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

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

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

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

1. What Is Intervention?

Intervention is a relatively new phenomenon in American procedure.[16] However, its use and availability have greatly expanded over the last century.[17] Rule 24's predecessor, Equity Rule 37, was adopted in 1912 and provided that "[a]nyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."[18] The adoption of the Federal Rules of Civil Procedure gave intervention an even greater role in federal litigation.[19]

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

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

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

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

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

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

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

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

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

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

25. *See id.*

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

2. Intervention of Right Requirements

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

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

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

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

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

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

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

30. *See id.*

31. *Id.* at 135.

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

33. *Id.* at 531.

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

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

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

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

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

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

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

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

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

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

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

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

42. *See id.* § 1908.2, at 369.

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

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

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

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

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

3. Rights of Intervening Parties

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

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

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

B. The Case or Controversy Clause and the Standing Requirement

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

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

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

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

51. *See id.*

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

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

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

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

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