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Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies

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FOXES GUARDING THE CHICKEN COOP: INTERVENTION AS
OF RIGHT AND THE DEFENSE OF CIVIL RIGHTS REMEDIES

Alan Jenkins*

This article focuses on the recent spate of cases in which educational institutions on the grounds that their race-conscious admissions policies are unconstitutional. The author analyzes the role of minority students and organizations who are the beneficiaries of those policies at the defendant institutions and their recent attempts to intervene in the lawsuits pursuant to Rule 24 of the Federal Rules of Civil Procedure. First, the author argues that under the traditional interpretation of Rule 24(a), intervention of right should be granted to minority students and organizations in the great majority of instances. Second, the author looks at the reasons that courts have denied intervention, analyzing both the rights and interests of the beneficiaries and the presumption that government parties provide adequate representation. Third, the author examines the conflicts between the interests and goals of defendant institutions and beneficiaries, noting the consequences of denying intervention. The author concludes by arguing that where the affirmative action admissions policies of educational institutions are challenged, district courts should embrace a practical presumption in favor of intervention for minority students and organizations.

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INTRODUCTION

The past decade has witnessed a rising wave of legal challenges to structural civil rights remedies. In the wake of Supreme Court decisions subjecting various race-sensitive policies to strict constitutional scrutiny,¹ relaxing standing requirements for plaintiffs challenging affirmative action programs,² and imposing more stringent criteria for the continuation of school desegregation remedies,³ such suits have become both more common and more frequently successful. Contributing to the increase in such challenges is a cadre of conservative law centers and think tanks opposed to vigorous civil rights enforcement. Appropriating the tactics of pro-civil rights groups that led to *Brown v. Board of Education*⁴ and other victories for equal opportunity,⁵ those organizations have litigated affirmative action challenges on behalf of unsuccessful candidates⁶ and opposed

1. See *Adarand Constructors v. Pena*, 575 U.S. 200 (1995) (federal disadvantaged business program); *Miller v. Johnson*, 515 U.S. 900 (1995) (electoral districts in which legislatures subordinate traditional districting principles to racial considerations); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (municipal contracting set-aside ordinance).

2. See generally *Shaw v. Reno*, 509 U.S. 630 (1993) (granting standing to plaintiffs within "bizarrely-drawn" districts and allowing a claim that the consideration of race in drawing those districts violated the Equal Protection Clause); *Northeastern Fla. Chapter of the Associated Gen. Contractors v. Jacksonville*, 508 U.S. 656 (1993) (holding that contractors competing under a system alleged unlawfully to consider race have standing to challenge that system without demonstrating that they would have been selected absent racial considerations).

3. See *Freeman v. Pitts*, 503 U.S. 467 (1992) (allowing the district court "to relinquish supervision and control of a school district in incremental stages, before full compliance has been achieved"); *Board of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991) (relaxing the standard for modification of a school desegregation consent decree); see also *Missouri v. Jenkins*, 515 U.S. 70 (1995) (overturning educational improvements and expenditures ordered by district court to remedy vestiges of past discrimination).

4. 347 U.S. 483 (1954) (overturning separate-but-equal doctrine in context of public schools); see also *Brown v. Board of Education*, 349 U.S. 294, 301 (1955) (ordering desegregation with "all deliberate speed").

5. See generally, ROGER GOLDMAN & DAVID GALLEN, *THURGOOD MARSHALL: JUSTICE FOR ALL* (1992) (chronicling, *inter alia*, the legal campaign by the National Association for the Advancement of Colored People, the NAACP Legal Defense and Educational Fund, and others to overturn the segregationist principle of *Plessy v. Ferguson*, 163 U.S. 537 (1896)); JACK GREENBERG, *CRUSADERS IN THE COURTS* (1994) (same); CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW* (1998) (same).

6. The principal organization litigating those challenges is the Center for Individual Rights ("CIR"). See, e.g., Ethan Bronner, *Conservatives Open Drive Against Affirmative Action*, N.Y. TIMES, Jan. 26, 1999, at A10 (describing ad campaign by CIR

the application of traditional anti-discrimination laws to private industry.⁷

With the rise in challenges to race-conscious⁸ programs has come a burgeoning, though more subtle, controversy. In a series of important cases addressing the validity of affirmative action programs in education, courts have denied intervention under Rule 24 of the Federal Rules of Civil Procedure⁹ to minority movants who

seeking to recruit plaintiffs to challenge affirmative action policies); Center for Individual Rights (visited Aug. 31, 1999) <<http://www.wdn.com/cir/cr-aa.htm>> (describing CIR's participation in suits against the University of Washington Law School and the Federal Communications Commission). CIR was also plaintiffs' counsel in *Hopwood v. Texas*, 78 F.3d 932, 940 (5th Cir. 1996), which has resulted in the invalidation of affirmative action at the University of Texas Law School; and is currently counsel in *Gratz v. Bollinger*, No. 97-CV-75231-DT (E.D. Mich., filed Oct. 14, 1997), in which plaintiffs challenge affirmative action at the University of Michigan's undergraduate college; and *Grutter v. Bollinger*, No. 97-CV-75928-DT (E.D. Mich., filed Dec. 3, 1997), a similar challenge to the University of Michigan Law School's admissions policy. A similar group is the Washington Legal Foundation, which successfully litigated a challenge to the University of Maryland's scholarship program for African Americans in *Podberesky v. Kirwan*, 956 F.2d 52, 53 (4th Cir. 1992) (listing counsel).

7. In addition to opposing public affirmative action programs on the ground that government "must not distinguish among its citizens on the basis of race, creed, color, or ethnicity," Center for Individual Rights, (visited Sept. 6, 1999) <<http://www.wdn.com/cir/cr-aa.htm>>, "CIR advocates a limited application of civil rights laws that would preserve private citizens' right to deal or not to deal with other private citizens without government scrutiny." *Id.* Accordingly, the organization has opposed the enforcement of basic anti-discrimination laws against private parties. *See, e.g.*, *Fair Hous. Council v. Local Daily News*, No. 96-CV-1383 (E.D. Pa. 1996) (challenging standing of fair housing groups and "testers" in suit against landlord, real estate agents, and newspapers for housing discrimination); *Thorpe v. Virginia State Univ.*, No. 96CV975 (E.D. Va. 1996) (challenging constitutionality of Violence Against Women Act); *Aguilar v. Avis Rent-A-Car*, No. SO54561, 53 Cal. Rptr. 2d 599 (Cal. App. 1996) (challenging, as *amicus curiae*, court injunction ordering end to racial harassment in workplace). Commentators at like-minded think tanks have similarly complemented their critique of affirmative action with opposition to laws that prohibit intentional discrimination by businesses. *See, e.g.*, Dinesh D'Souza, *Beyond Affirmative Action: The Triumph of the California Civil Rights Initiative Requires a New Approach to Race in America*, NAT'L REV., Dec. 9, 1996, at 26 (suggesting that individuals and companies be allowed to discriminate in private transactions such as selecting a business partner or hiring for a job); J. Glassman, *Is America Finally Going Color-Blind?*, WASH. POST, June 3, 1997, at A19 (arguing that the policies supporting affirmative action are disappearing).

8. Many of the issues discussed in this Article are equally applicable to gender-sensitive policies. Because the principal cases have involved questions of race, however, this Article will refer primarily to that context.

9. Rule 24 provides in pertinent part:

(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 the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to

are the beneficiaries of those programs.¹⁰ Specifically, students of color and organizations that represent them have sought, and been denied, intervention in suits challenging affirmative action programs at the University of Washington,¹¹ the University of Texas Law School,¹² and the Boston Latin Academy.¹³ The litigation in Boston and Texas resulted in the invalidation of race-conscious policies, while the Washington suit has yet to be resolved.¹⁴ Those courts are thus deciding the future of affirmative action and other civil rights remedies in cases from which the beneficiaries of those remedies are absent.¹⁵

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

(b) Permissive Intervention.

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

FED. R. CIV. P. 24.

10. As used here, the term "beneficiaries" refers to those classes of individuals whom affirmative action policies and other civil rights protections are intended to benefit directly. A more detailed discussion of those classes is set out *infra* in Section II(a).

11. See *Smith v. University of Wash. Law Sch.*, No. C97-335Z (W.D. Wash. July 27, 1998).

12. African American students and applicants attempted unsuccessfully to intervene in the litigation before trial, see *Hopwood v. Texas*, 21 F.3d 603, 605-06 (5th Cir. 1994), and immediately after trial, see *Hopwood v. Texas*, 78 F.3d 932, 959-62 (5th Cir. 1996). A subsequent attempt to intervene at the remedy stage was denied by the district court for lack of jurisdiction. The author served as co-counsel to the putative intervenors in the first two motions to intervene and in the appeal from the first denial of intervention.

13. See *Wessman v. Boston Sch. Comm.*, No. 97-11923-JLJ at 1, (D. Mass. Jan. 8, 1998); *Wessman v. Boston Sch. Comm.*, No. 97-11923-JLT, slip op. at 1 (D. Mass. Sept. 22, 1997).

14. See *Wessman v. Gittens*, No. 98-1657 (1st Cir. Nov. 19, 1998); *Hopwood v. Texas*, 78 F.3d 932, 940 (5th Cir. 1996). As a result of Washington State's Proposition I-200, which ended certain forms of state-sponsored affirmative action, the district court in *Smith* dismissed as moot a number of the plaintiff's claims for injunctive relief and declaratory relief. However, other issues in the case remain litigable. See *Smith v. University of Washington Law Sch.*, No. C97-335Z (W.D. Wash. Feb. 10, 1999).

15. That phenomenon is not entirely new. In *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), the National Association for the Advancement of Colored People (NAACP) unsuccessfully sought the equivalent of intervention before the California Supreme Court. After that court's adverse ruling on the merits in *Bakke*, but before the court rejected the Regents' petition for rehearing, the NAACP requested that the court "remand this case to the trial court for a new trial with directions to the trial

By contrast, the Sixth Circuit recently reversed the denial of intervention to minority students and organizations in suits against the University of Michigan's law school and undergraduate college.¹⁶ And in earlier decisions, district courts granted intervention to similar applicants in affirmative action suits against the University System of Georgia¹⁷ and the University of Maryland.¹⁸ Given the legal and social salience of race-sensitive programs and the ambiguity of past Supreme Court rulings on the issue,¹⁹ a case

court to permit the real parties in interest to present evidence on the full range of issues." Emma C. Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV. C.R.-C.L. L. REV. 31, 33 n.9 (1979) (quoting Petition of the NAACP for Leave to File as *Amicus Curiae* on Petition for Rehearing at 6, *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152 (1976)). The court denied the petition for rehearing, ignoring the request for a remand. *See id.*

Bakke notwithstanding, courts generally granted beneficiaries intervention in affirmative action cases until quite recently. *See, e.g.*, *Jansen v. City of Cincinnati*, 904 F.2d 336 (6th Cir. 1990) (granting intervention to Black applicants and employees of municipal fire department in challenge to department's affirmative action employment policy); *Associated Gen. Contractors v. City of New Haven*, 130 F.R.D. 4, 11 (D. Conn. 1990) (allowing minority contractors' association to intervene in affirmative action challenge to represent "private" interests); *Associated Gen. Contractors v. San Francisco*, 1985 WL 153 (N.D. Cal. 1985) (allowing minority business concerns to intervene in constitutional challenge to city's race-conscious contracting ordinance); *Associated Gen. Contractors v. Secretary of Commerce*, 459 F. Supp. 766, 771 (C.D. Cal. 1978) (allowing civil rights organizations to intervene in challenge to federal affirmative action program).

16. *See Grutter v. Bollinger*, 1999 FED App. 0295P (6th Cir. Aug. 10, 1999) (reversing *Grutter v. Bollinger*, No. 97-CV-75928-DT (E.D. Mich. July 6, 1998) (opinion and order denying intervention in University of Michigan Law School case) (available at University of Michigan Law School) (visited September 5, 1999) <<http://umich.edu/~newsinfo/Admission/gruord.html>>; *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998) (order denying motion to intervene in undergraduate college case).

17. *See Wooden v. Board of Regents of the Univ. Sys. of Ga.*, No. CV-497-45 (S.D. Ga. Sept. 10, 1997) (granting intervention to the Georgia State Conference of the NAACP and others challenging the consideration of race in remedying Georgia's formerly-segregated system of higher education).

18. *See Podberesky v. Kirwan*, No. JFM-90-1685, (Aug. 10, 1992) *noted in* 38 F. 3d 147, 162 n.* (4th Cir. 1992) (noting the grant of intervention for minority applicants in challenge to scholarship program for African Americans at University of Maryland).

19. The Supreme Court's affirmative action decisions have been fractious and unstable. Often, no opinion has commanded five votes, *see Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Wygant v. Jackson County Bd. of Educ.*, 476 U.S. 267 (1986), and recent precedent has been overturned or questioned. *See, e.g.*, *Adarand Constructors v. Peña*, 515 U.S. 200, 225-27 (1995) (overturning aspects of *Metro Broadcasting v. F.C.C.*, 497 U.S. 547 (1990); *Fullilove v. Klutznick*, 448 U.S. 448 (1980)). Moreover, while the Court's decisions have repeatedly stated that race-conscious programs are permissible in some circumstances, *see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989); *United States v. Paradise*, 480 U.S. 149 (1987); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 480 (1986), and cases cited therein; *see also Wygant*, 476 U.S. at 286 ("The Court is in agreement that . . . remedying past or present racial discrimination . . . is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed

addressing the validity of affirmative action in education seems likely to reach the High Court in the near future.²⁰ The silence of students of color in many of those cases is therefore all the more deafening.

Without intervention by beneficiaries, affirmative action cases typically pit unsuccessful White applicants and counsel opposed to traditional civil rights enforcement against governments and other institutions with a history of racial bias²¹ and strong incentives to avoid confessing civil rights liability.²² None of those parties have an unencumbered interest in identifying or preserving the constitutional and statutory *obligations* of public institutions to halt, avoid, and remedy discrimination against people of color; indeed, maintaining those obligations is contrary to the central interests of both sides.²³ Furthermore, each party in a bipolar affirmative action case faces strong disincentives to presenting evidence of recent discrimination by the defendant or questioning the validity of standardized tests and other selection criteria that may discriminatorily exclude certain classes of applicants.²⁴

Yet those issues are at the core of litigation regarding the validity of affirmative action policies.²⁵ In ruling on race-conscious remedies, moreover, courts necessarily make legal and factual findings that affect the rights and opportunities of people of color beyond the narrow context of a particular challenged policy.²⁶ Those rulings can have the effect of vitiating a defendant's duty to prevent and remedy racial bias. Therefore, at stake for minority beneficiaries

affirmative action program.") (O'Connor, J., concurring in part and concurring in judgment), recent opinions have failed to indicate the precise characteristics of a lawful program. *See Croson*, 488 U.S. 469 (striking down the programs at issue but not identifying viable alternatives); *Wygant*, 476 U.S. 267 (same). *But see Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978) (discussing favorably and in detail the admissions policy employed by Harvard University).

20. Although the Supreme Court unanimously denied a petition for certiorari in *Hopwood*, two Justices noted that their decision was based upon the unique posture of the case rather than a determination that the issues presented did not warrant Supreme Court review. *See Texas v. Hopwood*, 518 U.S. 1033 (1996) (opinion of Ginsburg, J., with whom Souter, J., joins). The Court subsequently granted *certiorari* in *Piscataway Township Bd. of Educ. v. Taxman*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117 (1997), which presented the issue of the legality under Title VII of the use of racial diversity considerations in the decision to lay off a White teacher. The Court subsequently dismissed the case as moot after the litigation was settled. *See Piscataway Township Bd. of Educ. v. Taxman*, *cert. dismissed*, 522 U.S. 1010 (1997).

21. *See infra* notes 140 and 149 and accompanying text.

22. *See discussion infra*, Part III(B).

23. *See id.*

24. *See infra* notes 154, 170.

25. *See infra* text accompanying notes 247–283.

26. *See infra* text accompanying notes 158–170.

is not only the loss of affirmative action polices, but also adverse legal and factual findings that can further erode their rights and opportunities.

The dramatic decline in minority participation in many institutions where affirmative action has been terminated illustrates the serious practical ramifications of that erosion. For example, in 1997, the first year in which the *Hopwood* decision was in effect at the University of Texas, *applications* from African American students dropped 30 percent from the previous year.²⁷ The proportions of African American and Mexican American students *admitted* to the 1997 class were 19 percent and 52 percent of 1996 proportions, respectively.²⁸ The graduate business program experienced similar declines.²⁹ In California, where a voter referendum³⁰ and a decision by the Regents of the University of California³¹ ended affirmative action, African American enrollment dropped by 63 percent, while Latino enrollment decreased by 34 percent.³² Those changes affect not only qualified minority students who are turned away from flagship institutions, but also those who choose not to attend such institutions because of racial isolation, and students of all races who attend institutions that are virtually segregated.

This Article contends that the ordinary operation of Rule 24 of the Federal Rules of Civil Procedure almost always entitles the beneficiaries of affirmative action programs to intervention as of right³³ in suits challenging those programs. Court decisions to the contrary, the Article argues, misapprehend the essential function of Rule 24. Part I traces the history and development of Rule 24, concluding that the values and principles that underlie the rule make intervention appropriate in these circumstances. Part II analyzes the grounds on which courts have denied intervention in affirmative action cases. That Part first addresses the important legal rights and practical interests of beneficiaries that are at stake in those

27. Jorge Chapa & Vincent A. Lazaro, *Hopwood in Texas: The Untimely End of Affirmative Action*, in *CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES* 51 (Gary Orfield & Edward Miller eds., 1998).

28. *Id.*

29. *Id.* Both the law school and the business school rely heavily on standardized test scores for admission. *Id.*

30. Proposition 209, codified at CAL. CONST. art I, § 31.

31. Regents of the University of California, *Policy Ensuring Equal Treatment in Admissions (SP-1)*, POLICIES OF THE REGENTS, July 20, 1995; see Amy Wallace & Dave Leshner, *UC Regents, In Historic Vote, Wipe Out Affirmative Action*, L.A. TIMES, July 21, 1995, at A1.

32. See Gary Orfield, *Campus Resegregation and Its Alternatives*, in *CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES* 1, 1 (Gary Orfield & Edward Miller eds., 1998).

33. The Article will not address at length the availability and operation of permissive intervention under Rule 24(b).

cases. Next, it examines the presumption, employed by a number of courts of appeals, that governmental parties adequately represent the interests of putative intervenors, making intervention inappropriate. It contends that such a presumption contravenes Supreme Court precedent and ignores the conflicts between the broad interests of governmental entities and the narrower concerns of individuals affected by government policies. Part III argues that, even assuming the validity of a presumption of adequate governmental representation, intervention by beneficiaries is appropriate in the vast majority of affirmative action cases because of conflicts between institutional defendants and beneficiaries. Part IV discusses the consequences of denying intervention in these cases. Finally, the Article recommends that courts adopt a practical presumption in favor of intervention by beneficiaries, absent particularized countervailing circumstances.

I. HISTORICAL DEVELOPMENT OF THE RIGHT TO INTERVENTION

The evolution of the intervention mechanism reflects a gradual broadening of the role of non-parties and a shift from a formalistic approach to a focus on the practical consequences of litigation on outsiders. As the doctrine first developed in American admiralty, equity, and common law procedure, it was generally limited to cases in which the court retained custody of real or personal property in which the putative intervenor claimed an interest.³⁴ Outside of that context, “the notion that third persons might invite themselves into lawsuits between others ran counter to the Anglo-American notion that the plaintiff was the master of the suit.”³⁵

Early state code provisions³⁶ and Rule 37 of the former Federal Rules of Equity were somewhat broader, but provided that intervention should be subordinate to the propriety of the main proceeding.³⁷ Courts generally construed that condition to require that the intervenor align itself with one of the original parties on

34. See FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 10.17, at 542 (4th ed. 1992). By contrast, the Roman law tradition was far more inclusive. See 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE AND PROCEDURE ¶ 24 App.101 (2d ed. 1999).

35. JAMES ET AL., *supra* note 34, § 10.17, at 542.

36. See *id.* § 10.17, at 543 n.7.

37. See FED. R. EQUITY 37 (1912) *cited in* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADINGS § 65, at 424 n.290 (2d ed. 1947) (“Anyone 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.”); see also CLARK, *supra* § 65, at 421 n.285. (listing state statutes); *id.* § 65, at 424–425 (discussing the former equity rule that intervention be subordinated to the original suit).

the existing issues.³⁸ As one respected treatise notes, “[t]his interpretation frustrated intervention by one who asserted a position antagonistic to both existing parties and greatly diminished the practical value of the procedure.”³⁹ The earliest American incarnations of the intervention mechanism thus assumed a bipolar dispute in which the interests of non-parties were ancillary to the litigation and secondary to those of the original parties.

That approach changed somewhat with the institution of the Federal Rules of Civil Procedure in 1938. As originally adopted, Rule 24(a)(2) provided for intervention where “[t]he representation of the applicant’s interests by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action.”⁴⁰ As Professor Kaplan, the drafter of the 1966 amendments to the Federal Rules, has explained, the provision “was intended to permit a beneficiary, say, to come into an action in which his fiduciary was appearing for him when the fiduciary suffered a conflict of interest or other disqualification; and the same applied to a member of a class coming into a class action to challenge and improve the representation.”⁴¹ In other words, the Rule was pertinent where a non-party’s *apparent* representative in existing litigation might not, in fact, share its interests because of legal or practical conflicts. Unlike its predecessors, moreover, the new rule did not sublimate the interests of putative intervenors to those of the existing parties or require alignment with one of the existing parties.

Most courts, however, interpreted the “is or may be bound” language of former Rule 24(a)(2) to require a showing that the original action might have a *res judicata* effect on the putative intervenor.⁴² That reading created a Catch-22: movants who were not adequately represented by the existing parties necessarily could not be bound

38. See JAMES ET AL., *supra* note 34, 10.17 at 543.

39. *Id.*

40. FED. R. CIV. P. 24(a)(2) (1938) (repealed 1966).

41. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 401 (1967); see also Advisory Comm. Notes to 1966 Proposed Amendments to Rules of Civil Procedure [hereinafter Advisory Comm. Notes], 39 F.R.D. 69, 110 (1966) (“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.”).

42. See *Degge v. City of Boulder*, 336 F.2d 220, 222 (10th Cir. 1964) (stating that the test in the circuit is whether the applicants will be bound by *res judicata*); *Atlantic Ref. Co. v. Standard Oil*, 304 F.2d 387, 393 (D.C. Cir. 1962) (“It is now well settled that in conventional litigation, the test to be applied in determining whether an applicant for intervention under Rule 24(a)(2) will be bound by a judgment in the action is whether he would be bound by such judgment under the doctrine of *res judicata*.”) (citation omitted).

under *res judicata* principles,⁴³ and those who would be bound could not demonstrate inadequate representation.⁴⁴ The Supreme Court solidified the dilemma for putative intervenors in *Sam Fox Publishing Co. v. United States*,⁴⁵ by embracing rather than resolving that paradoxical interpretation.⁴⁶

Complementing the old Rule 24(a)(2) was former Rule 24(a)(3), which provided for intervention of right when the movant was “so situated as to be adversely affected by a distribution or other disposition of property which is in the custody of the court.”⁴⁷ That provision went beyond the threat of *res judicata* to acknowledge the practical consequences of litigation on non-parties. The rule recognized that, in litigation concerning the disposition of property, non-parties with an interest in the property could be irreparably injured if the court did not hear and consider their interests in the first instance, irrespective of whether they would be formally bound by the judgment. Nor was that threat limited to non-parties who were aligned with one of the existing parties. To the contrary, a non-party with an independent interest in the property was often at a greater risk, since the litigation might distribute the entire property to the existing parties, nullifying the non-party’s interest. Despite its practical focus, however, the rule was of limited applicability because it reached only disputes over property in court custody.

Over time, an increasing number of lower courts resisted a strict interpretation of former Rules 24(a)(2) and 24(a)(3), refusing to require formal *res judicata* effect in cases under the former,⁴⁸ and stretching the meaning of “property” in the latter to embrace a broader range of controversies.⁴⁹ That resistance highlighted the limited utility of the two provisions and led the Advisory

43. See, e.g., *Hansberry v. Lee*, 311 U.S. 32 (1940).

44. See JAMES ET AL., *supra* note 34, § 10.17 at 544 (describing the “absurdity” of requiring both the threat of *res judicata* and inadequate representation); Kaplan, *supra* note 41, at 401–402 (same); see also *Reich v. Webb*, 336 F.2d 153, 156 (9th Cir. 1964) (acknowledging dilemma).

45. 366 U.S. 683 (1961).

46. See *id.* at 690–691 (denying intervention to private non-parties in government antitrust case on ground that they would not be precluded from bringing subsequent litigation); see also John W. Stack, Comment, *Intervention of Right in Class Actions: The Dilemma of Federal Rule of Civil Procedure 24(a)(2)*, 50 CAL. L. REV. 89 (1962) (describing the effects of the *Sam Fox* decision).

47. FED. R. CIV. P. 24(a)(3) (1938) (repealed 1966).

48. See *International Mortgage & Inv. Corp. v. Von Clemm*, 301 F.2d 857, 861 (2d Cir. 1962) (“[W]e conclude that in determining whether an applicant ‘is or may be bound,’ the district court is required to apply a practical test.”); *Atlantic Ref. Co. v. Standard Oil Co.*, 304 F.2d 387, 393–94 (D.C. Cir. 1962) (same).

49. See Kaplan, *supra* note 41, at 401 (citing *Formulabs, Inc. v. Hartley Pen Co.*, 275 F.2d 52 (9th Cir. 1960)).

Committee to revise and combine them in 1966.⁵⁰ The 1966 amendments eliminated the distinction between suits over property and other types of cases,⁵¹ removed the implied requirement of *res judicata* effect, and imposed a practical test with respect to both the potential consequences of the litigation for movants and the adequacy of representation. Rule 24(a) now provides that “anyone shall be permitted to intervene in an action” when a statute confers that right,⁵² or when

[T]he applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.⁵³

There has been some confusion as to whether the 1966 amendments shifted the burden of persuasion on the adequate-representation issue from the movant to the party resisting intervention.⁵⁴ In any event, it is clear that the amended provision is satisfied where representation of an applicant’s interest “may be” inadequate,⁵⁵ and that the adequacy inquiry calls for a flexible judgment.⁵⁶ Those changes necessarily contemplate a more inclusive,

50. See Advisory Comm. Notes, *supra* note 41, at 109–110 (describing rationale for combining former Rules 24(a)(2) and 24(a)(3)).

51. See *id.* at 109 (“If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of.”).

52. The prototypical intervention statute is 28 U.S.C. § 2403 (1994), which, *inter alia*, authorizes intervention by the United States Attorney General in suits challenging the constitutionality of a federal statute.

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

54. Compare *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967) (“While the change in wording does not relate to any change in standard as such, it underscores both the burden on those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention.”), *Texas v. United States Dep’t of Energy*, 754 F.2d 550, 553 (5th Cir. 1985) (same), and 7C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1909, at 314 (2d ed. 1986) [hereinafter WRIGHT, MILLER & KANE] (“[T]he effect of this change is to shift the burden of persuasion.”) with *Ordinance Container Corp. v. Sperry Rand Corp.*, 478 F.2d 844, 845 (5th Cir. 1973) (suggesting that movants retain the burden of persuasion as to adequacy of representation). While the burden-shifting argument is a persuasive one, this Article assumes that the movant retains the burden of persuasion as to each element of the intervention inquiry.

55. See *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972).

56. See JAMES ET AL., *supra* note 34, § 10.17, at 544–545 (“Rule 24(a)’s third requirement—that the applicant’s interest be inadequately represented by existing

practical approach to intervention of right that invites the participation of affected non-parties irrespective of their formal relationship to the original litigants and without regard to the alignment of their interests.⁵⁷

Modern Rule 24 thus reflects the reality of what Professor Chayes has called “public law litigation.”⁵⁸ Along with Rule 19 (regarding joinder of necessary parties), Rule 23 (regarding class actions), and Rule 22 (regarding interpleader), amended Rule 24 recognizes that, in an increasing number of cases, the litigation has “important consequences for many persons including absentees”

parties—also calls for a flexible judgment.”); *see also* Kaplan, *supra* note 41, at 403 (“[Adequacy] is to be decided without fetishes of form.”).

57. *See* Advisory Comm. Notes, *supra* note 41, at 110 (stating that the 1966 amendments “import[] practical considerations, and the deletion of the ‘bound’ language similarly frees the rule from undue preoccupation with strict considerations of *res judicata*”); *id.* at 109 (“If an absentee would be substantially affected in a practical sense by the determination made in an action he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of.”).

58. *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (discussing the increasing determination of issues of public law through civil litigation); Jones, *supra* note 15, at 32, 39–40 nn.25–36. In contrast to the bipolar, self-contained “traditional” model of litigation, Professor Chayes describes public law cases as those in which:

- (1) The scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties.
- (2) The party structure is not rigidly bilateral but sprawling and amorphous.
- (3) The fact inquiry is not historical and adjudicative but predictive and legislative.
- (4) Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead, it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.
- (5) The remedy is not imposed but negotiated.
- (6) The judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome.
- (7) The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.

Chayes, *supra* at 1302; *see also* Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1765 (1991) (noting that constitutional remedies serve the dual purpose of remedying private injuries and enforcing structural limitations on governmental power).

and “[t]he subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.”⁵⁹

Two Supreme Court cases decided soon after the 1966 amendments reflect the public law regime’s more inclusive approach. In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*,⁶⁰ three non-parties sought to intervene in an action by the federal government under Section 7 of the Clayton Act. The putative intervenors were: the State of California, where the defendant sold most of its gas; a large industrial user of natural gas who purchased from the defendant’s sources; and a natural gas distributor, whose sole supplier of natural gas had been the acquired company and would be the new, merged company.⁶¹ The Government and El Paso presented a proposed consent decree to the district court and those non-parties sought to intervene in order to oppose the decree as inadequate to protect healthy competition in the industry.⁶²

The district court denied intervention of right and permissive intervention, but allowed the applicants to participate as *amicus curiae*.⁶³ The Supreme Court reversed on direct appeal, granting intervention of right to all parties and directing *de novo* hearings on a proper remedy.⁶⁴ The Court acknowledged the movants’ interest in averting a settlement that they alleged would “reduce[] the competitive factor in natural gas available to Californians.”⁶⁵ Suggesting that the proposed settlement did not, in fact, provide for a competitive environment,⁶⁶ the Court further found that the parties had not adequately represented the applicants’ interests.⁶⁷

59. Chayes, *supra* note 55 at 1302; *see also* Chayes, *supra* note 55 at 1289–95, 1302–10; Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 270 n.1 (1989) (arguing that public law cases set out to “vindicate important social values that affect numerous individuals and entities.”); Cindy Vreeland, Comment, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279, 302–06 (1990) (arguing that intervention is more frequently appropriate in public law cases).

60. 386 U.S. 129 (1967).

61. *See id.* at 132–34.

62. *See id.*

63. *See United States v. El Paso Natural Gas Co.*, 37 F.R.D. 330, 331–33 (D. Utah 1965).

64. *See Cascade*, 386 U.S. at 135–36. The Court found the intervention of California and the user of natural gas to be required by former Rule 24(a)(3), which was in force at the time of the applicants’ motion. It held that the distributor was entitled to intervention under amended Rule 24(a)(2) as to “further proceedings.”

65. *Id.* at 135.

66. *See id.* at 136–43 (“The Department of Justice, . . . by stipulation or otherwise has no authority to circumscribe the power of the courts to see that our mandate is carried out.”).

67. *See id.* at 136–43.

In *Trbovich v. United Mine Workers of America*,⁶⁸ a union member sought to intervene in a suit initiated by the Secretary of Labor to set aside a union election under the Labor-Management Reporting and Disclosure Act (LMRDA).⁶⁹ Although the LMRDA designated the Secretary as the sole entity authorized to initiate such suits on behalf of union members,⁷⁰ the Supreme Court found intervention of right to be required, rejecting the Secretary's argument that he would adequately represent the member's interests.⁷¹ In so doing, the Court expressly recognized the dichotomy between the union member's interest in a lawful election and the broader "public interest" pursued by the Secretary. In addition to protecting the rights of union members, the Court explained, "the Secretary has an obligation to protect the vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member. . . . Both functions are important, and they may not always dictate precisely the same approach to the conduct of the litigation."⁷² The requirement of inadequate representation, the Court stated, "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."⁷³

Importantly, both *Cascade* and *Trbovich* involved government plaintiffs authorized by statute to pursue the same interests that the intervenors sought to protect—free competition in *Cascade* and democratic union elections in *Trbovich*. Both suits, too, were public law cases, intended to effect structural change, as well as to remedy individual harms. While the *Cascade* Court hinted that the Government in that case had been lax in its responsibilities,⁷⁴ the *Trbovich* Court expressly rejected any notion that the Secretary had "failed to perform his statutory duty."⁷⁵ It relied instead on the Secretary's conflicting interests *vis-à-vis* union members.⁷⁶

So construed, Rule 24(a)(2) acknowledges the distinction between the broad and diverse interests of governmental litigants, and the narrower interests of non-parties affected by those litigants' policies. It also recognizes that an *overlap* of interests does not guarantee adequate representation where the existing party must balance

68. 404 U.S. 528 (1972).

69. 29 U.S.C. § 482(b) (1994).

70. *See id.* at § 483.

71. *See Trbovich*, 404 U.S. at 538–539.

72. *Id.* (internal quotations and citations omitted).

73. *Id.* at 538 n.10 (emphasis added).

74. *See Cascade, Natural Gas Corp v. El Paso Natural Gas Co.*, 386 U.S. 129, 136 (1967).

75. *Trbovich*, 404 U.S. at 538.

76. *See id.*

other countervailing concerns against the interest it shares with a non-party.⁷⁷ Rather, representation in those circumstances “may be” inadequate, and that is all that Rule 24(a)(2) requires.⁷⁸

The development of amended Rule 24(a)(2) reveals that the rule serves three primary functions: (1) it protects the interests of non-parties; (2) it advances the courts’ truthseeking role; and (3) it promotes judicial economy. The protective function is manifest from the text of the rule, which allows a non-party to participate when he is “so situated that the disposition of the action may as a practical matter impair or impede his ability to protect [a cognizable] interest.”⁷⁹

Importantly, the protective function extends beyond an applicant’s interest in the particular outcomes sought by the existing parties. Rather, an applicant’s participation may focus on a subsidiary issue before the court, the disposition of which will affect the applicant’s interest. Alternatively, the applicant’s interest may be adverse to both parties, yet directly implicated by the litigation.⁸⁰

77. There was no question in *Trbovich*, for example, that the government’s interests included union members’ right to a fair election. Yet the Court correctly recognized that the government’s other duties and concerns compromised that interest. The same was true of the *Cascade* intervenors’ interest in free competition, which was among the government’s objectives in that litigation. See also WRIGHT, MILLER & KANE, *supra* note 54, § 1909, at 319:

[I]f [the applicant’s] interest is similar to, but not identical with, that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, but he ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee.

78. See *Jansen v. City of Cincinnati*, 904 F.2d 336, 343 (6th Cir. 1990) (“[I]nterests need not be wholly ‘adverse’ before there is a basis for concluding that existing representation of a ‘different’ interest may be inadequate.” (quoting *Nuesse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967))); *Nuesse*, 385 F.2d at 704 (A “serious possibility” that the absentee’s interest “may not be adequately represented” is enough to satisfy the rule); *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997) (“[I]t may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor’s arguments.”).

79. FED. R. CIV. P. 24(a)(2); see also Jean L. Doyle, Note, *Federal Rule 24: Defining Interest for Purposes of Intervention of Right by an Environmental Organization*, 22 VAL. U. L. REV. 109, 121 (1987) (“Protecting third parties has historically been a major policy concern of intervention, and, with the modern trend toward expanding civil litigation beyond purely private concerns, this protective function has become increasingly important.”).

80. See *Jones*, *supra* note 15, at 42 (“[I]ntervention can prevent injury to nonparties whose interests bear a sufficiently close connection to the matter being litigated In public law litigation, with its frequent objective of reordering prominent social policies and institutions, non-parties must be protected from the ever-widening impact of such lawsuits.”). A quintessential example is *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), in which the applicants opposed the outcome to which both of the existing parties had agreed. See *supra* text accompanying notes 61–68. Further, many courts presume that representation is adequate where an applicant seeks the same “ultimate objective” as an existing party. See, e.g.,

With respect to the truthseeking function, Rule 24(a)(2) recognizes that the participation of non-parties with meaningful but unrepresented interests increases the likelihood that all legal and factual issues in the suit will be fully identified and vigorously litigated. Like the joinder of necessary parties under Rule 19, Rule 24(a)(2) acknowledges that our adversarial decisionmaking process suffers where relevant concerns are not presented to the court by litigants with a direct interest in doing so.⁸¹ The rule therefore affords intervention where it appears that movants would offer evidence and arguments that the existing parties would not.⁸²

Here it should be noted that a number of courts have allowed applicants to participate as *amicus curiae* in lieu of intervention.⁸³

Edwards v. City of Houston, 78 F.3d 983, 1005 (5th Cir. 1996); Meek v. Metropolitan Dade County, 985 F.2d 1471, 1477-78 (11th Cir. 1993). If an applicant could also be denied intervention because it sought to advance a *different* outcome from the existing parties, it is difficult to imagine a situation in which intervention would be appropriate. It is precisely that type of catch-22 that the 1966 amendments' more pragmatic approach sought to avoid.

81. See Utah v. American Pipe & Constr. Co., 50 F.R.D. 99, 102 (C.D. Cal. 1970) ("[I]t is only in those cases where the prospective intervenor appears to have a sufficient stake in the outcome and enough to contribute to the resolution of the controversy, that a right to intervene arises."). That principle is most frequently expressed in the context of standing. Under Article III of the Constitution, courts demand that litigants demonstrate a personal stake in a lawsuit so as to assure "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions." Flast v. Cohen, 392 U.S. 83, 99 (1968) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). Even where the existing parties satisfy the minimum requirements of Article III, conflicts and limitations in their interests may make the participation of non-parties important to the truth-seeking process.

82. See Jones, *supra* note 15, at 42 ("[I]ntervention often expands the information available to a court in its search for an equitable adjudication of the merits of the lawsuit." (citing Black v. Pallan, 554 F.2d 947, 954-955 (9th Cir. 1977)); see also David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 745 (1968) ("The resources of the litigating arm of the government are . . . limited, and persons with special interests may be able to offer useful information otherwise unavailable to the court, particularly on the question of appropriate relief."). For example, the Ninth Circuit's intervention analysis inquires:

[W]hether the interests of a present party to the suit are such that it will undoubtedly make all of the intervenor's arguments; whether the present party is able and willing to make such arguments; and whether the intervenor would offer any necessary element to the proceedings that other parties would neglect.

United States v. Stringfellow, 783 F.2d 821, 827 (9th Cir. 1986) (citing County of Fresno v. Andrus, 622 F.2d 436, 438-439 (9th Cir. 1980)); see also, Jansen v. City of Cincinnati, 904 F.2d 336, 343 (6th Cir. 1990) (granting intervention where city and African American putative intervenors disagreed as to factual predicate for affirmative action plan).

83. See, e.g., United States v. Hooker Chem. & Plastics, 749 F.2d 968 (2d Cir. 1984) (environmental groups attempting to intervene in action against corporation by the government); Blake v. Pallan, 554 F.2d 947 (9th Cir. 1977) (federal securities class

While *amicus* participation can be important in informing the court of alternative arguments and perspectives, it is no substitute for intervention as a party under Rule 24(a)(2). Depending on the point at which they join the litigation, intervenors may engage in pleadings, discovery, and motion practice; introduce evidence; examine and cross-examine witnesses at trial; and appeal adverse judgments. None of those mechanisms are available to *amici*, who are essentially relegated to advancing supplemental legal arguments and alternative interpretations of the existing parties' evidence.⁸⁴

The judicial economy concern is forward looking; it seeks to diminish the use of judicial resources in future litigation by non-parties affected by the instant suit. The benefit, where parties intervene, of disposing of all issues in a single proceeding and avoiding later suits by rejected applicants on the same subject matter outweighs potential delay or disruption of the original suit.⁸⁵ Importantly, the judicial economy concern does not justify denying intervention on the ground that it would expand the *present* litigation, except insofar as the movant's participation would simply duplicate that of the existing parties (thus defeating the truth seeking function).⁸⁶ While Rule 24(b) expressly includes the potential for undue delay as a consideration in the *permissive* intervention inquiry,⁸⁷ that factor is not directly relevant in the award of

action); *United States v. Board of Sch. Comm'r.*, 466 F.2d 573 (7th Cir. 1972) (school desegregation case).

84. See *Coalition of Ariz./N.M. Counties v. Department of Interior*, 100 F.3d 837, 844 (10th Cir. 1996) ("[T]he right to file a brief as *amicus curiae* is no substitute for the right to intervene as a party in the action under Rule 24(a)(2).").

85. See *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (describing Rule 24(a)(2)'s "goal of disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process"); *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 825 (5th Cir. 1967) (noting the "great public interest . . . [in] having a disposition . . . of as much of the controversy to as many of the parties as fairly possible"); see also *Brennan v. McDonnell Douglas Corp.*, 519 F.2d 718, 720 (8th Cir. 1975) (stating that one of the purposes behind Rule 24 is to discourage "piecemeal litigation"); *Jones*, *supra* note 15, at 42 nn.41-42 ("[I]ntervention serves the goal of judicial economy by the consolidation of related issues into a single suit. Intervenors are welcomed into a pending lawsuit when to do so would prevent proliferation of similar litigation or discourage piecemeal adjudication.") (citing *Davis v. Board of Sch. Comm'rs*, 517 F.2d 1044, 1049 (5th Cir. 1975)).

86. See, e.g., *Environmental Defense Fund v. Costle*, 79 F.R.D. 235, 243 (D.D.C. 1978) (denying intervention where movant's arguments "will be cumulative of the arguments advanced by other defendants").

87. Rule 24(b) provides, in pertinent part:

Upon timely application anyone may be permitted to intervene in an action . . . 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.

intervention of right under Rule 24(a)(2).⁸⁸ Indeed, giving negative weight both to participation that would expand the scope of litigation and also to participation that would merely duplicate the existing parties' case⁸⁹ would erect a paradoxical, and virtually insurmountable, barrier to third-party participation. To the extent that the inclusion of additional litigants poses manageability concerns, courts' inherent authority to control cases within their jurisdiction is sufficient to address those issues. In particular, a court clearly has authority to constrain the participation of intervenors, consistent with the protection of their interests.⁹⁰ As the Advisory Committee on the 1966 amendments to Rule 24 explained, "intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."⁹¹

The foregoing principles emphasize the confluence of the identity of the movant, the interests that she seeks to protect through intervention, and her relationship to the parties vis-à-vis those interests. In applying those principles to the context of affirmative action challenges, several categories of individuals occupy the position of affected non-party that warrants intervention of right.

88. See Jones, *supra* note 15, at 12, 56 ("Unlike rule 24(b), . . . the text of rule 24(a)(2) contains no language which could be construed to permit, let alone recommend, balancing the intervenor's interest against possible prejudice to the original parties or injecting considerations of judicial efficiency."); Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1232 (1966) (same). Again, this argument assumes that the motion to intervene is timely. See *infra* note 112. Under Rule 24(a)(2), courts may properly consider prejudice to the existing parties that would result from the movant's delay in seeking intervention. See JAMES ET AL., *supra* note 34, § 10.17, at 547. That is different, however, from disruption or expansion of the litigation that would result from intervention irrespective of when the movant filed its motion.

89. See *American Lung Ass'n v. Reilly*, 962 F.2d 258, 262 (2d Cir. 1992) (giving negative weight under Rule 24(a)(2) to the fact that movant's participation would be redundant); *Cajun Elec. Power Coop., Inc. v. Gulf States Util.*, 940 F.2d 117, 120-121 (5th Cir. 1991) (same).

90. See JAMES ET AL., *supra* note 34, § 10.17 at 545 ("Sometimes, the court will allow an intervenor to participate in some issues but not in others, or will limit the intervenor's manner of participation by requiring leave of court before the intervenor can take a deposition."); cf. *Solid Waste Agency v. United States Army Corps of Eng'rs*, 101 F.3d 503, 509 (7th Cir. 1996) (denying application to intervene of right, but suggesting that applicants could file standby or "conditional" application to intervene).

91. Advisory Comm. Notes, *supra* note 41, at 111. Of course, to the extent that courts limit the issues on which intervenors may present evidence and examine witnesses, the preclusive effect of any judgment will be similarly limited. For a general discussion of issue preclusion, see 18 WRIGHT, MILLER & KANE, *supra* note 54, § 4420, at 182-192 (1981).

II. NON-PARTY INTERESTS IN AFFIRMATIVE ACTION CASES

A. *Beneficiaries of Affirmative Action*

At least three classes of non-parties possess interests that are directly implicated by affirmative action litigation. For purposes of this discussion, they will be referred to as "beneficiaries" of the challenged policies. The first and most obvious class consists of applicants from underrepresented racial groups who compete with plaintiffs challenging affirmative action policies and other applicants for opportunities under the challenged program. Like the plaintiffs, those minority applicants have a direct, practical interest in the system under which they are evaluated for—in this case—educational opportunities.⁹² Moreover, if the plaintiffs are successful, the litigation will almost certainly diminish the likelihood that minority applicants may obtain those opportunities. That reality is reflected in the declines in minority applicants, admittees, and matriculants at many of the campuses that have ended their affirmative admissions programs.⁹³

In challenges to educational programs, a second class of beneficiaries consists of *existing* students of all races at the defendant institution who seek to preserve an integrated or diverse environment at that institution. While an affirmative action challenge is unlikely to threaten their place within the student body,⁹⁴ members of that class have a direct interest in the diversity of the environment in which they study or work. A third class consists of organizations that represent the individuals described above. For the reasons that justify the principle of organizational standing,⁹⁵ an association may

92. The central analysis advanced in this Article is equally applicable to cases challenging race-sensitive programs in employment and public contracting.

93. See *infra* text accompanying notes 28–33.

94. Courts to date have not divested existing students of their positions, even where those courts have invalidated the existing selection criteria.

95. An organization may assert standing to sue on its own behalf where it can allege "a concrete and demonstrable injury to [its] activities," *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), or, on behalf of its members, where: a) its members would otherwise have standing to sue in their own right; b) the interests it seeks to protect are germane to the organization's purpose; and c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. See *Warth v. Seldin*, 422 U.S. 490, 511 (1975). In similar circumstances, courts have frequently granted intervention to organizational litigants. See, e.g., *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996) (granting intervention to unions in discrimination action challenging police department's employment practices); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983) (granting intervention to conservation organization to defend government's creation of bird preservation area); *Adams v. Matthews*, 536 F.2d 417, 418 (D.C. Cir. 1976) (granting

possess the relevant interest on its own behalf or by virtue of its members' interests.⁹⁶

As to those classes, direct engagement with the defendant institution and its policies distinguishes them from the general public, from individuals with merely an ideological interest in the issue of affirmative action, and from classes—such as students at other institutions—who may be affected indirectly by the development of affirmative action jurisprudence, but who have no direct relationship to the policies or parties at issue in the instant litigation.⁹⁷

Yet, despite the manifest practical consequences of affirmative action litigation for these beneficiaries, courts have denied them intervention in many of the education cases initiated this decade,⁹⁸ based on a variety of rationales. In *Hopwood*, the district court and court of appeals denied intervention on the ground that the applicants—an organization of Black University of Texas law students and an association of Black undergraduates whose members intended to apply to the Law School—failed to demonstrate that the State of Texas would not adequately represent their interests.⁹⁹ In *Smith v. University of Washington Law School*,¹⁰⁰ the district court denied intervention on grounds of adequate representation and timeliness,¹⁰¹ and in the Boston Latin School case, *Wessman v. Boston School Committee*,¹⁰² the court denied intervention to minority applicants with the explanation that they “[sought] to introduce evidence which raises issues unrelated to any of the claims made by the parties in the underlying action.”¹⁰³ The applicants, that court explained, “[could], with greater efficiency, enforce the rights they seek to assert by commencing separate litigation.”¹⁰⁴

Although later reversed by the court of appeals, the district court in each of the University of Michigan cases initially denied intervention to similar classes of intermediaries. In the under-

intervention to women's rights organization to preserve enforcement of gender discrimination laws).

96. See, e.g., *Wooden v. Board of Regents of the Univ. Sys. of Ga.*, No. CV-497-45 (S.D. Ga. Sept. 10, 1997) (granting intervention to NAACP and others in affirmative action suit). See generally Vreeland, *supra* note 59.

97. Cf. *Northeastern Fla. Chapter of the Associated Gen. Contractors v. Jacksonville*, 508 U.S. 656, 669 (1993) (holding that where organization's members are ready and able to bid on public contracts, the organization has standing to challenge racial impediments to successful bid).

98. See *supra* notes 11-15.

99. See *Hopwood v. Texas*, 21 F.3d 603, 606 (5th Cir. 1994).

100. No. C97-335z (W.D. Wash. July 27, 1998).

101. See *Smith v. University of Wash. Law Sch.*, No. C97-335z, slip op. at 2-3 (W.D. Wash. July 27, 1998).

102. No. 97-11923-JLJ (D.Mass. Jan. 8, 1998).

103. *Id.* at 1.

104. *Id.*

graduate case, *Gratz v. Bollinger*,¹⁰⁵ the district court held that the putative intervenors—African American and Latino students who intended to apply to the University and an organization dedicated to equal educational opportunity for such students in Michigan¹⁰⁶—lacked a substantial legal interest in the litigation¹⁰⁷ and failed to demonstrate that the state defendants would not adequately represent their interests.¹⁰⁸ The district court in the law school case, *Grutter v. Bollinger*,¹⁰⁹ denied intervention to a broader group of applicants¹¹⁰ on adequacy-of-representation grounds.¹¹¹

Common to those decisions is a fundamental misapprehension of the established legal interests of beneficiaries that are at stake in affirmative action cases and the structural conflicts that prevent an institutional party—and particularly a governmental defendant—from adequately representing those interests. Construed in light of the history and precedent discussed above, Rule 24(a)(2) clearly vests beneficiaries with a right to intervene in almost all cases challenging race-sensitive policies.¹¹²

105. 183 F.R.D. 209 (E.D. Mich. 1998).

106. *See id.*

107. *See id.* at 213–14 (holding that applicants also could not demonstrate impairment of such an interest).

108. *See id.* at 213–14 (citing *Hopwood v. State of Texas*, 21 F.3d 603 (5th Cir. 1994)). The district court subsequently reaffirmed its decision in ruling on the applicants' motion for reconsideration. *See Gratz v. Bollinger*, No. 97-CV-75231-DT (E.D. Mich. Oct. 26, 1998) (order denying reconsideration of motion to intervene).

109. No. 97-CV-75928-DT (E.D. Mich. July 6, 1998).

110. The putative intervenors in *Grutter* were three organizations and 41 individuals who described themselves as:

Black, Latino/a, Mexican-American, Filipino/a, Asian American and other students who currently attend the University of Michigan . . . including some who attend the University of Michigan Law School; applicant organizations are interracial coalitions which actively seek to preserve affirmative action programs at the University of Michigan.

Id. at 1.

111. *See id.* at 3–6. The court assumed, but did not decide, that the movants possessed a protectable interest.

112. The discussion that follows assumes that a beneficiary's motion is timely under the rule. Although the question of timeliness is necessarily intertwined with the legal and factual complexities of each case, *see Piambino v. Bailey*, 610 F.2d 1306, 1321 (5th Cir. 1980), this Article will not directly address that issue. For a more thorough consideration of the timeliness question in the affirmative action context, *see Jones, supra* note 15.

B. "Protectable" Interests at Stake

Courts typically have acknowledged that minority students and other beneficiaries are directly impacted, as a practical matter, by affirmative action litigation.¹¹³ The district court in *Gratz*, however, concluded that the applicants in that case lacked the type of "significantly protectable" interest required for intervention "because [they did] not have any legally enforceable right to have the existing admissions policy continued."¹¹⁴ That conclusion was erroneous in at least two respects. Rule 24 requires that an "interest"—not an enforceable right—be at stake, and the requisite interest need not attach to the precise outcome sought by one of the existing parties.

The court of appeals in the University of Michigan cases correctly ruled that a putative intervenor need not demonstrate an independently enforceable "right" at stake in the litigation in order to prevail.¹¹⁵ Rule 24 has never required such a showing, and, in a number of cases—including *Trbovich v. United Mine Workers of America*¹¹⁶—it is clear that the putative intervenor did *not* have an independently enforceable right at stake.¹¹⁷ Moreover, because amended Rule 24(a)(2) does not require alignment with an existing party's objectives,¹¹⁸ it clearly does not contemplate that an applicant

113. See, e.g., *Jansen v. City of Cincinnati*, 904 F.2d 336, 342 (6th Cir. 1990); *In re Birmingham Reverse Discrimination Litig.*, 833 F.2d 1492, 1496 n.13 (11th Cir. 1987); *Smith v. University of Wash. Law Sch.*, No. C97-3352, slip op. at 3 (July 24, 1998); *Wooden v. Board of Regents of the Univ. Sys. of Ga.*, No. CV-497-45, slip op. at 6 (S.D. Ga. Sept. 10, 1997).

114. *Gratz v. Bollinger*, 183 F.R.D. 209, 214 (E.D. Mich. 1998), *rev'd*, Nos. 98-2009/2248 (6th Cir. Aug. 10, 1999). The *Wessman* court may have been expressing the same concern when it stated that the applicants "seek to introduce evidence which raises issues unrelated to any of the claims made by the parties in the underlying action." *Wessman*, slip op. at 1.

115. See *Grutter v. Bollinger*, 1999 FED App. 0295P, at 7 (6th Cir. Aug. 10, 1999) (rejecting "the notion that Rule 24(a)(2) requires a specific legal or equitable interest") (quoting *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)). The court also rejected the *Gratz* district court's suggestion that applicants must rely on an extant consent decree in order to demonstrate the requisite interest. *Id.*

116. 404 U.S. 528 (1972).

117. See 29 U.S.C. § 483 (designating Secretary of Labor as sole entity authorized to bring suit under provision of Labor-Management Reporting and Disclosure Act at issue in *Trbovich*); see also *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982) (acknowledging interest of organization that sponsored legislation controlling radioactive waste in suit challenging constitutionality of that legislation); *McClain v. Wagner Elec. Corp.*, 550 F.2d 1115 (8th Cir. 1977) (granting intervention in title VII suit brought by E.E.O.C. to employees who could not sue their employer independently).

118. See *supra* note 80; see also *Atlantis Dev. Corp. v. United States*, 379 F.2d 818 (5th Cir. 1967) (granting intervention to a party whose claim was hostile to both the

must have an interest in—much less a right to—the particular *outcome* sought by an existing party. Rather, the rule requires “an interest *relating to* the property or transaction which is the subject of the action.”¹¹⁹ Just as an applicant with an interest in property need not support either of the existing parties’ claims to that property in order to obtain intervention, applicants under amended Rule 24(a)(2) may seek to defend independent interests that are at stake in the litigation.¹²⁰

In the affirmative action context, beneficiaries possess a range of established interests of the kind that have traditionally warranted intervention. Those include both an interest in the admissions policies that are the subject of the suit and an interest in independent civil rights protections and remedies that are threatened by the litigation.

1. Interests Derived from the Challenged Policy

Beneficiaries have interests *under the challenged policy itself* that they may protect through intervention. Courts have repeatedly

government and the rival private claimant in suit by government to enjoin development of an offshore island).

119. FED. R. CIV. P. 24(a)(2) (emphasis added); *see also* Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967) (expressly rejecting the notion that the rule requires “a specific legal or equitable interest.”); *United States v. American Inst. of Real Estate Appraisers of the Nat’l Ass’n of Realtors*, 442 F. Supp. 1072, 1080 (D. Ill. 1977) (“[The interest requirement is satisfied] by something less than a specific legal or equitable interest in the chose.”). *See, e.g.*, *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967) (recognizing intervenor’s economic interest in a competitive market); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (recognizing parents’ interest in education of their children).

120. *See* Advisory Comm. Notes, *supra* note 41, at 109 (“If an absentee would be “substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of.”) (emphasis added). To the extent that the *Wessman* court denied intervention based on the conclusion that the applicants sought to preserve independent interests in integration and desegregation, rather than the particular admissions policy at issue, the court ignored Rule 24(a)(2)’s more expansive view of the interests that warrant intervention. *See* *Stotts v. Memphis Fire Dept.*, 679 F.2d 579, 589 (6th Cir. 1982) (granting union intervention in Title VII suit by Black firefighters where relief sought would conflict with contractual seniority system); *Adams v. Matthews*, 536 F.2d 417, 418 (D.C. Cir. 1976) (acknowledging adequate interest of women’s rights organization seeking to preserve federal enforcement of gender discrimination laws in suit by minority parents seeking federal enforcement of laws requiring racial desegregation of schools); *Gaines v. Dixie Carriers*, 434 F.2d 52, 54 (5th Cir. 1970) (stating that a law firm should have been allowed to intervene in its former client’s action to protect firm’s interest under a contingent fee agreement following client’s substitution of counsel); *see also* WRIGHT, MILLER & KANE, *supra* note 54, § 1909, at 319 (“The easiest case [for intervention] is that in which the absentee has an interest that may, as a practical matter, be harmed by disposition of the action and his interest is not represented at all.”).

held that, in cases challenging the constitutionality or legal validity of regulatory regimes, non-parties governed by those regimes have a cognizable interest in the litigation for purposes of intervention.¹²¹ In other words, the movant's legitimate expectations under the challenged regime are the relevant "interest relating to the transaction" for purposes of Rule 24(a)(2). Minority applicants who are evaluated under the challenged policies, and those already selected by the defendant institution, clearly occupy that position. There is no question that a change in admission policies will directly and practically affect them, just as it will the plaintiffs.

2. Independent Interests

A battery of constitutional and statutory provisions also vest in beneficiaries interests "relating to" the subject of the litigation. Those provisions—principally the Reconstruction Amendments and federal civil rights laws—afford beneficiaries both a "negative" interest in opposing present racial bias and segregation, and a "positive" interest in proactive desegregation and the elimination of the vestiges of past discrimination. The negative interest protects against mechanisms and practices that discriminatorily exclude beneficiaries,¹²² while the positive interest often *requires* race-sensitive remedial policies. In each instance, there exists a "significantly protectable"¹²³ legal interest that is implicated by affirmative action litigation.

Beneficiaries' legal interests—both positive and negative—derive primarily from the Equal Protection Clause of the

121. See *In re Birmingham Reverse Discrimination Litig.*, 833 F.2d 1492, 1496 n.13 (11th Cir. 1987) (acknowledging interest of existing employees in ensuring that anti-discrimination remedy does not improperly displace them); *Howard v. McLucas*, 782 F.2d 956 (11th Cir. 1986) (same); *McClain v. Wagner Elec. Corp.*, 550 F.2d 1115 (8th Cir. 1977) (disallowing employees to sue independently where Equal Employment Opportunity Commission challenges an employer's hiring policies under Title VII, but granting employees intervention as of right under Rule 24(a)); *New York Pub. Interest Res. Group v. Regents of Univ. of State of N.Y.*, 516 F.2d 350 (2d Cir. 1975) (deeming that pharmaceutical association had protectable interest in suit against regents of state university challenging validity of regulation from which association's members benefited); *E.E.O.C. v. American Tel. & Tel. Co.*, 506 F.2d 735 (3rd Cir. 1974) (acknowledging interest of union in provisions of collective bargaining agreement with employer which might be modified or invalidated by a consent decree entered into by the existing parties); see also *WRIGHT, MILLER & KANE*, *supra* note 54, § 1908 at 285 ("[I]n cases challenging various statutory schemes as unconstitutional or as improperly interpreted and applied, the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention.").

122. Of course, that interest is also an enforceable *right*, though it need not be so for purposes of intervention.

123. *Donaldson v. United States*, 400 U.S. 517, 531 (1971).

Fourteenth Amendment¹²⁴ and the Civil Rights Act of 1964.¹²⁵ The Equal Protection Clause prohibits intentional discrimination and segregation by state and local entities,¹²⁶ while requiring institutions that have formerly discriminated to eliminate "root and branch" the vestiges of that past discrimination.¹²⁷ The latter command often requires race-conscious remedial policies, including student selection.¹²⁸

That an institution's selection procedures are facially neutral as to race does not mean, *a priori*, that they were adopted for a race-neutral purpose and are therefore constitutional. "The Constitution requires . . . that [courts] look beyond the face of the statute . . . and also consider challenged selection practices to afford 'protection against action of the State through its administrative officers in effecting the prohibited discrimination.'"¹²⁹ Nor does the duty to correct such violations dissipate merely through the passage of time; rather, extant violations continue to require corrective

124. U.S. CONST. Amend. XIV, § 1 ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").

125. See 42 U.S.C. § 2000d (1964), *et seq.* (prohibiting racial discrimination in federally funded programs).

126. See *Village of Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252 (1977) (holding that Equal Protection Clause prohibits intentional housing discrimination by municipal government); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (rejecting separate-but-equal doctrine; outlawing racial segregation in public schools). The same principle applies to the federal government through the equal protection component of the Fifth Amendment's Due Process Clause. See *Bolling v. Sharpe*, 347 U.S. 497 (1954) (invalidating racial segregation in public schools of District of Columbia as violative of due process guarantee of Fifth Amendment).

127. See *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968).

128. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971) (stating that district courts are empowered to take "affirmative action in the form of remedial altering of attendance zones . . . to achieve truly nondiscriminatory [pupil] assignments."); *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969) (upholding desegregation order that required racial composition of each school's teaching staff to equal the racial composition of all teachers in the entire system); see also *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*) (upholding educational enhancements focused on African American students to remedy school segregation); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 46 (1971) (unanimously invalidating state law prohibiting assignment of students on the basis of race; emphasizing that race "must be considered" not only in determining whether a constitutional violation exists, but also in formulating its remedy).

129. *Batson v. Kentucky*, 476 U.S. 79, 88 (1986) (quoting *Norris v. Alabama*, 294 U.S. 587, 589 (1935)). Nor must a policy completely exclude members of a particular racial group in order to offend the Equal Protection Clause. A long line of cases "establish[] the principle that substantial underrepresentation of [a racial] group constitutes a constitutional violation as well, if it results from purposeful discrimination." *Castaneda v. Partida*, 430 U.S. 482, 493 (1977) (citing cases).

governmental action until remedied.¹³⁰ Indeed, the Supreme Court recently reiterated that continuing affirmative duty in the context of higher education, explaining that “if the State has not discharged this duty, it remains in violation of the Fourteenth Amendment.”¹³¹

Where a formerly discriminatory institution has not yet been declared racially unitary, policies that disproportionately exclude or disadvantage racial minorities are inherently suspect, and may be unlawful. As the Court recently explained in *United States v. Fordice*,¹³²

[I]f the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose.¹³³

130. See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985) (invalidating a provision of the Alabama Constitution, adopted in 1901, that was intended to disenfranchise African Americans).

131. *United States v. Fordice*, 505 U.S. 717, 728 (1992); see also *Knight v. Alabama*, No. 92-6160, slip op. at 5 (11th Cir. Feb. 24, 1994) (recognizing interest identified in *Fordice*); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (opinion of Kennedy, J., concurring in part and concurring in the judgment) (“[T]he State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State”).

132. 505 U.S. 717 (1992).

133. *Id.* at 731–32. The same principle applies in public school desegregation cases. See, e.g., *Keyes v. School Dist. No. 1*, 413 U.S. 189, 211 (1973).

That admonition has obvious relevance for public institutions, such as those in Texas¹³⁴ and Georgia,¹³⁵ which openly maintained racially segregated educational systems.¹³⁶ The courts have made clear, however, that intentional segregation and discrimination through covert or ostensibly race-neutral policies also violate the Constitution and invoke the same affirmative desegregation duties.¹³⁷ Thus, many northern institutions are similarly affected. The Boston Public Schools are, of course, a prototypical example.¹³⁸ Michigan, too, has been found to have engaged in intentional racial segregation.¹³⁹ Accordingly, courts ordered race-conscious relief in each of those jurisdictions.¹⁴⁰ Thus, although the Equal Protection

134. See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950) (invalidating segregated admissions at University of Texas Law School). Texas public schools in almost every major urban area remained segregated long after the 1954 *Brown* decision. See, e.g., *United States v. Texas Educ. Agency (AISD)*, 467 F.2d 848 (5th Cir. 1972) (Austin); *Houston Indep. Sch. Dist. v. Ross*, 282 F.2d 95, 96 (5th Cir. 1960) (Houston); *Borders v. Rippey*, 247 F.2d 268 (5th Cir. 1957) (Dallas); *Flax v. Potts*, 204 F. Supp. 458 (N.D. Tex. 1962) (Ft. Worth); *United States v. Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970) (nine school districts in Eastern Texas), *aff'd with modifications*, 447 F.2d 441 (5th Cir. 1971), (state-wide relief). While some of those systems were declared unitary in the late 1980's, see, e.g., *Flax v. Potts*, 725 F. Supp. 322 (N.D. Tex. 1989) (Ft. Worth), many Texas school districts still have not been declared unitary, see, e.g., *Tasby v. Edwards*, 807 F. Supp. 421 (N.D. Tex. 1992) (Dallas), and many of the districts that have received such declarations did so on the ground that no practicable remedy existed, rather than for having eliminated all vestiges of the previous invidious discrimination. See, e.g., *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 224, 228 (5th Cir. 1983); *Flax v. Potts*, 725 F. Supp. at 330.

135. See, e.g., *Freeman v. Pitts*, 503 U.S. 467 (1992); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985); *United States v. Bd. of Educ.*, 576 F.2d 37 (5th Cir. 1978); *Acree v. County Bd. of Educ.*, 458 F.2d 486 (5th Cir. 1972); *Wooden v. Board of Regents of the Univ. Sys. of Ga.*, No. CV 497-45 (S.D. Ga. Sept. 10, 1997).

136. See *United States v. Fordice*, 505 U.S. 717, (1992); *Knight v. Alabama*, No. 92-6160, slip op. at 5 (11th Cir. Fed. 24, 1994); see also *Adams v. Richardson*, 356 F. Supp. 92, 101 (D.D.C. 1973), *modified and aff'd unanimously en banc*, 480 F.2d 1159 (D.C. Cir. 1973) (requiring enforcement of civil rights laws against segregated systems of higher education in 17 southern and border states, including Texas and Georgia).

137. See, e.g., *Milliken II*, 433 U.S. 267 (1977); *Keyes v. School Dist. No. 1*, 396 U.S. 1215 (1969).

138. See, e.g., *Morgan v. Kerrigan*, 509 F.2d 580 (1st Cir. 1974) (finding that Boston examination schools were intentionally segregated).

139. In *Milliken v. Bradley*, 418 U.S. 717, 724 (1974) (*Milliken I*), the district court found that "[g]overnmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area." 418 U.S. at 724 (quoting district court opinion, 338 F. Supp. 582, 587 (E.D. Mich. 1971)). Those and other actions, in turn, led to *de jure* educational segregation. See *Milliken I*, 418 U.S. at 725.

140. See *Milliken II*, 433 U.S. at 267, 274 (upholding educational enhancements focused on African American students to remedy the effects of school segregation); *Morgan v. Kerrigan*, 401 F. Supp. 216, 243 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir.

Clause prohibits only intentional discrimination,¹⁴¹ it conveys a positive interest in affirmative remedies, as well as a negative interest in non-discriminatory treatment.¹⁴² In formerly-segregated institutions, the latter interest includes freedom from policies that disproportionately exclude students of color.

Title VI of the Civil Rights Act of 1964,¹⁴³ which covers public and private entities that receive federal funds,¹⁴⁴ similarly prohibits intentional discrimination¹⁴⁵ and often requires affirmative remedies.¹⁴⁶ In addition, however, the statute and its implementing regulations¹⁴⁷ together prohibit certain policies and practices with discriminatory effects, irrespective of whether they are intentionally discriminatory and irrespective of any past findings of segregation or discrimination.¹⁴⁸ With respect to covered educational institutions,

1976) (imposing 35% "set aside" for minority students in Boston examination schools).

141. See *Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976).

142. Thus, in *Hopwood* and *Wessman*, applicants sought to intervene in order to demonstrate that the defendants were obligated to maintain policies that did not disproportionately exclude students of color, including, if necessary, race-sensitive policies. See Brief of Proposed Intervenors-Defendants-Appellants at 2-8, *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996 (No. 50569)); Memorandum in Support of Renewed Motion to Intervene at 17, *Wessman v. Boston Sch. Comm.*, No. 97-11923-JLT (D. Mass. Dec. 18, 1997).

143. 42 U.S.C. § 2000d (1964), *et seq.*

144. The statute's substantive provision declares that "[n]o person in the United States shall, on ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1964).

145. See, e.g., *Guardians Assn. v. Civil Serv. Comm'n.*, 463 U.S. 582 (1983); *Hankins v. Temple Univ.*, 829 F.2d 437, 440 (3d Cir. 1987).

146. See *Board of Educ. v. Harris*, 444 U.S. 130, 151 (1979) (requiring "integration" by formerly segregated entities under Title VI); *Hills v. Gautreaux*, 425 U.S. 284, 292, 305 (1976) (upholding, as remedy for government-sponsored segregation of public housing, "a comprehensive metropolitan area plan [to dismantle] segregated public housing system in the City of Chicago") (citation omitted); *Lau v. Nichols*, 414 U.S. 563 (1974) (requiring school districts with substantial limited-English-proficient populations to offer English instruction).

147. See, e.g., 34 C.F.R. § 100.3(b) (2) (1998) (Dep't of Education); 45 C.F.R. § 80.3(b) (1) (viii) (2) (1998) (Public Welfare); 15 C.F.R. § 8.4(b) (2) (1998) (Commerce and Foreign Trade); 24 C.F.R. § 1.4(b) (2) (i) (1998) (Housing and Urban Development).

148. In *Guardians Ass'n. v. Civil Serv. Comm.*, 463 U.S. 582 (1983), a majority of the Court held that, while the Title VI statute reaches only intentional discrimination, the federal agencies charged with enforcing the statute had issued valid regulations prohibiting certain discriminatory effects. See 463 U.S. at 607-608 (opinion of Powell, J., in which Burger, C.J., and Rehnquist, J., joined) (statute reaches only discriminatory intent); *id.* at 635 (opinion of Stevens, J., in which Brennan and Blackmun, J.J., joined) (same); *id.* at 584 (White, J., announcing the judgment of the Court) (regulations validly prohibit discriminatory effects); *id.* at 623 n.15 (opinion of Marshall, J.) (statute and regulations prohibit disparate impact as well as intent). A

the Title VI regulatory regime prohibits admissions, placement, and other meaningful selection criteria that disproportionately exclude or segregate applicants of a particular race, unless the use of those criteria is justified by "educational necessity."¹⁴⁹ That standard requires, among other things, strict validation of selection methodologies to ensure a strong correlation with the institution's valid educational goals.¹⁵⁰ The defendant's use of an affirmative action program does not remove that obligation with respect to its underlying selection process.¹⁵¹

Because they concern the opportunities available to minority applicants, and the role of race in access to those opportunities, Title VI and the Equal Protection Clause clearly vest minority students with rights and interests "relating to the . . . subject of the action"¹⁵² in affirmative action cases.¹⁵³ Collectively, those provisions prohibit

unanimous Court reaffirmed that holding in *Alexander v. Choate*, 469 U.S. 287, 293–294 (1985) ("Title VI . . . delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts."); see also Alan Jenkins, *Title VI of the Civil Rights Act of 1964: Racial Discrimination in Federally Funded Programs*, in 10 CIVIL RIGHTS LITIGATION AND ATTORNEY FEE HANDBOOK 182, 192 (S. Salzman & B. Wolvovitz eds., 1995), and cases cited therein.

149. See, e.g., *Board of Educ. v. Harris*, 444 U.S. 130, 151 (1979) (requiring a showing of "educational necessity" to justify a policy which causes a racially disproportionate impact); see also *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1413 (11th Cir. 1993) (requiring "educational necessity"; a "manifest relationship" to the defendant's mission); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1418 (11th Cir. 1985) (proclaiming that educational necessity demands a "manifest demonstrable relationship to classroom education.").

150. See 34 C.F.R. § 100.3(b) (2) (U.S. Dept. of Education Title VI regulations requiring, *inter alia* validation of selection criteria); *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984) (holding that the use of non-validated IQ tests with a discriminatory effect on Black children to place students in classes for the educable mentally retarded violates Title VI); *Groves v. Alabama State Bd. of Educ.*, 776 F. Supp. 1518 (M.D. Ala. 1991) (enjoining under Title VI state board of education from using minimum ACT score as requirement for admission to undergraduate teacher training program); see also *Sharif v. New York State Educ. Dep't*, 709 F. Supp. 345 (S.D.N.Y. 1989) (ruling that use of SAT scores to award merit scholarships where 10-point male/female score differential existed established *prima facie* violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681–1688).

151. See *Connecticut v. Teal*, 457 U.S. 440 (1982) (rejecting under Title VII the proposition that an affirmative action policy that produces a non-discriminatory "bottom line" precludes liability as to otherwise discriminatory selection criteria).

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

153. Note that the federal civil rights laws not only protect minorities who are excluded; but also grant insiders of all races a right to an integrated environment free of racial bias. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), in which a unanimous Supreme Court held that Black and White residents of Richmond, Virginia, and an organization dedicated to promoting low-and moderate-income housing had standing under the Fair Housing Act to challenge segregative conduct by a real estate agent. The individuals were held to have a litigable interest in "the

policies and actions intended to disadvantage, exclude, or segregate beneficiaries based on race; proscribe most policies by formerly-segregated public bodies that have a discriminatory result; outlaw selection criteria with racially disparate effects at federally-funded institutions; and require affirmative remedies—at times including race-sensitive policies—to remediate extant violations. Those positive and negative interests plainly are at issue in suits seeking to alter a university's admissions process. Moreover, as the following section explains, those interests are not merely implicated, but placed at direct risk by the litigation, so as to warrant intervention of right.

C. Impairment of Beneficiaries' Interest

The disposition of affirmative action suits inevitably threatens to "impair or impede" beneficiaries' ability to protect their interests.¹⁵⁴ Those suits, by definition, seek to limit a defendant's ability to address perceived discrimination and racial isolation through race-sensitive policies. Yet, it is well established that a blanket rule against the consideration of race not only frustrates civil rights enforcement, but can also violate the Constitution. In *Board of Education v. Swann*,¹⁵⁵ for example, the Supreme Court struck down North Carolina's Anti-Busing Law, which flatly forbade the assignment of any student on account of race for the purpose of creating a racial balance or ratio in the schools and prohibited busing for such purposes.¹⁵⁶ Writing for a unanimous Court, Chief Justice Burger explained:

important social, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices" and the impairment or frustration of the organization's activities. *Id.* at 363.

154. FED. R. CIV. P. 24(a)(2). Because the district court in *Gratz* held that the applicants lacked a protectable interest, it necessarily concluded that no such interest would be impaired by the litigation. See *Gratz v. Bollinger*, 183 F.R.D. 209, 212 (E.D. Mich. 1998), *rev'd*, 1999 FED App. 0295P (6th Cir. Aug. 10, 1999).

155. 402 U.S. 43 (1971).

156. The statute, N.C. GEN. STAT. §§ 115–176.1 (Supp. 1969), provided in pertinent part:

No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing [*sic*] of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing [*sic*].

[T]he statute exploits an apparently neutral form to control school assignment plans by directing that they be 'color blind'; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education*. Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligations to eliminate existing dual school systems.¹⁵⁷

The inflexible, "color-blind" policies that affirmative action plaintiffs seek to impose similarly threaten to deprive school officials of an important tool for measuring, identifying, and remedying civil rights violations, contrary to the interests of beneficiaries. In other words, as in *Swann*, a blanket mandate to "ignore" race can hamper an institution in its duty to avoid racially disparate effects and to remediate discriminatory policies.

Moreover, bipolar affirmative action litigation can establish adverse legal precedent and factual findings that are at the heart of beneficiaries' interests under the civil rights laws. If a court holds, for example, that an institutional defendant is free of present and prior discrimination or the remediable effects of past segregation, adverse *stare decisis*¹⁵⁸ will make it exceedingly difficult for beneficiaries in a subsequent suit to advance a cause of action based on those allegations. That potentiality is well illustrated by *Hopwood*, in which the courts found, *inter alia*, that "in recent history, there is no evidence of overt, officially sanctioned discrimination at the University of Texas."¹⁵⁹

157. 402 U.S. 43, 45-46 (internal citation omitted); *see also* *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S.457 (1982) (invalidating on Equal Protection grounds state initiative banning busing of students for purposes of school desegregation).

158. Courts have repeatedly held that the potential for adverse *stare decisis* is the type of threatened impairment contemplated by Rule 24(a)(2). *See, e.g.*, *Oneida Indian Nation v. New York*, 732 F.2d 261 (2nd Cir. 1984); *Francis v. Chamber of Commerce of the United States*, 481 F.2d 192, 195 & n.8 (4th Cir. 1973); *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 826-28 (5th Cir. 1967); *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967). Note, however, that the relevant *stare decisis* effect is as to the particular subject matter or property at issue in the instant case; the adverse effect of precedent on subsequent, unrelated litigation does not justify intervention. *See* WRIGHT, MILLER & KANE, *supra* note 54, § 1908, at 305.

159. 78 F.3d 932, 954 (5th Cir. 1996) (quoting *Hopwood v. Texas*, 861 F. Supp. 551, 572 (W.D. Tex. 1994)). The risk of such findings clearly is relevant under Rule 24(a)(2). *See, e.g.*, *Cook v. Boorstin*, 763 F.2d 1462 (D.C. Cir. 1985) (allowing Black employees of Library of Congress to intervene in Title VII class action against library where applicant would rely on similar evidence as plaintiffs and there was substan-

Even more daunting is the possibility that beneficiaries will have to challenge elements of a court-ordered remedy in collateral proceedings.¹⁶⁰ That prospect is thrown into stark relief by the *Hopwood* court's ruling that the UT Law School:

[M]ay not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor representation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school.¹⁶¹

Because challenges to affirmative action policies typically rely on test scores and other numerical measures—both in asserting the plaintiff's entitlement to admission and in advancing a remedial regime based on the plaintiff's conception of "merit"¹⁶²—they threaten beneficiaries' interest against selection criteria with a discriminatory purpose or effect. Where affirmative action has ended, institutions have typically reverted to heavy reliance on numerical measures that have a racially discriminatory impact¹⁶³ and often lack the predictive validity that the civil rights laws require. Indeed, a growing body of evidence speaks to the lack of meaningful predic-

tial potential for practical impairment of the intervenor's interests); *Stotts v. Memphis Fire Dep't*, 679 F.2d 579, 589 (6th Cir. 1982) (granting intervention to union in Title VII suit by Black firefighters where relief sought would conflict with contractual seniority system); *McClain v. Wagner Elec. Corp.*, 550 F.2d 1115 (8th Cir. 1977) (allowing aggrieved employee to intervene in E.E.O.C.-initiated Title VII suit against employer).

160. See *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 418 (1954) (conflicting judgements to be avoided); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 367 (1934) (same). It is clear, however, that such attacks are permissible. See *Martin v. Wilks*, 490 U.S. 755, 765 (1989) ("The linchpin of the 'impermissible collateral attack' doctrine—the attribution of preclusive effect to a failure to intervene—is . . . quite inconsistent with Rule 19 and 24.").

161. *Hopwood v. Texas*, 21 F.3d 603 (5th Cir. 1996).

162. See Susan Strum & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 968–980 (1996) (discussing reliance on standardized measures); see also Plaintiffs' Memorandum of Law in Opposition to Motion for Partial Summary Judgment 8–11, *Smith v. University of Wash. Law Sch.*, No. C-97-335, (filed Jan. 20, 1998) (relying on numerical measures); *Grutter v. Bollinger*, No. 97-CV-75928-DT, ¶ 20, 23 (E.D. Mich. filed Dec. 3, 1997) (same); *Hopwood v. Texas*, 78 F.3d 932, 937 (5th Cir. 1996) (noting, by reference to median test scores, that racially "disparate standards greatly affected a candidate's chance of admission.").

163. See Orfield, *supra* note 32, at 7–9 (describing adverse effects of those criteria where affirmative action has terminated); Strum & Guinier, *supra* note 162, at 968–998 (same); see also *supra* text accompanying notes 26–31.

tive value of standardized tests commonly used in the admissions context.¹⁶⁴

Once instituted, inappropriate or inflexible standardized measures can have an immediate and lasting impact on the interests of beneficiaries. The court of appeals recognized that reality in the University of Michigan cases:

There is little room for doubt that access to the University for African American and Latino/a students will be impaired to some extent and that a substantial decline in the enrollment of these students may well result if the University is precluded from considering race as a factor in admissions. Recent experiences in California and Texas suggest such an outcome. The probability of similar effects in Michigan is more than sufficient to meet the minimal requirements of the impairment element.¹⁶⁵

Even if later corrected through subsequent litigation or policy reform, racial isolation and resegregation within public universities and other institutions will inevitably affect the hearts and minds of a large cohort—perhaps a generation—of beneficiaries “in a way unlikely ever to be undone.”¹⁶⁶ That impairment of beneficiaries’ legal and practical interests clearly implicates Rule 24(a)(2)’s protective function.

164. See DAVID OWEN, *NONE OF THE ABOVE: BEHIND THE MYTH OF SCHOLASTIC APTITUDE* 207 (1985) (discussing the weak correlation between SAT scores and college grades); WARREN W. WILLINGHAM ET AL., *PREDICTING COLLEGE GRADES: AN ANALYSIS OF INSTITUTIONAL TRENDS OVER TWO DECADES* (1990) (same); see also WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998) (documenting the success of African American students who attended—as a result of affirmative action—universities with median SAT scores above their own); CHARLES ROONEY, *TEST SCORES DO NOT EQUAL MERIT: ENHANCING EQUITY AND EXCELLENCE IN COLLEGE ADMISSIONS BY DEEMPHASIZING SAT AND ACT RESULTS* (1998) (discussing misuse and misconceptions regarding standardized tests); Lani Guinier et al., *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 23 n.70, 27 n.74 (1994) (noting the weak relationship between LSAT and first, second, and third-year grades for men and women, students of color, and White students); *A Measurement of What?*, *BLACK ISSUES IN HIGHER EDUCATION*, Sept. 4, 1997, at 18 (discussing misuse and misconceptions regarding standardized tests).

165. See *Grutter v. Bollinger*, 1999 FED App. 0295P, at 9–10 (6th Cir. Aug. 10, 1999).

166. *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954).

III. INADEQUATE REPRESENTATION BY DEFENDANTS

The civil rights protections discussed above vest in beneficiaries substantive rights and interests *against* the defendants in affirmative action cases. Indeed, it has been excluded individuals and civil rights groups who have primarily enforced those laws against public and private institutions, "act[ing] not only on their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority."¹⁶⁷ Given the history of conflict between minority communities and governmental institutions over equal opportunity and integration, it is ironic that the most common ground on which courts have denied intervention in affirmative action cases has been that beneficiaries' interests would be adequately represented by the existing governmental defendants.¹⁶⁸

Those rulings have rested on two interrelated lines of reasoning, both of which are analytically flawed. The first is a doctrinal rule that has developed in several circuits under which courts presume that government litigants adequately represent all interested non-parties for purposes of Rule 24(a)(2).¹⁶⁹ The second is a systematic undervaluing by those courts of conflicts between the interests of beneficiaries and those of defendants. For the reasons that follow, a presumption of adequate representation by government is misguided and, irrespective of whether such a presumption applies, the conflicts inherent in affirmative action cases make intervention by beneficiaries appropriate in almost all cases.

A. *The Presumption of Adequate Government Representation*

There is disagreement among the circuits as to whether, and to what degree, the adequacy-of-representation inquiry should be different where one of the existing parties is a governmental entity. The Fifth Circuit employs a strong presumption that governmental parties adequately represent the interests of non-parties seeking

167. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) (internal quotation marks omitted); *see also Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973) (noting private attorney general function of civil rights litigation); *Allen v. State Bd. of Elections*, 393 U.S. 544, 556 (1969) (same); *Newman v. Piggie Park Enter.*, 390 U.S. 400, 402 (1968) (same).

168. *See supra* text accompanying notes 99–111.

169. *See, e.g., Hopwood v. Texas*, 21 F.3d 603, 606 (5th Cir. 1994); *Smith v. Washington*, No. C97-335Z, slip op. at 3 (W.D. Wash. July 27, 1998); *Grutter v. Bollinger*, No. 97-CV-75928-DT, at 4 (E.D. Mich. July 6, 1998) (opinion and order denying motion to intervene) (available at University of Michigan Law School) (visited September 5, 1999) <<http://umich.edu/~newsinfo/Admission/gruord.html>>, *rev'd*, 1999 FED App. 0295P (6th Cir. Aug. 10, 1999).

intervention.¹⁷⁰ As the *Hopwood* court explained, that standard requires “a much stronger showing of inadequacy” in government cases.¹⁷¹ The Second Circuit similarly requires a “strong showing” of inadequate representation when the purported representative is a state or municipal entity or the federal government.¹⁷² The First, Third, Seventh, Eighth, and D.C. Circuits employ a similar presumption.¹⁷³ In the circuits that have adopted it, the presumption of adequate government representation necessarily applies to intervention in all suits challenging public affirmative action programs.

The Ninth Circuit, in contrast, has expressly repudiated the presumption of adequate government representation, holding instead that “where the government [is] the purported representative, . . . ‘the requirement of inadequacy of representation is satisfied if the applicant shows that representation of its interests “may be” inadequate and . . . the burden of making that showing is minimal.’”¹⁷⁴ The Ninth Circuit therefore applies the same test of adequacy to suits involving private and governmental parties.

The district courts in each of the University of Michigan cases appear to have invoked the presumption to deny intervention to beneficiaries.¹⁷⁵ The court of appeals reversed, however, noting that “this circuit has declined to endorse a higher standard for inadequacy when a governmental entity is involved.”¹⁷⁶ Consequently,

170. See *Edwards v. City of Houston*, 78 F.3d 983, 1005 (1996) (en banc) (“[W]hen the putative representative is a governmental body or officer charged by law with representing the interests of the absentee, a presumption of adequate representation arises whether the would-be intervenor is a citizen or subdivision of the governmental entity.”).

171. *Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994).

172. See *United States v. Hooker Chem. & Plastics Corp.*, 749 F.2d 968, 987 (2d Cir. 1984); see also *id.* at 984 (“[W]e agree with the Third, Fifth and District of Columbia Circuits that, in litigation of this sort, a greater showing that representation is inadequate should be required.”).

173. See *Chiglo v. City of Preston*, 104 F.3d 185, 187–88 (8th Cir. 1997); *Brody v. Spang*, 957 F.2d 1108, 1124 (3rd Cir. 1992); *American Nat’l Bank and Trust Co. v. City of Chicago*, 865 F.2d 144, 148 (7th Cir. 1989); *Dimond v. District of Columbia*, 792 F.2d 179, 192–193 (D.C. Cir. 1986); *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982).

174. *United States v. Stringfellow*, 783 F.2d 821, 827 (9th Cir. 1986) (quoting *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)); see also *Legal Aid Soc’y v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980).

175. See *Grutter v. Bollinger*, No. 97-CV-75928-DT, at 4 (E.D. Mich. July 6, 1998) (opinion and order denying motion to intervene) (available at University of Michigan Law School) (visited September 5, 1999) <<http://umich.edu/~newsinfo/Admission/gruord.html>>; *Gratz v. Bollinger*, 183 F.R.D. 209, 212 (E.D. Mich. 1998) (same).

176. *Grutter v. Bollinger*, 1999 FED App. 0295P, at 10 (6th Cir. Aug. 10, 1999) (citing *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997)); see also *Jansen v. City of Cincinnati*, 904 F.2d 336, 343 (6th Cir. 1990) (finding minority em-

whatever ambiguity existed heretofore, the Sixth Circuit has now squarely rejected the presumption.

Although the Tenth Circuit has not explicitly considered a presumption of adequate government representation, it has construed the inadequacy requirement liberally in cases involving governmental parties, acknowledging “the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible.”¹⁷⁷ Similarly, the Fourth Circuit has not directly addressed the presumption, but has noted the inherent conflict of interest between government’s representation of the public interest generally and the more focused interests of specific applicants for intervention.¹⁷⁸ The Eleventh Circuit also employs a uniform adequacy inquiry and has recognized the potential clash between the diverse interests served by governmental litigants and the narrow interest of putative intervenors.¹⁷⁹

Close analysis of the reasoning underlying the presumption of adequate government representation demonstrates that it should be rejected.¹⁸⁰ Nothing in the text or history of Rule 24(a)(2) supports a special, heightened showing for suits involving government. Rather, the development of the Rule recounted above, and the general principle that courts should interpret the Federal Rules of Civil Procedure liberally,¹⁸¹ strongly militate against such a barrier to intervention. More particularly, the presumption contravenes clear

ployees entitled to intervene in a challenge to a municipal affirmative action policy, noting that city-defendant’s interest in defending its hiring practices was distinct from those of minority job applicants).

177. *Coalition of Ariz./N.M. Counties v. U.S. Dep’t of the Interior*, 100 F.3d 837, 845 (10th Cir. 1996) (citing *National Farm Lines*, 564 F.2d 381, 384 (10th Cir. 1977)).

178. *See In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991) (stating that “[a] South Carolina [agency] in theory, should represent all of the citizens of the state . . . Sierra Club on the other hand, appears to represent only a subset of citizens concerned with hazardous waste—those who would prefer that few or no new hazardous waste facilities receive permits.”).

179. *See, e.g., Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1478 (11th Cir. 1993).

180. The persistent circuit conflict on this issue warrants Supreme Court intervention. United States Supreme Court Rule 10(a) provides that *certiorari* is warranted where, *inter alia*, “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.” SUP. CT. R. 10(a).

181. *See Federal Sav. and Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993) (“Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action.”) (citing *Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992)); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982) (noting “liberal” standard for intervention); *see also Miller v. Amusement Enters.*, 426 F.2d 534, 537 (5th Cir. 1970) (footnote omitted) (same).

Supreme Court precedent and is contrary to the role of government as litigant.

1. The *Trbovich* and *Cascade* Decisions

A presumption of adequate government representation plainly ignores the Supreme Court's decisions in *Trbovich v. United Mine Workers*¹⁸² and *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*¹⁸³ As discussed above, each of those cases involved government plaintiffs charged with representing interests that included those of the putative intervenors.¹⁸⁴ Yet, in each case, the Court granted intervention in terms applicable to governmental and private suits alike.¹⁸⁵ And in *Trbovich*, the Court made clear that an applicant's burden in such circumstances is "minimal."¹⁸⁶ That relaxed standard is simply incompatible with the "strong showing" that courts have required in applying the presumption.

Further, the *Trbovich* Court found that representation might be inadequate in that case based on the structural distinction between the broad public interests served by government and the narrow interests pursued by affected non-parties.¹⁸⁷ It defies reason to conclude that that rationale would countenance a *heightened* adequacy standard for suits involving government. Rather, governmental defendants' broad and diverse interests cut the other way: it is *more* likely that a public defendant will have an interest against vigorously advancing certain relevant evidence and arguments. Accordingly, the Ninth Circuit rejected the presumption at least in part in reliance on *Trbovich*.¹⁸⁸

Conversely, the circuits that do apply the presumption have made little or no attempt to explain its facial inconsistency with *Trbovich* and *Cascade*. The *Hopwood* court's discussion of the issue is typical:

182. 404 U.S. 528 (1972).

183. 386 U.S. 129 (1967).

184. See *infra* text accompanying notes 60-76.

185. See *id.*

186. 404 U.S. at 538 n.10.

187. See *id.* at 538-39.

188. See, e.g., *United States v. Stringfellow*, 783 F.2d 821, 827 (9th Cir. 1986) (describing *Trbovich* as requiring showing that "representation of interests 'may be' inadequate and . . . the burden of making that showing is minimal," for purposes of inadequacy of representation) (quoting *Sagebrush Rebellion v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)); see also Chayes, *supra* note 58, at 1293 ("The Ninth Circuit's approach to the inadequate representation requirement is probably a fairer reading of *Trbovich*.").

The Supreme Court held in 1972 that the burden is “minimal” and that the requirement “is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate *But* where the party whose representation is said to be inadequate is a governmental agency, a much stronger showing of inadequacy is required.”¹⁸⁹

That statement ignores the fact that *Trbovich* itself involved a governmental party pursuing the same objective as the movants under statutory authority to do so.¹⁹⁰ In sum, the Supreme Court’s prior rulings on the adequacy-of-representation issue make a presumption of adequacy untenable.

2. The *Parens Patriae* Rationale

The doctrinal underpinnings of the presumption are also flawed. Courts that apply the presumption typically rely on the doctrine of “*parens patriae*”¹⁹¹—literally, “parent of the country”¹⁹²—a principle of Article III standing under which government entities may initiate suits on behalf of their citizens.¹⁹³ That doctrine, however, does not justify a presumption of adequate representation for intervention purposes, especially when the public entity is a defendant in the litigation. *Parens patriae* jurisprudence has consistently distinguished between the “quasi-sovereign” interests of the state, on the one hand, and the narrower interests of particular individuals or classes of individuals, on the other. A state may invoke the doctrine when the former type of interest—such as “the health and well-being . . . of its residents *in general*”¹⁹⁴—is at stake, but not merely to pursue the rights or interests of particular individuals.¹⁹⁵ That distinction mirrors the *Trbovich* Court’s

189. *Hopwood v. Texas*, 21 F.3d 603, 605 (5th Cir. 1994) (emphasis added) (quoting *Trbovich*, 404 U.S. at 538 n.10).

190. See *supra* text accompanying notes 60–77.

191. See, e.g., *United States v. Hooker Chem. and Plastics Corp.*, 749 F.2d 968, 984 (2d Cir. 1984); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1000 (8th Cir. 1993).

192. BLACK’S LAW DICTIONARY 1114 (6th ed. 1990).

193. See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 3-20, at 147–151 (2nd ed. 1988).

194. *Alfred L. Snapp & Sons v. Puerto Rico*, 458 U.S. 592, 607 (1982) (emphasis added).

195. See, e.g., *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976); *North Dakota v. Minnesota*, 263 U.S. 365 (1923); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Oklahoma v. Atchison, Topeka and Santa Fe Ry. Co.*, 220 U.S. 277 (1911); *Kansas v. United States*, 204 U.S. 331 (1907).

reasoning and undermines a blanket presumption of adequate government representation.

Illustrative of that distinction is *Alfred L. Snapp & Son, Inc. v. Puerto Rico*,¹⁹⁶ in which the Commonwealth of Puerto Rico sued a number of farming concerns in Virginia, alleging that those companies had discriminated against Puerto Rican workers in violation of federal labor and immigration laws. Seeking declaratory and injunctive relief in its *parens patriae* capacity, Puerto Rico asserted that the alleged discrimination deprived *the Commonwealth* of its right “to effectively participate in the benefits of the Federal Employment Service System of which it is a part,” and thereby injured its efforts “to promote opportunities for profitable employment for Puerto Rican laborers and to reduce unemployment in the Commonwealth.”¹⁹⁷

The Supreme Court held that Puerto Rico had *parens patriae* standing to maintain the suit. The Court first noted that *parens patriae* standing does *not* arise when the State is merely “stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves”¹⁹⁸ Rather, “the State must articulate an interest apart from the interests of particular private parties.”¹⁹⁹ Specifically, it must articulate a “quasi-sovereign interest,” which includes, among other things, an interest “in the health and well-being—both physical and economic—of its residents in general.”²⁰⁰ Applying those principles, the Court held that Puerto Rico had a quasi-sovereign interest in protecting a substantial segment of its citizenry from discrimination and in securing its rightful status within the federal system.²⁰¹

By contrast, in *Pennsylvania ex rel. Rafferty v. Philadelphia Psychiatric Center*,²⁰² the Commonwealth of Pennsylvania and a nurse sued a state-funded psychiatric center that had earlier terminated the nurse’s employment. The suit alleged that, by firing the nurse for criticizing the hospital in a newspaper interview, the hospital had violated her First Amendment rights.²⁰³ The court dismissed the Commonwealth for lack of standing and ruled that in order to assert *parens patriae* standing, a governmental entity must demonstrate:

196. 458 U.S. 592 (1982).

197. *Id.* at 600.

198. *Id.* (citing *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387 (1938); *Oklahoma v. Atchison, Topeka, & Santa Fe Ry. Co.*, 220 U.S. 277 (1911)).

199. *Alfred L. Snapp*, 458 U.S. at 607.

200. *Id.* at 607.

201. *See id.* at 608–610.

202. 356 F. Supp. 500 (E.D. Pa. 1973).

203. *See id.* at 502.

(1) that a substantial number of the state's inhabitants are threatened with injury; and (2) that the state's injury is somehow separate and distinct from the injury to individuals.²⁰⁴ The case at bar met neither of those requirements because the alleged injury directly affected only the private plaintiff.²⁰⁵

A long line of decisions reinforces the distinction between the private interests of individuals and the more general public concerns that support *parens patriae* status.²⁰⁶ Indeed, a number of cases suggest that the government may proceed in that capacity *only* where private plaintiffs could not obtain full relief in an independent suit.²⁰⁷

Importantly, the case law does *not* suggest that remedying discrimination and promoting diversity do not qualify as important governmental responsibilities that serve the public welfare, or that a government entity cannot properly invoke *parens patriae* status to vindicate civil rights or other constitutional interests.²⁰⁸ Rather, the

204. See *id.* at 505.

205. In the court's view, the Commonwealth's asserted interest in the free flow of information regarding state-operated programs was too remote and speculative to support *parens patriae* status. See *id.*

206. Compare *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976) (stating that Pennsylvania lacked *parens patriae* standing to challenge New Jersey's "transportation benefits tax" as violative of Privileges and Immunities and Equal Protection Clauses; the litigation was, in reality, a collectivity of private suits against New Jersey for withheld taxes), with *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (stating that Pennsylvania and Ohio properly invoked *parens patriae* status in suit to enjoin West Virginia from enforcing state legislation that would constrict the supply of natural gas into their territories; each state sued first, as proprietor of public institutions whose supply of gas would be cut off by the threatened interference with interstate commerce, and second, as representative of the consuming public, whose health, comfort, and welfare were jeopardized by the threatened withdrawal of gas from the interstate stream). See generally *Satsky v. Paramount Communications*, 7 F.3d 1464, 1469 (10th Cir. 1993) (allowing state to sue to protect citizens against pollution of air over its territory, but not to assert the rights of private individuals); *Pennsylvania ex rel. Sheppard v. National Ass'n of Flood Insurers*, 520 F.2d 11, 22 (3rd Cir. 1975) (stating that a quasi-sovereign interest must be an interest of the state existing separate and apart from those injuries suffered individually by the state's citizens); *TRIBE, supra* note 193, § 3-20, at 147 (explaining that "[when] a state is merely suing on behalf of its citizens without possessing any independent injury to itself, the standing requirement is ordinarily thought not to have been satisfied.") (footnote omitted).

207. See, e.g., *Pennsylvania v. Porter*, 659 F.2d 306, 316 (3rd Cir. 1981) (allowing state to maintain suit against police officer and officials for unconstitutional abuse of citizens where, *inter alia*, individual victims lacked the resources to challenge a broad-based pattern of police abuse and, in any event, might be unable to show a likelihood of future violations); *State ex rel. McCain v. Metschan*, 32 53 P. 1071 (Or. 1898) (stating that *parens patriae* authority is implicated where the wrong complained of is public in character, affecting no one citizen more than another, leaving private plaintiffs without remedy).

208. The case law is strongly to the contrary. See, e.g., *Alfred L. Snapp and Sons v. Puerto Rico*, 458 U.S. 592 (1982) (allowing Commonwealth to sue a private company, alleging that it had discriminated against its citizens in employment, especially in light of the history of invidious discrimination against Puerto Ricans); *Porter*, 659

import of *parens patriae* jurisprudence for present purposes is that the government's participation in a suit through that mechanism is no substitute for the role of an otherwise qualified intervenor seeking to protect its own narrower interests. To the contrary, Rule 24(a)(2)'s requirement that applicants possess a distinct and identifiable interest in the subject matter of the existing suit ensures that intervenors' concerns will be independent of the more diffuse public interest that the government pursues in its *parens patriae* capacity.

Accordingly, a general presumption of adequate government representation is far too blunt an instrument to draw support from the particularized role and function of the *parens patriae* doctrine. As applied by most courts, the presumption does not distinguish between cases in which the government is a defendant, as opposed to a plaintiff, or between cases in which the government pursues its own pecuniary or proprietary interests and those in which it seeks to protect the health and welfare of its citizens. Thus, where an applicant satisfies Rule 24(a)(2)'s "interest" requirement, its motion should not be defeated on a *parens patriae* rationale.

More broadly, the representational role and responsibilities of government in a democratic society make a blanket presumption of adequate representation inappropriate. Governments represent all of their residents, and must necessarily balance constituents' competing interests. That role contrasts starkly with the position of individuals and organizations affected by the subject matter of the litigation.²⁰⁹ For example, a public entity's representative role may cause government litigants to adopt compromise approaches or to change positions over time. The Supreme Court has acknowledged that reality where the federal government acts as litigant, commenting that "[i]n addition to those institutional concerns traditionally considered by the Solicitor General, the panoply of important public issues raised in governmental litigation may quite properly lead successive administrations of the Executive Branch to take differing positions with respect to the resolution of a particular issue."²¹⁰

F.2d at 316 (allowing state to sue police officials as *parens patriae* to remedy unconstitutional police misconduct); *Pennsylvania v. Brown*, 260 F. Supp. 323 (E.D. Pa. 1966) (state had standing as *parens patriae* in suit under 42 U.S.C. § 1983 to enjoin a school from refusing to admit African American students).

209. See, e.g., *In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991) ("[A state agency], in theory, should represent all of the citizens of the state," whereas a public interest group represents only a subset of citizens concerned with a particular issue).

210. *United States v. Mendoza*, 464 U.S. 154, 161 (1984) (rejecting collateral estoppel of United States). Public entities are also susceptible to agency capture and ideological bias. Yet those phenomena are difficult to demonstrate in a particular case and courts are understandably loath to so label the actions of a sitting administration. A presumption of adequate representation by government ignores those

The distinction between public and private interests is clearly evident in affirmative action cases. While the residents of a state or municipality—and, therefore, their government—have an interest in remedying discrimination within the jurisdiction, that general concern is necessarily distinct from the particularized interests of minority applicants (who will be considered under different standards if the suit is successful) and members of the current student body (whose academic environment may be radically altered as a result of the litigation).

Moreover, the very posture of those cases—in which the government appears as a defendant to maintain its policies—undermines the presumption. Whatever the validity of the *parens patriae* rationale in cases in which the government initiates litigation under statutory authority on behalf of the putative intervenor, no such mandate exists where the government is haled into court as a defendant. Although the interests of the private applicant and the government may overlap in that situation, they clearly diverge as well, so as to make a presumption of adequacy inappropriate.²¹¹

B. Undervaluation of Conflicting Interests

The courts that have denied intervention based on adequate representation have also dismissed or undervalued the conflicts that exist between the interests of beneficiaries and interests of state defendants. They have ruled, for example, that the movants failed to show that the State would not vigorously defend its program, or that the movants lacked a “separate defense” of the program that the defendants had failed to assert.²¹² But that standard is inappropriately high

realities or, at least, improperly adds to the burden already facing applicants in those circumstances.

211. See, e.g., *United States v. Hooker Chem. & Plastics Corp.*, 101 F.R.D. 451, 457 n.5 (W.D.N.Y. 1984), *aff'd*, 749 F.2d 968 (2d Cir. 1984) (“It is not uncommon for courts to depart from the *parens patriae* doctrine when the action is one in which government regulations are challenged and private parties who benefit from such regulations seek to intervene as defendants.”); see also *Chiglo v. City of Preston*, 104 F.3d 185, 188 (8th Cir. 1997) (“If the citizen stands to gain or lose from the litigation in a different way from the public at large, the *parens patriae* would not be expected to represent him.”); *Sierra Club v. Espy*, 18 F.3d 1202, 1207–1208 (5th Cir. 1994) (“[The] government must represent the broad public interest, not just the economic concerns of the timber industry.”) (emphasis in original); *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (stating that government representation of private parties is inadequate in certain circumstances due to government duty to represent broad public interest).

212. See *Hopwood v. Texas*, 21 F.3d at 605; *Grutter v. Bollinger*, No. 97-CV-75928 at 4 (E.D. Mich. July 6, 1998) (available at University of Michigan Law School) (visited September 5, 1999) <<http://umich.edu/~newsinfo/Admission/gruord.html>> (“Defendants indicate that they will vigorously defend this case, and the proposed intervenors have not offered any persuasive reason why the Court

and asks the wrong question; Rule 24(a)(2) requires movants to demonstrate only that representation “may be” inadequate.²¹³ That requirement is satisfied, at a minimum, where the supposed representative’s interests diverge from, or conflict with, those of the movant.²¹⁴ While mere disagreement with an existing party’s tactics may not alone demonstrate inadequate representation,²¹⁵ the fact that an applicant seeks to address relevant issues that the existing party may not—due to conflicts, collusion, or nonfeasance—does.²¹⁶ Even

should doubt this representation.”), *rev’d*, 1999 FED App. 0295P (6th Cir. Aug. 10, 1999); *id.* at 12–13 (no separate defense); *Smith v. Washington*, No C97-3357, slip op. at 3 (W.D. Wash. July 27, 1998) (Law School “has vigorously defended its policy thus far . . . and there is no basis for concluding that it will not continue to do so.”).

213. Even where the presumption of adequate government representation applies, courts repeatedly have held that the presumption of adequate representation is rebutted where the existing party has an interest that is *potentially* adverse to those of the proposed intervenor. Significantly, that standard does not require that those interests be diametrically *opposed*. See, e.g., *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1478 (11th Cir. 1993) (ruling that voters are entitled to intervene in voting rights suit to defend at large system, county commissioner defendants “had to consider the overall fairness of the election system, . . . the expense of litigation, . . . and the social and political divisiveness of the election issue”); *Chiles v. Thornburgh*, 865 F.2d 1197, 1214–15 (11th Cir. 1989) (holding that alien detainees have distinct interest in conditions of confinement that may not be served by county government concerned with effect of detention facility on outside community); *Kneeland v. NCAA*, 806 F.2d 1285, 1288 (5th Cir. 1987) (recognizing adversity of interests “between agency attempts to represent the regulated parties and statutory mandates to serve the ‘public interest’”) (citations omitted); *New York Pub. Interest Research Group v. Regents of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975) (putative intervenors, an association of pharmacists, had a narrower, economic interest in regulatory statute than did the defendant regents); *Hines v. D’Artois*, 531 F.2d 726, 738 (5th Cir. 1976) (granting intervention to state examiner in municipal employment discrimination suit where “[h]is interests . . . may not coincide completely with those of defendants below.”). Courts have similarly held that the presumption of adequate representation by parties seeking the same ultimate objective as the applicant must fall under those circumstances. See *Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir. 1984).

214. See *Standin v. Union Elec. Co.*, 309 F.2d 912, 919 (8th Cir. 1962) (Blackmun J.) (holding that representation is inadequate where representative possesses an adverse interest, fails to fulfill its duty, or colludes with an opposing party); *Jansen v. City of Cincinnati*, 904 F.2d 336, 343 (6th Cir. 1990) (“[I]nterests need not be wholly ‘adverse’ before there is a basis for concluding that existing representation of a ‘different’ interest may be inadequate.”) (quoting *Nuesse v. Camp.*, 385 F.2d 694, 703 (D.C. Cir. 1967)); see also *Martin v. Kalvar Corp.*, 411 F.2d 552, 553 (5th Cir. 1969) (enumerating the same considerations under current Rule 24(a)(2)); *WRIGHT, MILLER & KANE*, *supra* note 54, § 1908, at 292 (same). Nor must an intervenor advance a “separate defense.” See *AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997) (finding movant’s different “approach and reasoning” sufficient).

215. See, e.g., *Bumgarner v. Ute Indian Tribe*, 417 F.2d 1305, 1308 (10th Cir. 1969) (holding that the fact that appellants would have handled the case differently “is not sufficient to challenge the adequacy of the representation”); *Pierson v. United States*, 71 F.R.D. 75, 80 (D. Del. 1976) (“A simple difference as to litigation tactics is insufficient to satisfy the inadequate representation requirement.”).

216. See, e.g., *Jansen v. City of Cincinnati*, 904 F.2d 336, 343 (6th Cir. 1990) (stating that where city and African American putative intervenors disagreed as to factual

assuming the validity of a presumption of adequate representation, the presumption is rebutted by such a showing.²¹⁷

Dynamics unique to the defense of affirmative action policies create inherent conflicts between the interests of party defendants and beneficiaries. Adversity of interest arises from the substantive legal showing necessary to defend race-sensitive programs, in terms of defendants' liability concerns, administrative and fiscal considerations, and political pressures surrounding the sensitive issue of race.

1. Liability Concerns

In *City of Richmond v. J.A. Croson Co.*,²¹⁸ and *Adarand Constructors, Inc. v. Peña*,²¹⁹ the Supreme Court held that certain public affirmative action programs intended to remedy racial discrimination are subject to strict constitutional scrutiny.²²⁰ Under *Croson* and *Adarand*, such programs are lawful when they are narrowly tailored to address the continuing effects of past or present discrimination.²²¹ In

predicate for affirmative action plan, intervention must be granted); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) (citations omitted) (inquiring "whether [the defendant] will undoubtedly make all of the intervenor's arguments, whether [the defendant] is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected.").

217. See *Sierra Club v. Espy*, 18 F.3d 1202, 1207-1208 (5th Cir. 1994) (presumption is rebutted where interests of movant and government may diverge in fact; in the instant case, "government must represent the broad public interest, not just the economic concerns of the [industry movants]"); *Chiglo v. City of Preston*, 104 F.3d 185, 187-188 (8th Cir. 1997) ("[A] proposed intervenor may rebut this presumption, among other ways, by showing that the *parens patriae* has committed misfeasance or nonfeasance in protecting the public."); *id.* at 188 ("If the citizen stands to gain or lose from the litigation in a different way from the public at large, the *parens patriae* would not be expected to represent him."); *accord Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1478 (11th Cir. 1993); *Chiles v. Thornburgh*, 865 F.2d 1197, 1214-15 (11th Cir. 1989); *Kneeland v. NCAA*, 806 F.2d 1285, 1288-89 (5th Cir. 1987); *New York Pub. Interest Res. Group v. Regents of Univ. of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975).

218. 488 U.S. 469 (1989).

219. 515 U.S. 200 (1995).

220. See *Adarand*, 515 U.S. at 236 (federal set-aside program); *Croson*, 488 U.S. at 494 (municipal set-aside program).

221. See *Adarand*, 515 U.S. at 227; *Croson*, 488 U.S. at 491-92. Though precedent-setting in terms of the level of scrutiny that they imposed, those rulings also reaffirmed a line of cases standing for the proposition that "government bodies . . . may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination." *United States v. Paradise*, 480 U.S. 149, 166 (1987) (citing *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 480 (1986), and cases cited therein); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) ("The Court is in agreement that . . . remedying past or present racial discrimination . . . is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program.")

order to defend those efforts, institutions must demonstrate a "strong basis in evidence for [their] conclusion that remedial action was necessary."²²²

Although an institution need not confess that it is presently liable for unlawful racial discrimination in order to defend an affirmative action plan,²²³ evidence of past and present discrimination by the defendant institution and continuing effects of that discrimination are central to the survival of such plans. In particular, the *Croson* standard places great weight on evidence that would raise an inference of liability against the government under the Equal Protection Clause and 1964 Civil Rights Act. The *Croson* Court focused, for example, on the role of racial disparities in identifying past and present discrimination,²²⁴ noting the relevant statistical comparisons for demonstrating remediable discrimination:

In the employment context, we have recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of discrimination. . . . But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating

(O'Connor, J., concurring in part and concurring in judgment). Public institutions may address identified private racism, as well as their own discrimination, through appropriate race-conscious measures. See *Croson*, 488 U.S. at 491-92 ("It would seem . . . clear . . . that a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction."). By contrast, more diffuse "societal" discrimination cannot support such efforts. See *Croson*, 488 U.S. at 499.

222. *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)); see also *Podberesky v. Kirwan*, 956 F.2d 52, 57 (4th Cir. 1992) (applying "strong basis" requirement).

223. See *Wygant*, 476 U.S. at 286 (opinion of O'Connor, J.) ("This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required."); see also *Croson*, 488 U.S. at 492 (stating that narrowly tailored affirmative action is permissible where government has become a "passive participant" in racial exclusion by private actors).

224. See 488 U.S. at 501 ("There is no doubt that '[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination' under Title VII.") (quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-308 (1977)). The Court has long held that racial disparities are probative of intentional discrimination. See, e.g., *Castaneda v. Partida*, 430 U.S. 482, 495-96 (1977); *Swain v. Alabama*, 380 U.S. 202 (1965); *Norris v. Alabama*, 294 U.S. 587 (1935); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); Michael O. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966). But see *McCleskey v. Kemp*, 481 U.S. 279 (1987) (holding that evidence of statistical disparities in capital sentencing was insufficient to demonstrate Equal Protection violation).

discriminatory exclusion must be the number of minorities qualified to undertake the particular task.²²⁵

The latter standard is appropriate in the higher education context, where students must meet certain minimum requirements. Yet that same showing creates a *prima facie* case of unlawful discrimination *against* the affirmative action defendant vis-à-vis excluded minorities—that is, the putative intervenors.²²⁶ Under the Equal Protection Clause, when a person affected by a governmental policy “has shown substantial underrepresentation of his group, he has made out a *prima facie* case of discriminatory purpose, and the burden then shifts to the State to rebut that case.”²²⁷ As the Supreme Court recently explained, that rule is based on the principle that “the impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions.”²²⁸ If the government cannot provide an adequate race-neutral explanation for the disparity, then it is liable to members of the underrepresented group under the Constitution.²²⁹ Thus, by proffering evidence of the racial disparities that would exist absent the use of race-sensitive policies, affirmative action defendants expose themselves to potential liability to

225. *Crososn*, 488 U.S. at 501–502. (citing *Hazelwood*, 443 U.S. at 308; *Johnson v. Transportation Agency*, 480 U.S. 616, 651–652 (1987) (O’Connor, J., concurring in judgment)).

226. See *Crososn*, 488 U.S. at 500 (O’Connor, J.) (stating that the program at issue could not withstand strict scrutiny because “[t]here is nothing approaching a *prima facie* case of a constitutional or statutory violation by *anyone* in the Richmond construction industry”) (emphasis in original).

227. *Castaneda v. Partida*, 430 U.S. 482, 496 (1977); see also *Batson v. Kentucky*, 476 U.S. 79, 94 (1986) (“Once the defendant makes the requisite showing [by establishing a *prima facie* case], the burden shifts to the State to explain adequately the racial exclusion. The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties,” but must demonstrate that the challenged effect was due to “‘permissible racially neutral selection criteria.’”) (quoting *Alexander v. Louisiana*, 405 U.S. 625, 631–32 (1972)).

The same dilemma arises in challenges to voluntary affirmative action in employment under Title VII. In *United Steelworkers of America v. Weber*, 443 U.S. 193, 208–09 (1979), the Supreme Court held that private employers may take race into account in their employment decisions in order to eliminate “a manifest racial imbalance” in “traditionally segregated job categories” and when the decisions do not “unnecessarily trammel the interests of the white employees.” In *Johnson v. Transportation Agency*, 480 U.S. 616, 627 n.6, 631 (1987), the Court held that Title VII permits public employers to take race into account in like circumstances. The “manifest imbalance” requirement, though less stringent than the *Crososn* standard, similarly implicates liability concerns for affirmative action defendants.

228. *Reno v. Bossier Parish Sch. Bd.*, No. 95-1455 (May 12, 1997).

229. See *Castaneda*, 430 U.S. at 493–500; *Washington v. Davis*, 426 U.S. 229, 241 (1976).

minority applicants.²³⁰ For formerly segregated institutions, such evidence may demonstrate that further remedial efforts—and court supervision—are needed.²³¹ Thus, an affirmative action defendant cannot advance a vigorous defense of its program on remedial grounds without risking liability to beneficiaries and others under the Constitution. The same dilemma exists for defendants who are recipients of federal funds and for employers under the disparate treatment standards of Titles VI²³² and VII²³³ of the 1964 Civil Rights Act, respectively.²³⁴

Under those provisions' disparate *impact* principles, the risk of liability for defendants is even greater. Statistical disparities of the kind described in *Croson* give rise to a *prima facie* case of disparate impact discrimination that a defendant may rebut only through evidence that its selection criteria are empirically valid and manifestly necessary to its legitimate institutional objectives.²³⁵ The

230. See Charles Lawrence, *When the Defendants are Foxes Too: The Need for Intervention by Minorities in "Reverse Discrimination" Suits Like Bakke*, 34 GUILD PRAC. 1, 8 (1978) (asserting that, in the *Bakke* litigation, "[s]uch a defense would have constituted an admission that would have subjected the defendant to legal attack by minority students who had been denied admission."). That is true both where minority applicants contend that the Constitution *requires* race-conscious policies and where the contention is simply that the institution's underlying selection system is discriminatory.

231. See generally *United States v. Fordice*, 505 U.S. 717 (1992) (stating that segregative effects of admissions criteria and disparate attendance rates were evidence that state had not disestablished its racially dual system of higher education); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 211 (1973) (requiring formerly segregated school board to prove that its conduct "did not create or contribute to" the racial identifiability of its schools or that racially identifiable schools are in no way the result of school board action).

232. See *Dowdell v. City of Apopka*, 511 F. Supp. 1375, 1384 (M.D. Fla. 1981) (applying Equal Protection inquiry in Title VI case).

233. See *Bazemore v. Friday*, 478 U.S. 385 (1986) (statistical disparity establishes *prima facie* case); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (same); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977) (same).

234. Title VII's employment protections do not cover student admissions, but may be relevant to the employment of graduate students as teaching assistants. Moreover, the principles discussed here are equally applicable to cases involving affirmative action in public employment. Also relevant to the defense of affirmative action programs are the Civil Rights Act of 1866, 42 U.S.C. § 1981, which prohibits racial discrimination in private contracts, and a host of state and municipal civil rights laws. Cf. *New York State Club Assn. v. New York City*, 487 U.S. 1, 10–11, 13–14 (1988) (upholding municipal ordinance prohibiting private racial discrimination).

235. See *supra* note 149 and accompanying text; see also 42 U.S.C. § 2000e-2(k) (1) (A) (i) (1998) (stating that in order to stand under Title VII, an employment practice with a racially disparate effect must be "job related for the position in question and consistent with business necessity").

institution bears both the burden of production and the burden of persuasion in making that showing.²³⁶

The threat of disparate impact liability by affirmative action defendants to minority applicants is not merely speculative. Minority students recently filed a suit against the University of California at Berkeley, alleging that its post-affirmative action admissions policy discriminates against African American, Latino, and Filipino American applicants in violation of Title VI.²³⁷ Specifically, the plaintiffs allege that University of California, Berkeley's over-reliance on standardized test scores and advanced placement courses—unavailable in many predominantly-minority schools—has a racially adverse impact on the plaintiff groups that is not justified by educational necessity.²³⁸

Challenges to numerical selection procedures have been particularly successful under Title VI,²³⁹ and, as has been mentioned, a growing body of research and commentary contends that standardized measures such as the SAT, LSAT, and MCAT have discriminatory effects and lack the predictive value that the civil rights laws demand.²⁴⁰

236. See 42 U.S.C. § 2000e(m) (“[T]he term ‘demonstrates’ means meets the burdens of production and persuasion.”) (emphasis added); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 & n.14 (11th Cir. 1993) (applying same standard in Title VI case).

237. *Rios v. Regents of the Univ. of Cal.*, No. 99-0525, Complaint (filed Feb. 2, 1999); see also M. Fletcher, *Civil Rights Groups File Suit Over Calif. Admissions Policy*, WASH. POST, Feb. 3, 1999, at A2. A similar class of plaintiffs unsuccessfully challenged the validity of Proposition 209 itself under federal constitutional and statutory law. See *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), cert. denied, 522 U.S. 963 (1997). Ironically, the Center for Individual Rights—counsel for plaintiffs in *Hopwood*, *Gratz*, *Grutter*, and *Smith*, supra—obtained intervention in that case on behalf of the sponsors of the initiative.

238. See *Rios v. Regents of the Univ. of Cal.*, No. 99-0525, Complaint at 15–18 (filed Feb. 2, 1999).

239. See *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984) (use of non-validated IQ tests with discriminatory effect on Black children to place students in classes for the educable mentally retarded violates Title VI); *Groves v. Alabama State Bd. of Educ.*, 776 F. Supp. 1518 (M.D. Ala. 1991) (enjoining under Title VI state board of education from using minimum ACT score as requirement for admission to undergraduate teacher training program); see also 34 C.F.R. § 100.3(b) (2) (1998) (U.S. Dept. of Education regulations implementing Title VI); *Sharif v. New York State Educ. Dep’t*, 709 F. Supp. 345 (S.D.N.Y. 1989) (use of SAT scores to award merit scholarships where 10-point male/female score differential existed violated Title VI’s sister statute, Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681–1688).

240. The same is true of a range of non-numerical criteria employed by admissions offices. Consider, for example, so called “legacy” admissions, in which universities apply relaxed standards to the relatives of alumni. See John Larew, *Why Are Doves of Unqualified, Unprepared Kids Getting into Our Top Colleges? Because Their Dads Are Alumni*, WASHINGTON MONTHLY, June, 1991, at 10 (noting, *inter alia*, that one-fifth of Harvard students received admissions preferences because their parents attended the University; and that Yale “legacy” applicants were two-and-a-half times

The *Croson* standard thus requires defendants to risk liability to minority applicants in order to defend their affirmative action policies on remedial grounds. That awkward posture brings the defendant's interest in avoiding liability into conflict, first, with beneficiaries' narrower and unencumbered interest in preserving remedial policies and second, with the beneficiaries' independent interest in opposing factual findings and injunctive remedies that vitiate their rights to unbiased selection procedures and a desegregated environment.²⁴¹ In each instance, the specter of civil rights liability prevents defendants from adequately representing the interests of beneficiaries. Accordingly, the court of appeals in *Grutter* was correct in holding that conflicts inherent in a remedial

more likely to be accepted to that school than were their "unconnected" peers). For formerly-segregated or racially homogeneous institutions, that practice has the effect of perpetuating past exclusion with no discernable educational benefits. Similarly, preferences for students from well-funded schools with advanced placement and other competitive courses also tend to disadvantage students of color.

241. In *Hopwood*, the movants sought to advance both of those interests. They moved for intervention in order to present evidence that the Texas Index—a formula which uses as factors a student's LSAT score and undergraduate GPA—was invalid as applied to African American students because it failed to predict reliably their academic success at the Law School. See *Hopwood v. Texas*, No. 94-50569, Brief of Proposed Intervenors-Defendants-Appellants at 15-18 (filed Dec. 19, 1994). In a declaration, the movant's expert concluded:

(1) that regression analysis results obtained by the Law School Admission Services . . . conclusively demonstrate that the selection criteria which the Law School has used to evaluate African American applications was invalid, (2) that the Texas Index should not have been used as an initial sorting criterion for African American applications, but (3) that the practice of reducing the numerical values of the Texas Index required of African American applications had, at least some ameliorative effect upon the invalid application of the Texas Index.

Id. at 16.

If proven, that allegation would have rendered the TI—upon which the plaintiffs based their theory of liability and desired remedy—invalid under Title VI. See, e.g., 34 C.F.R. § 100.3(b) (2) (1998) (U.S. Dept. of Education Title VI regulations prohibiting use of invalid selection criteria with discriminatory effects); *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984) (use of non-validated IQ tests with discriminatory effect on Black children to place students in classes for the educable mentally retarded violates Title VI). The applicants in *Hopwood* further argued that de-emphasizing the TI for African American applicants was a necessary and lawful response to the limitations of that measure for that group of students. Brief of Proposed Intervenors-Defendants-Appellants at 30 (filed Dec. 19, 1994). See *Kirkland v. New York Dept. of Corrective Services*, 628 F.2d 796 (2d Cir. 1980) (approving the addition of 250 points to the raw scores of groups adversely impacted by invalid examination); *Association Against Discrimination in Employment v. City of Bridgeport*, 594 F.2d 306 (2d Cir. 1979) (indicating lowering the cutoff score for minority test takers might be a suitable remedy for an invalid test with a discriminatory effect).

defense raised the possibility that representation by the State might be inadequate:

We find persuasive [the movants'] argument that the University is unlikely to present evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria, and that these may be important and relevant factors in determining the legality of a race-conscious admissions policy.²⁴²

Significantly, the Court in *Regents of the University of California v. Bakke*²⁴³ held that the educational benefits of a diverse student body also provide a compelling governmental interest which supports a "properly devised admissions program."²⁴⁴ As the Court has since noted, "a 'diverse student body' contributing to a robust exchange of ideas is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated."²⁴⁵ Following that precedent, numerous lower courts have upheld public affirmative action policies on diversity grounds.²⁴⁶ Because the *Bakke* diversity standard allows "an admissions program where race or ethnic background is simply one element—to be weighed fairly

242. *Grutter v. Bollinger*, 1999 FED App. 0295P, at 11 (6th Cir. Aug. 10, 1999). The accuracy of that finding was subsequently confirmed by a University official's public statement that "[w]e strongly disagree that our admissions process is discriminatory in any way." Peter Schmidt, *The Chronicle of Higher Education*, *Today's News: Court Opens Way for Minority Students to Intervene in Mich. Affirmative-Action Case* (visited September 3, 1999) <<http://www.chronicle.com/daily/99/08/99081101n.htm>>.

243. 438 U.S. 265 (1978).

244. *Bakke*, 438 U.S. at 320 (opinion of Powell, J., joined by Brennan, White, Marshall, and Blackmun, JJ.).

245. *Metropolitan Broad., Inc. v. FCC*, 497 U.S. 547, 568 (1990), *overruled in part*, *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *see also* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest.").

246. *See* *Jacobson v. Cincinnati Bd. of Educ.*, 961 F.2d 100, 102–03 (6th Cir. 1992) (finding compelling interest in obtaining educational benefits of racially diverse faculty); *Zaslowsky v. Board of Educ.*, 610 F.2d 661, 663–64 (9th Cir. 1979) (same); *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988) (holding that law enforcement agency had compelling interest in diverse workforce); *Talbert v. City of Richmond*, 648 F.2d 925, 931–32 (4th Cir. 1981) (same); *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695–96 (6th Cir. 1979) (same); *University and Community College Sys. of Nevada v. Farmer*, 930 P.2d 730 (Nev. 1997) (upholding the consideration of race by the University of Nevada at Reno in hiring in order to diversify its faculty). *But see* *Taxman v. Board of Educ.*, 91 F.3d 1547 (3d Cir. 1996) (rejecting diversity rationale in Title VII context), *cert. granted*, 521 U.S. 1117, (1997), *dismissed as moot*, 522 U.S. 1010 (1997).

against other elements—in the selection process,”²⁴⁷ it may raise fewer of the liability concerns discussed above. However, demonstrating the need for specific efforts to achieve diversity likely requires the same type of statistical disparity evidence as does a remedial defense. Moreover, because plaintiffs in affirmative action cases have typically sought decisions overruling or ignoring *Bakke*,²⁴⁸ and at least one lower court has essentially done so,²⁴⁹ a diversity defense offers no protection to beneficiaries’ anti-discrimination interests.

It also bears noting that those interests are not merely a subset of the defendant’s interests. Beneficiaries will often be well served, for example, by a ruling that sets aside an existing selection process, but recognizes the necessity of non-discriminatory selection criteria, the need to remedy past discrimination, and the availability of lawful means to meet those demands.²⁵⁰ So long as the remedy serves those goals, it is likely to protect beneficiaries’ interests in the litigation. For the defendant, however, such a ruling would contravene its interest in avoiding liability and court-imposed limitations on its autonomy.

That conflict was manifest in *Hopwood*, where beneficiaries sought intervention in part to attack the Law School’s undergraduate admissions criteria, which relied heavily on numerical measures that the movants’ expert found to be invalid for African American students.²⁵¹ Not surprisingly, none of the existing parties advanced that argument. Similarly, beneficiary-movants in the *Wessman* case sought intervention to demonstrate that “selecting among qualified students in the manner proposed by plaintiffs, based solely on composite [numerical scores] would vitiate [their] interest in a constitutional and non-discriminatory . . . admissions process.”²⁵² The threat of liability inherent in the *Croson* standard and

247. 438 U.S. at 318; see also *id.* at 316 (discussing favorably the Harvard University admissions program).

248. See Center for Individual Rights, *Michigan Questions and Answers* <<http://www.wdncom/cir/mighiqu.htm>> (visited July 19, 1998) (contending that Justice Powell’s opinion in *Bakke* “does not correctly state the law”).

249. See *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

250. See Lawrence, *supra* note 230, at 8 (“Intervenors [in *Bakke*] would have offered evidence to demonstrate that the effect of the University’s substantial reliance on [the MCAT] is to actively discriminate against minorities since the tests make minorities appear to be less qualified than their subsequent performance in medical school proves them to be.”).

251. See *supra* note 241.

252. No. 97-11923-WGY, Memorandum of Law in Support of Motion to Intervene, at 7 (filed Sept. 11, 1997); see also slip op. at 13 (“[N]o one (least of all, the School Committee) claims that the examination or any component thereof is discriminatory

beneficiaries' interest in prohibiting discriminatory selection criteria make affirmative action defendants inadequate representatives of minority movants.

2. Administrative Concerns

Another type of conflict that arises in affirmative action cases relates to the divergent economic and administrative interests of institutional defendants on the one hand, and the narrower participatory interests of beneficiary groups on the other. As in many public law cases, the government's interests as administrator—here of a public educational system—diverge from those of beneficiaries as participants within that system. As Professor Moore has explained:

In some situations, the government's representation of the general public interest will put it in sufficiently sharp conflict to private interests that those private interests may intervene because, in fact, they are not adequately represented by the government. This is frequently the case when one group of citizens sues the government, challenging the validity of laws or regulations and the citizens who benefit from those laws or regulations wish to intervene and assert their own, particular interests rather than the general, public good.²⁵³

Intervention by affected non-parties is particularly appropriate in such public law cases because of their potential to affect outsiders in unforeseen ways.²⁵⁴

In the affirmative action context, defendants have an interest not only in avoiding liability, but also in maintaining selection criteria and other operating procedures that are easy to administer, relatively inexpensive, and enjoy broad support. Beneficiaries, in contrast, are generally unconcerned with the particular mechanisms that are used, so long as they are fair and preserve equal opportunity.

in operation or effect, or that it would be discriminatory if it were used as the sole criterion for admission.”).

253. MOORE ET AL., *supra* note 34, ¶ 24.03[4][a], at 24–49.

254. See Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 270 n.1 (1989) (arguing that intervention is particularly appropriate in public law cases); Cindy Vreeland, *Public Interest Groups, Public Law Litigation, & Federal Rule 24 (a)*, 57 U. CHI. L. REV. 279 (1990) (same); Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 UCLA L. REV. 244 (1978) (same); Symposium, *Problems of Intervention in Public Law Litigation*, 13 U.C. DAVIS L. REV. 211 (1980) (same).

Again, those divergent interests are particularly well-illustrated by the role of standardized tests and other numerical selection criteria. In addition to ease of use—when compared with interviews, portfolio approaches, and other less quantifiable methodologies—student test scores have become an integral part of a university's perceived standing in the academic community and among potential applicants. A former admissions officer recently explained this phenomenon:

Part of what admissions officers worry about," says [former Dartmouth admissions officer Michele] Hernández, "is the college guide books that kids read, which list the average S.A.T. scores for every college. If colleges take too many kids with lower scores, their averages drop, and that can create a domino effect. Once colleges start reporting lower average scores, they seem less desirable, and they stop attracting the strongest kids."²⁵⁵

Beneficiaries' interest in challenging certain standardized tests and other measures that disproportionately exclude applicants of color is therefore potentially at odds with defendants' institutional interest in maintaining those measures.²⁵⁶

3. Political Concerns

In addition to administrative factors, a range of political concerns limit institutional defendants' willingness vigorously to defend affirmative action policies. For example, the admission of discrimination—especially recent or contemporaneous discrimination—is a difficult and politically sensitive endeavor for any public institution.²⁵⁷ Additionally, legislators, trustees, alumni, athletic

255. Tony Schwartz, *The Test Under Stress*, THE NEW YORK TIMES MAGAZINE, Jan 10, 1999, at 51.

256. See *Wessman v. Gittens*, 160 F.3d 790, 803 (1st Cir. 1998) ("[A]ny such claim [that numerical measures are discriminatory] would make precious little sense in the context of the School Committee's argument, for standardized achievement tests (a component of the entrance examination) are the primary objective measurement of the asserted achievement gap.").

257. See *Podberesky v. Kirwan*, 838 F. Supp. 1075, 1082 n.47 (D. Md. 1993) (noting that a university defending an affirmative action program is put in the "unusual position" of having "to engage in extended self-criticism to justify its pursuit of a goal that it deems worthy"); *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1478 (11th Cir. 1993) (granting intervention in challenge to at-large voting system, stating that county commissioners "were likely to be influenced by their own desires to remain politically popular and effective leaders," as well as "the social and political divisiveness of the election issue"); see also Lawrence, *supra* note 230, at 8

programs, and others often bring strong political pressure to bear on university admissions staff to serve various constituencies and interests. Such pressures rarely coincide with beneficiaries' interests.

Partisan and ideological opposition to affirmative action by politicians and others with influence over the defendant institution can also defeat adequacy of representation. Obvious examples of that phenomenon include the machinations of the Reagan Justice Department to eliminate affirmative action policies, including decrees that the United States had sought as plaintiff in civil rights litigation. The Department's strategies during that period included changing the government's position from support to opposition in important affirmative action cases²⁵⁸ and, at the extreme end of the spectrum, authorizing covert court filings by non-civil service attorneys to avoid consultation with responsible Department personnel.²⁵⁹

While one hopes that such backroom dealings are the rare exception, similar conflicts arise whenever the institution or counsel charged with defending a policy includes elements opposed to that policy. In *Hopwood*, for example, Texas' then Attorney General Dan Morales announced that he opposed affirmative action and would not handle the university's appeal.²⁶⁰ Similarly, after the Fifth Circuit's liability ruling in *Hopwood*, the Attorney General of Georgia—a state outside of the Fifth Circuit—recommended that affirmative action policies in the state's colleges and universities be revised or eliminated in light of the ruling.²⁶¹ Those decisions and public statements by top law enforcement officials clearly pose practical barriers to adequate government representation, in both existing and future litigation.²⁶²

("[I]nstitutions, just as individuals, find it difficult to recognize and accept their own prejudice. Recognition of past ethnic discrimination would amount to an un-American confession.")

258. See B. LANDSBERG, ENFORCING CIVIL RIGHTS: RACE DISCRIMINATION AND THE DEPARTMENT OF JUSTICE 102, 147 (1997).

259. See *id.* at 168.

260. See Rex Bossert, *Texas AG Abandons 'Hopwood'*, NATIONAL LAW JOURNAL, May 11, 1998, at A10. (quoting then Attorney General Dan Morales as stating publicly that his office "ha[d] identified no sufficient grounds" for an appeal).

261. See William H. Honan, *New Attack on Race-Based Admissions*, N.Y. TIMES, April 10, 1996, at B8.

262. Cf. *Yniguez v. Arizona*, 939 F.2d 727, 737-738 (9th Cir. 1991) (noting that Governor who originally opposed English-only ballot initiative became inadequate representative of initiative sponsors after governor declined to appeal decision holding initiative unconstitutional).

IV. THE CONSEQUENCES OF DENYING
INTERVENTION TO BENEFICIARIES

The foregoing legal, administrative, and political conflicts demonstrate that affirmative action defendants cannot adequately represent the interests of beneficiaries. Yet one might still query whether the participation of beneficiaries actually makes a difference. If that question were considered purely in terms of the survival of challenged policies, the response might be negative thus far. The *Podberesky* court allowed beneficiaries to intervene, while the *Hopwood* and *Wessman* courts did not. Yet in each of those cases, the district court upheld the consideration of race in the admissions process,²⁶³ only to be overturned by the court of appeals.²⁶⁴ The University of Georgia case, in which beneficiaries gained participation, was largely dismissed on standing grounds, with one plaintiff receiving one dollar in nominal damages.²⁶⁵ The University of Michigan cases, in which intervention was granted, and the *Smith* case, in which intervention was denied, had not concluded at the time of this writing. Moreover, although courts have typically granted intervention to minority voters in constitutional challenges to "majority-minority" electoral districts²⁶⁶—which pose similar constitutional questions and, therefore, corresponding conflicts for

263. See *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994) (finding the challenged affirmative action policy unlawful, but holding that the University could continue to consider race in its admissions process); *Podberesky v. Kirwan*, 838 F. Supp. 1075 (D. Md. 1993) (denying plaintiff's motion for summary judgment and granting defendants' motion for summary judgment); *Wessman v. Boston Sch. Comm.*, 996 F. Supp. 120 (D. Mass. 1988) (upholding, after a bench trial, the Boston Latin School's consideration of race in student assignment).

264. See *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (reversing summary judgment for defendants and ordering summary judgment for plaintiff); *Hopwood v. Texas*, 78 F.3d 931 (5th Cir. 1996) (holding that the law school may not consider race in its admissions process); *Wessman v. Gittens*, No. 98-1657 (1st Cir. 1998) (holding Boston Latin's policy unconstitutional).

265. See *Tracy v. Bd. of Regents of the Univ. Sys.* No. CV-497-45 (S.D. Ga. July 6, 1999) (orders dismissing case as to one plaintiff on standing grounds, refusing to certify case as a class action, and awarding remaining plaintiff \$1.00 in nominal relief).

266. See *Lawyer v. United States Dep't of Justice*, 117 S. Ct. 2186 (1997) (noting intervenor-defendants); *Bush v. Vera*, 517 U.S. 952 (1996) (same); *Shaw v. Hunt*, 517 U.S. 899 (1996) (same); *Miller v. Johnson*, 515 U.S. 900 (1995) (same).

government defendants²⁶⁷—the Supreme Court has invalidated a number of those districts, notwithstanding that participation.²⁶⁸

Such an inquiry is unduly narrow, however. Beneficiaries should typically be granted intervention in affirmative action cases not because their presence will guarantee the validation of challenged policies in any given case, but because their participation in the litigation is likely to inform the deliberative process, afford them a voice in defense of their own interests, and reduce the likelihood of subsequent litigation on the same subject matter. Thus, the proper question is whether their participation serves Rule 24(a)(2)'s truth seeking, protective, and judicial economy functions.²⁶⁹ A comparison of the *Hopwood* and *Wessman* decisions, on one hand, and the *Podberesky* and *Wooden* decisions, on the other, suggests that the participation of beneficiaries in the latter cases served those functions.

The *Hopwood* decision not only invalidated the particular policy at issue, but also swept away a range of values and protections of critical interest to beneficiaries. The court ruled, *inter alia*, that Justice Powell's recognition of diversity as a compelling governmental interest in *Bakke*²⁷⁰ was no longer good law;²⁷¹ that intentional discrimination in Texas' K-12 public schools and the University of Texas system was beyond the Law School's ability to redress

267. Equal protection challenges to the consideration of race in the redistricting process designed to remedy past discrimination and comply with the Voting Rights Act of 1965 pit plaintiffs against state and local governments with a history of racial exclusion in voting.

268. See *Shaw v. Hunt*, 517 U.S. 899 (1996) (invalidating North Carolina congressional districts); *Bush v. Vera*, 517 U.S. 952 (1996) (invalidating Texas congressional districts); *Miller v. Johnson*, 515 U.S. 900 (1995) (invalidating Georgia congressional districts). *But see* *Lawyer v. United States Dep't of Justice*, 117 S. Ct. 2186 (1997) (upholding settlement plan for state legislative districts against equal protection challenge).

269. Perhaps it bears noting that one need not support affirmative action in order to embrace the intervention analysis advanced here. Nor, for that matter, must a movant seek to defend the particular affirmative action policy at issue in order to warrant intervention to protect its independent interests.

270. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. at 311–315 (1978). The Court has subsequently cited *Bakke* for the proposition that “a ‘diverse student body’ contributing to a ‘robust exchange of ideas’ is a ‘constitutionally permissible goal’ on which a race-conscious university admissions program may be predicated.” *Metropolitan Broad., Inc. v. FCC*, 497 U.S. 547, 568 (1990), *overruled in part*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring).

271. See *Hopwood v. Texas*, 78 F.3d 932, 944 (“We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.”); *id.* at 945–946 (“[W]e see the caselaw as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional.”).

through race-sensitive policies;²⁷² that a racially hostile environment and poor reputation in minority communities were not the type of effects that the Law School could redress through affirmative action;²⁷³ that the race-sensitive policy was not part of the University's obligations under Title VI;²⁷⁴ and that the State's desegregation duties under *United States v. Fordice*²⁷⁵ did not expand the Law School's ability to combat past discrimination through race-sensitive admissions.²⁷⁶ More broadly, the decision embraced the validity of numerical admissions criteria as a measure of student merit.²⁷⁷

Although the *Wessman* court assumed, *arguendo*, that diversity could provide a compelling governmental interest,²⁷⁸ it rejected the notion that "racial isolation" limits minority students' willingness to participate in class discussion;²⁷⁹ rejected the notion that a permanent injunction in prior school desegregation litigation justified affirmative action;²⁸⁰ found insufficient evidence that racially disparate achievement in the Boston schools was attributable to remediable discrimination;²⁸¹ and equated numerical criteria with "strict merit selection."²⁸²

By comparison, the *Podberesky* court—which heard from beneficiary intervenors—ruled rather narrowly. It held that factual disputes existed as to the link between the school's racially hostile environment, poor reputation, underrepresentation of African American students, and low Black retention rates, on the one hand, and past discrimination on the other.²⁸³ It further held that the

272. See *id.* at 950 ("[W]e conclude that the district court erred in expanding the remedial justification to reach all public education within the State of Texas.").

273. See *id.* at 952.

274. See *id.* at 954.

275. 505 U.S. 717 (1992).

276. See *Hopwood*, 78 F.3d at 955.

277. See *id.* at 938. (describing racially disparate mean GPA and LSAT scores of admittees as a "lowering of standards"; noting that the Law School's original policy—which it later abandoned—"apparently helped the law school maintain a pool of potentially acceptable, but marginal, minority candidates."). Also of relevance to the putative intervenors, both courts in *Hopwood* found that "in recent history, there is no evidence of overt, officially sanctioned discrimination at the University of Texas." *Hopwood v. Texas*, 861 F. Supp. 551, 572 (W.D. Tex. 1994), quoted in *Hopwood*, 78 F.3d at 954.

278. See *Wessman v. Gittens*, No. 98-1657 (Nov. 19, 1998), slip op. at 6.

279. See *id.* at 9.

280. See *id.* at 11.

281. See *id.* at 13.

282. *Id.* at 10; see also slip op. at 13 ("[N]o one (least of all, the School Committee) claims that the examination or any component thereof is discriminatory in operation or effect, or that it would be discriminatory if it were used as the sole criterion for admission.").

283. See *Podberesky v. Kirwan*, 38 F.3d 147, 154-57 (4th Cir. 1994).

African American scholarship program at issue in that case was not narrowly tailored because it was limited to high-achieving Black students, included non-residents of Maryland, and utilized an "arbitrary" reference pool for determining the degree of Black underrepresentation.²⁸⁴ In other words, though it eliminated the challenged program, the court did not seriously undermine beneficiaries' broader anti-discrimination and remedial interests in future cases.

Clearly, the limited breadth of the *Podberesky* ruling sprang in part from its posture—on appeal from cross-motions for summary judgment. Nonetheless, it also appears that the participation of minority beneficiaries helped to preserve the subsidiary civil rights protections that were at risk, albeit *sub silentio*, in that litigation. In the University of Georgia case, the court denied the plaintiff's request for class certification and compensatory damages based on the *intervenor's* expert witness testimony that the plaintiff would not have been admitted even under a "race-blind" admissions process.²⁸⁵ The participation of beneficiaries in that case was therefore dispositive. The resolution of cases currently pending will, no doubt, provide further insight into the practical ramifications of intervention.

CONCLUSION

Intervention by beneficiaries in affirmative action cases serves Rule 24(a)(2)'s protective, economy, and truthseeking functions. It ensures that beneficiaries have an opportunity to defend their own constitutional and statutory interests that are at stake in those cases; it reduces the likelihood that affected non-parties will engage the courts in subsequent litigation on the same subject matter; and it ensures that relevant factual and legal aspects of the case are not neglected due to the existing parties' conflicts and limitations.

This is not to say that every beneficiary automatically warrants intervention under Rule 24(a)(2) in every affirmative action case. Rather, the interests at stake and the structural and political conflicts common to most affirmative action litigation recommend a practical, rebuttable presumption in favor of intervention in such cases.²⁸⁶

284. See *id.* at 158–60.

285. See *Tracy v. Board of Regents of the Univ. Sys.*, No. CV-497-45, slip op. at 5–7 (S.D. Ga. July 6, 1999). Notably, that testimony was provided by the same expert witness whose testimony was excluded in *Hopwood*. See *id.* (describing testimony of Dr. Shapiro).

286. A general prescription, applicable in certain substantive categories of cases, is consistent with the underpinnings of Rule 24. The propriety of intervention necessarily entails consideration of the substantive law and evidentiary requirements of

Intervention will *not* be appropriate where: (1) the purported beneficiary lacks the incentive or capacity to advance the independent interests that it identifies; (2) an existing party (or prior intervenor) has an *unfettered* motivation to advance the beneficiary's interests—that is, for case-specific reasons, an existing litigant lacks the conflicts identified herein and demonstrates an intention and ability to advance the beneficiary's interests;²⁸⁷ (3) the movant possesses the same conflicts or limitations as the existing parties, making its participation of negligible value; or (4) the movant, though a beneficiary, seeks to advance an irrelevant,²⁸⁸ frivolous, or unlawful objective. In those situations, Rule 24(a)(2)'s truthseeking function would not be advanced by granting intervention, and the nexus between the existing litigation and the Rule's protective and efficiency functions would be too attenuated to warrant intervention. Absent those types of particularized concerns, however, courts ought to grant intervention of right to beneficiaries in the vast majority of affirmative action cases.

More broadly, allowing the participation of beneficiaries in such cases maintains not just the reality, but the appearance of fairness. The Supreme Court has rejected the notion that Rule 24 is "a comprehensive inventory of the allowable instances for intervention," noting that the public interest may require that intervention be allowed wholly outside of the rule.²⁸⁹ Accordingly, even if a strict reading of Rule 24(a)(2) did not require intervention in these circumstances, the participation of beneficiaries would be necessary to

the underlying dispute. *See, e.g.,* *Trbovich v. United Mine Workers*, 404 U.S. 528, 530–536 (1972) (reviewing the text and legislative history of Labor Management Reporting Act to determine that intervention by union member was appropriate); *United States v. Hooker Chem. & Plastics*, 749 F.2d 968 (2d Cir. 1984) (reviewing text and legislative history of Clean Water Act, Safe Drinking Water Act, and Resource Conservation Recovery Act to conclude that citizen suit provisions in each statute do not grant private parties the right to intervene).

287. Note, however, that where a movant seeks intervention early in the litigation—rather than, for example, for the purpose of appealing a decision or opposing settlement—its showing of inadequacy will be somewhat speculative. It may not be clear, for example, precisely what evidence the existing parties will develop and present at trial. The applicant's showing must, therefore, focus on divergent interests, potential conflicts, and the likely impact of those conflicts on the litigation of issues affecting the applicant's interests. Though predictive, that presentation is fully consistent with the applicant's burden of showing that representation "may be" inadequate.

288. An "irrelevant" interest in this context is one that is not potentially implicated by the litigation, not merely one that has not been identified by the existing parties.

289. *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 505 (1941); *see also* *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967) (same); *Textile Workers Union v. Allendale Co.*, 226 F.2d 765, 767 (D.C. Cir. 1955) ("Obviously tailored to fit ordinary civil litigation, these provisions require other than literal application in atypical cases.").

preserve the integrity of the judicial process. As the Supreme Court has noted in other contexts, "justice must satisfy the appearance of justice."²⁹⁰ That command is particularly salient in matters of race, where there has been a legacy of exclusion from the justice system.²⁹¹

At the time that the *Hopwood* plaintiffs filed their suit, for example, there was a forty-year history of legal and political adversity between African Americans and the State of Texas as to the precise subject of the litigation: the elimination and remediation of racial segregation and its effects. That history included Heman Sweatt, who first challenged segregation at the University of Texas in 1946,²⁹² as well as generations of Title VI enforcement, spurred by students of color.²⁹³ Civil rights struggles in Georgia, Boston, and other regions have been similarly contentious.²⁹⁴ The notion that those students' rights should now be decided in bipolar litigation between those same state governments and plaintiffs hostile to minority opportunity strains credulity and degrades the appearance of fairness.²⁹⁵ That, in many of those cases, denial of intervention rested upon a finding of adequate representation is particularly troubling.

290. *Offutt v. United States*, 348 U.S. 11, 14 (1954) (commenting on a trial judge's discretion under the Federal Rules of Criminal Procedure); *cf. In re Gault*, 387 U.S. 1, 26 (1967) (discussing studies that suggest that "the appearance as well as the actuality of fairness . . . may be more impressive . . . so far as [a] juvenile is concerned.").

291. *See, e.g., Castaneda v. Partida*, 430 U.S. 482, 493 (1977) (finding discrimination in selection of grand jurors); *Turner v. Fouche*, 396 U.S. 346 (1970) (same); *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 331-337 (1970) (finding discrimination in selection of grand and petit jurors); *Whitus v. Georgia*, 385 U.S. 545, 552 (1967) (same). *See generally* DAVID COLE, *NO EQUAL JUSTICE* (1999) (detailing the pervasive effects of race in the criminal justice system); SAMUEL R. GROSS AND ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989) (describing relationship between a criminal defendant's race, the race of the victim, and the likelihood that the death penalty will be sought and imposed by prosecutors, judges, and juries).

292. *See Sweatt v. Painter*, 339 U.S. 629 (1950).

293. *See* ALMETRIS DUREN & LOUISE ISCOE, *OVERCOMING: A HISTORY OF BLACK INTEGRATION AT THE UNIVERSITY OF TEXAS AT AUSTIN* (1979) (recounting struggle by Black students and civil rights leaders to desegregate the University of Texas system, and to eliminate persistent discriminatory practices such as Whites-only dormitories and sports teams in the 1960s and 1970s).

294. *See, e.g., supra* note 135 and accompanying text (citing Georgia desegregation litigation); *Adams v. Richardson*, 356 F. Supp. 92, 101 (D.D.C. 1973), *modified and aff'd unanimously en banc*, 480 F.2d 1159 (D.C. Cir. 1973) (requiring enforcement of civil rights laws against segregated systems of higher education in 17 southern and border states, including Texas and Georgia); *supra* note 142 (citing Boston school desegregation litigation).

295. As the Supreme Court has stated in the grand jury context, the exclusion "of [African Americans], or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice. . . . 'The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.'" *Rose v. Mitchell*, 443 U.S. 545, 556 (1979) (quoting *Ballard v. United States*,

Ultimately, affording participation to beneficiaries in affirmative action cases comports with the letter and spirit of Rule 24 while supporting the legitimacy of the judicial process and respecting the interest and ability of affected communities to defend their own interests. The vital questions of equal opportunity and racial justice posed by these cases deserve nothing less.

329 U.S. 187, 195 (1946)); *see also* Lawrence, *supra* note 230, at 8 ("To allow a case of the magnitude and impact of *Bakke* to be decided without an opportunity for minorities to present vital evidence . . . is a travesty of justice.").