-claim).
Although the authority of courts to grant intervention has not been limited to rule 24, it is unlikely that federal appellate courts would devise an alternative basis for intervention. If courts frustrate the proposal, it is more likely to be by expansion of abuse of discretion as a reviewing standard. This standard applies currently to appeals from denials of applications for permissive intervention based on paragraph (b) of rule 24. Although the reversal of denials under paragraph (b) is rare, there is no reason to believe that appellate courts would be similarly restrained under the proposal. Under the present rule, applicants for intervention who stand to suffer any cognizable harm from the litigation will advance their case for intervention on the tactically superior ground of paragraph (a)(2). Consequently, the greatest pressure for reversal is exerted in review of rule 24(a)(2) denials. When intervention of right was more narrowly confined in the original rule, pressure upon appellate courts to reverse resulted in the judicial distortion and manipulation of apparent textual limitations of paragraphs (a)(2) and (a)(3). The inchoate nature of abuse of discretion as a reviewing standard would seem to provide the means for appellate courts to structure a doctrine of redecision similar to that now utilized through intervention of right. Clearly, the usefulness of the proposal depends on the acceptance and cooperation of federal appellate courts.

It is reasonable to expect that this cooperation would be forthcoming. First, for the reasons offered in this article, the proposal is a better federal intervention rule and should be permitted to work. It would be unduly cynical to assume that judges will be less thoughtful than others in considering points posed in favor of adopting the proposal. Second, the proposal coincides with a contemporary reexamination of the appropriate reach of appellate activity prompted by critical docket congestion in federal courts of appeals. In another multiparty setting, the Supreme Court has recently questioned the appropriateness of appellate redecision of a trial court denial of class certification when review of that denial had to turn on a time-consuming reexamination of facts that vary greatly from case to case. This and other recent

180 See note 22 supra.
181 See note 21 supra.
182 See note 76 supra.
183 See note 40 supra.
184 See note 41 supra.
cases\textsuperscript{187} suggest that the time is ripe for reconsidering the appropriate roles for federal trial and appellate courts in intervention decisionmaking.

\textbf{Conclusion}

This article has been concerned with the functional definition, critique, and ultimate rejection of nonstatutory intervention of right in rule 24. From an understanding of the character of intervention controversies and of the appropriate institutional reach of trial and appellate courts, one is led to two conclusions. First, the best rule to guide intervention decisionmaking is one that permits variable treatment of applications according to how essential procedural values might best be served. Second, the purpose and effectiveness of intervention decisionmaking under this rule will be obscured least by minimal involvement of appellate courts in the decisionmaking process. This model is incompatible with the function and effect of nonstatutory intervention of right in rule 24. By amendment, nonstatutory intervention of right should be abolished, and all intervention decisionmaking should be committed to the sound discretion of district court judges.

It may not be possible to conclude that especially deserving applicants for intervention will enjoy the same tactical advantage under the proposal as they enjoy presently under rule 24(a). The proposal contains a sensitive apparatus for measuring deserving applications, however, and, with effective advocacy, the number of successful applications should not decline appreciably.

The climate for the proposal is favorable. The proposal advances a functional approach to reform of rule 24 undertaken but not completed in 1966. It will also cause to wither questionable and frequently criticized satellite doctrines grounded on nonstatutory intervention of right. Finally, the proposal will provide one sensible means for reducing the number of cases swelling the dockets of federal appellate courts.

If the ideas set out in this article have meaning at all, they have meaning well beyond the intervention context. The author would be pleased if readers find in this work material for the critical evaluation of other aspects of civil procedure.