You cannot intervene in your own case, duh! Yet the U.S. Supreme Court disagreed, holding that Federal Rule of Civil Procedure 24(a)(2) allows state legislative leaders, seeking to represent the state’s sovereign interest, to intervene when the attorney general is already representing the state’s sovereign interest. In this Article, I contend that the text, history, and practice of Rule 24(a)(2) prohibit such “self-intervention.” I then explore how the fictive approach to state immunity established in Ex parte Young causes this confusion, while concluding that the doctrine, properly understood, focuses on real, not nominal, parties in interest. I further conclude that such irregular joinder strikes at important state separation-of-power principles that assign the representation of state litigation to executive officers. Finally, I show that a Federal Rule of Civil Procedure 25(d) substitution analysis is the stronger approach to suits such as these.
INTRODUCTION

An existing party in interest cannot move to intervene in its own suit. I can't believe I had to write this obviously true proposition! Yet, the U.S. Supreme Court disagrees.1 In Berger v. North Carolina State Conference of the NAACP, the Court held that state legislatures, purporting to represent the state sovereign interest, have a right to intervene to defend the validity of a state statute even though an executive official represents the state sovereign interest. In this Article, I argue that these intervention attempts are little more than motions to intervene in one's own case, which I coin as “self-intervention.” Allowing such self-intervention is unsupportable as a matter of the text, history, and practice of Federal Rule of Civil Procedure 24(a)(2)—the intervention as of right rule. Further, such an approach confuses the legal fiction of Ex parte Young, which deploys the use of nominal parties to avoid Eleventh Amendment immunity, with the real party in interest. In reality—and in doctrine—the real party in interest in these suits is the state. I further conclude that the courts should not, under the guise of intervention, allow statehouses to vest themselves with the executive authority to represent the state sovereign interest in court that is constitutionally assigned to the executive. I close by noting that these self-intervention motions are better understood as failing efforts for Rule 25(d) public official substitution.

1. See Berger v. N.C. State Conf. of the NAACP (Berger IV), 142 S. Ct. 2191, 2206 (2022). This Article was originally drafted prior to the Court’s decision, after certiorari was granted. Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 577 (2021) (mem.). Based upon this prior SSRN posting, I signed an amicus brief in this case. See Brief of Federal Courts Scholars as Amici Curiae in Support of Respondents, Berger v. N.C. State Conf. of the NAACP, 2022 WL 525082 (2022) (No. 21-248). After the Court published Berger, this piece was revised, in part, to address that opinion. This Article expresses my views alone.
How is it that we find our courts increasingly facing self-intervention motions? Gerrymandering drives the recent presentation of this phenomenon—even though after Berger such motions will arise in any number of areas outside of political disputes.\(^2\) Gerrymandering remains a substantial concern in the states.\(^3\) As a result, in some states one party wins statewide (i.e., non-gerrymanderable) elections while the other party wins legislative district (i.e., gerrymanderable) elections.\(^4\) Such division of authority leads to situations where the statehouse passes or supports a statute that embodies a policy choice contrary to those held by the relevant executive official tasked with taking on the state’s litigation duties.\(^5\) This splitting of party power and political interests has led to self-intervention motions filed by statehouses to join in suits defended fully by the state attorney general. This pattern, while not a new one,\(^6\) occurred recently in both Wisconsin and North Carolina.\(^7\)

\(^2\) See infra Section IV.C (predicting an impact for all non-corporeal entities).


\(^6\) See Anthony Johnstone, *A State Is a "They," Not an "It": Intrastate Conflicts in Multistate Challenges to the Affordable Care Act*, 2019 B.Y.U. L. REV. 1471 (outlining a similar phenomenon in multiple actors claiming statute as the state for amicus briefing purposes).

\(^7\) I will also address a case out of Arizona, which is an intra-party spat. See infra Section II.B.
I turn first to Wisconsin. Here, Wisconsin statutes imposed a series of regulations upon abortion services. Planned Parenthood of Wisconsin challenged the validity of these state statutes in federal court. The Republican-controlled statehouse supported the validity of the legislation. Democratic Attorney General Josh Kaul, while pledging to defend all Wisconsin law, had been endorsed by an arm of Planned Parenthood of Wisconsin during his campaign. Nonetheless, Attorney General Kaul defended the suit, specifically denying “that the regulations violated the Constitution.” The Wisconsin legislature, however, sought to intervene as of right, “as an agent of the state.” The district court and circuit court refused to grant the motion to intervene.

A similar pattern arose in North Carolina. In December 2018, the North Carolina General Assembly passed Senate Bill 824 (S.B. 824), a photo-ID-to-vote law. At the time, the General Assembly was controlled by the Republican Party, while

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9. Id.
12. Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 796 (7th Cir. 2019).
13. Id. at 798.
14. Id.
Governor Roy Cooper and Attorney General Josh Stein were members of the Democratic Party. Voter identification laws, such as S.B. 824, had been hallmark Republican Party policy planks, which the Democratic Party had rejected. This policy split motivated the North Carolina House and Senate to override Governor Cooper’s veto, thereby enacting S.B. 824 on December 19, 2018. Suit to enjoin S.B. 824 soon followed. Although Attorney General Stein defended that suit—indeed, he prevailed in defending the law on appeal—the leaders of the General Assembly sought to intervene as of right representing the sovereign “interests of the State of North Carolina.” The legislative leaders, “[p]ointing to past statements opposing voter identification laws by the Governor and Attorney General . . ., claimed that the defendants ‘cannot be trusted to defend S.B. 824.’” The district and circuit courts refused to allow the intervention. This led to a successful petition for writ of certiorari from the Supreme Court, where those decisions were reversed.

While the lower courts correctly denied intervention in these cases, in this Article I argue that treating such self-intervention attempts as if they are at all amenable to a Rule 24(a)(2) analysis constitutes a fundamental error. Furthermore, the Supreme Court compounded upon this error in Berger, when


20. Berger III, 999 F.3d at 918.
21. Id.
22. Id. at 923.
23. Id. at 921.
24. Id. at 919–20.
25. Id. at 934.
26. See supra note 1.
it continued to treat such self-intervention motions as amenable to a Rule 24(a)(2) analysis and—worse still—when it held that state legislative leaders may intervene as of right in suits that are defended by other state agents. Even though the Supreme Court has ruled on this question, for two broad reasons, it continues to matter that American courts analyze these self-intervention motions appropriately. First, the majority of state courts model their civil procedure upon the Federal Rules, yet these state high courts retain the authority to interpret their rules distinctly from the Supreme Court’s interpretation of the Federal Rules. Thus, these high courts should avoid the errors embedded in the Berger opinion. And second, the federal courts themselves should limit the damaging impact of the Berger decision from metastasizing to other non-corporeal entities like corporations.

My argument proceeds in five parts, concluding that these motions are little more than erroneous attempts to intervene in one’s own case. In Part I, I review the leading Fourth Circuit, Seventh Circuit, and District of Arizona cases that engage with the self-intervention issue, while also narrowing the issues under discussion. In Part II, I address the text, history, and practice of Rule 24(a)(2), showing that this rule is not compatible with self-intervention. In Part III, I explain how the fictive approach to immunity established in Ex parte Young causes this confusion, while concluding that the doctrine here supports a


29. See FED. R. CIV. P. 1 (“These rules govern the procedure in all civil actions and proceedings in the United States district courts . . . .”) (emphasis added); Zachary D. Clopton, Procedural Retrenchment and the States, 106 CAL. L. REV. 411, 424 (2018) (“States thus remain free to reject Supreme Court decisions interpreting federal procedural rules, even if state rules are patterned on the federal ones.”).

30. See infra Section IV.C (predicting an impact for all non-corporeal entities).
focus on real, not nominal, parties in interest. In Part IV, I conclude that such self-intervention strikes at important state law separation-of-power principles that assign the representation of state litigation to executive officers. In Part V, I contend that a Rule 25(d) substitution analysis is the stronger approach to suits such as these.

I. L’ÉTAT C’EST MOI

Currently arising out of states with divided governments, the federal courts are seeing self-intervention motions by legislatures to join suits already being defended by the state attorneys general. These suits are not ones in which the state executive fails to defend, leaving the legislature to step in to defend. Nor are these suits in which the legislature presents a unique interest to intervene as the legislature itself. Rather, these joinder motions seek to have two representatives speak for the same party in interest—the state as a sovereign. In this Part, I introduce the three leading cases raising this issue, present a few clarifying comments narrowing the issues under review, and highlight that this issue is not one limited to intra-state, political disputes.


32. These cases lack the “self-intervention” aspect to them precisely because the prior state actors had abandoned representation. See Cameron v. EMW Women’s Surgical Ctr., 142 S. Ct. 1002, 1012 n.5 (2022) (allowing state attorney general to intervene in federal appellate proceeding “to defend Kentucky’s interests” after “no other official [was] willing to do so”); Karcher v. May, 484 U.S. 72, at 75, 81–82 (1987) (holding that state legislators leaders could intervene to defend the constitutionality of state law after the attorney general declined to do so); Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1951 (2019) (rejecting the argument for lack of standing that the state legislature and its leadership, who intervened to represent their “own” legislative interests rather than those of the State as a whole, could displace the attorney general as representative of the state’s sovereign interest); Hollingsworth v. Perry, 570 U.S. 693, 694–95 (2013) (holding that proponents of a ballot initiative who “ha[d] no role . . . in the enforcement of” the initiative and were not “agents of the State” lacked standing to defend it on appeal). Moreover, as addressed infra Part V, these questions of abandoned representation are better viewed as Rule 25(d)(2) substitution issues than intervention questions.

33. An option arguably left open, if standing could be found, in Bethune-Hill. See 139 S. Ct. at 1952–53, 1953 n.3; see also N.C. State Conf. of the NAACP v. Berger (Berger III), 999 F.3d 915, 928 (4th Cir. 2021) (en banc), rev’d, 142 S. Ct. 2191 (2022) (quoting Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 800 (7th Cir. 2019)).
A. Planned Parenthood of Wisconsin, Inc. v. Kaul

I turn first to the Seventh Circuit’s Planned Parenthood of Wisconsin, Inc. v. Kaul opinion. Here, Planned Parenthood of Wisconsin, Inc. (PPWI) filed a suit against Wisconsin’s attorney general and an assortment of other state officials, all in their official capacities. PPWI brought an Ex parte Young-style suit, before the Court had issued Dobbs v. Jackson Women’s Health Organization, to enjoin enforcement of state abortion regulations that it alleged violated the constitutional rights of itself and its patients.

The attorney general answered the complaint instead of moving to dismiss for failure to state a claim. His answer, however, denied that the regulations violated the Constitution. A week later, the Wisconsin legislature sought to intervene as of right, where this Article focuses, and permissively. In so doing, the legislature looked to Virginia House of Delegates v. Bethune-Hill, and sought “to intervene only as an agent of the state,” and not in its separate legislative capacity. The Supreme Court in Bethune-Hill held that one house of a state legislature lacked standing as an intervenor-defendant to appeal a judgment below, striking a state redistricting statute when the original defendants declined to take the appeal. In reaching that judgment, the Court stated in dicta that a state could authorize the legislature, or even one house, to litigate on the state’s behalf instead of the attorney general. The Wisconsin legislature relied upon Bethune-Hill as the basis for arguing that a state may by statute appoint any government entity to represent it in court.

The district court denied the motion to intervene, which the Seventh Circuit affirmed on appeal. First, the circuit court

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34. Kaul, 942 F.3d at 793.
35. Id. at 796.
37. Kaul, 942 F.3d at 796.
38. Id.
42. Kaul, 942 F.3d at 798.
44. Id. at 1952.
45. Kaul, 942 F.3d at 798; see also Wis. Stat. § 803.09(2m) (2019).
46. Kaul, 942 F.3d at 796.
assumed, without deciding, that the Wisconsin statute gave the legislature a Rule 24(a)(2) “interest” as a representative of the state itself.\textsuperscript{47} The circuit court further concluded, however, that because the attorney general represented this same state interest already, the legislature could intervene only if the attorney general’s representation was inadequate.\textsuperscript{48} The court described this as the “unenviable task” of convincing a federal court that the attorney general, who was defending the statute, was inadequately representing the interests of his own state.\textsuperscript{49} The court went on to apply a presumption of adequate representation by the attorney general, absent a showing of “bad faith or gross negligence.”\textsuperscript{50} Judge Sykes concurred, arguing that the majority’s presumption was too strong. He nevertheless agreed with the majority that in this case, the legislature could not rebut his, or the majority’s, presumption of adequacy by resting “largely on political and policy differences with the Attorney General over abortion regulations, as well as disagreements about litigation strategy . . . .”\textsuperscript{51}

\textbf{B. Arizonans for Fair Elections v. Hobbs}

I turn next to the District of Arizona’s \textit{Arizonans for Fair Elections v. Hobbs} decision.\textsuperscript{52} This case arose out of the COVID-19 pandemic.\textsuperscript{53} The plaintiffs argued that COVID-19 restrictions barred them from collecting the physical signatures needed to advance certain citizen initiatives they supported, which they contended amounted to First and Fourteenth Amendment violations.\textsuperscript{54} State Attorney General Mark Brnovich defended the suit on behalf of the state.\textsuperscript{55} Attorney General Brnovich was a Republican.\textsuperscript{56} As in the prior cases, the speaker of the Arizona House and president of the Arizona Senate sought to intervene.

\begin{itemize}
  \item \textsuperscript{47} \textit{Id.} at 797–98.
  \item \textsuperscript{48} \textit{Id.} at 800–01.
  \item \textsuperscript{49} \textit{Id.} at 801.
  \item \textsuperscript{50} \textit{Id.}
  \item \textsuperscript{51} \textit{Id.} at 810–11; \textit{see also id.} at 801 (majority opinion) (reaching the same conclusion as the concurrence).
  \item \textsuperscript{52} \textit{Arizonans for Fair Elections v. Hobbs}, 335 F.R.D. 269 (D. Ariz. 2020).
  \item \textsuperscript{53} \textit{Id.} at 272.
  \item \textsuperscript{54} \textit{Id.}
  \item \textsuperscript{55} \textit{Id.} at 273.
  \item \textsuperscript{56} \textit{Attorney General Continues Election Investigation After Audit Flop}, HILL (Sept. 28, 2021), https://thehill.com/homenews/campaign/574348-arizona-attorney-general-continues-election-investigation-after-audit-flop [https://perma.cc/32N8-6DR2] (noting Brnovich is a Republican).
\end{itemize}
as of right, this Article's focus, and permissively.\textsuperscript{57} In a switch from \textit{Kaul} and \textit{Berger}, here, both Arizona legislative leaders were also Republicans.\textsuperscript{58} Nevertheless, the legislative leaders relied upon an Arizona statute granting them the right “to defend the State’s interest.”\textsuperscript{59} Applying \textit{Kaul}'s presumption of adequacy, the district court denied the motion to intervene, holding that the attorney general, who was defending the suit, adequately represented the state's interests.\textsuperscript{60}

\textbf{C. North Carolina State Conference of NAACP v. Berger}

I turn last to \textit{North Carolina State Conference of NAACP v. Berger}.\textsuperscript{61} Here, the North Carolina NAACP challenged state voter identification laws as contrary to the Voting Rights Act, the Fourteenth Amendment, and the Fifteenth Amendment. The plaintiffs sought pre-enforcement, \textit{Ex parte Young}-style review by way of suit for injunction, suing the governor and members of the state board of elections in their official capacities.\textsuperscript{62} The state attorney general defended the constitutionality of the state voter identification law, which included overturning a preliminary injunction against the state law on appeal.\textsuperscript{63}

Despite the state attorney general’s consistent and ultimately successful defense of the law, the speaker of the North Carolina House of Representatives and the president pro tempore of the North Carolina Senate twice sought to intervene in the suit.\textsuperscript{64} The motions sought to intervene both as of right\textsuperscript{65} and permissively.\textsuperscript{66} This discussion focuses upon the motions to intervene as of right. In their first motion, “the Leaders purported to speak on behalf of the General Assembly, rather than the State of North Carolina as a whole.”\textsuperscript{67} The district court

\begin{footnotesize}
\begin{enumerate}
\item \textit{Hobbs}, 335 F.R.D. at 273.
\item \textit{Hobbs}, 335 F.R.D. at 273.
\item \textit{Id.} at 275.
\item \textit{Id.} at 919.
\item \textit{Id.} at 923.
\item \textit{Id.} at 919–21.
\item See \textit{FED. R. CIV. P. 24(a)(2)}.
\item See \textit{FED. R. CIV. P. 24(b)}.
\item \textit{Berger III}, 999 F.3d at 919.
\end{enumerate}
\end{footnotesize}
denied this motion to intervene as of right,\(^{68}\) and the leaders failed to timely appeal this issue.\(^{69}\)

As in *Kaul*, after the Supreme Court issued *Bethune-Hill*,\(^ {70}\) the leaders filed a second motion to intervene as of right.\(^ {71}\) Grabbing onto the *Bethune-Hill* dicta,\(^ {72}\) the North Carolina leaders, in a renewed motion, argued that they represented not just a legislative interest, but that they now sought to intervene to represent the sovereign “interests of the State of North Carolina.”\(^ {73}\) Indeed, they argued that state statute empowered them to represent the sovereign state interest.\(^ {74}\) Furthermore, the leaders argued that although the state attorney general was defending the suit, they disagreed with his strategic choices, which in their view supported their motion to intervene as of right.\(^ {75}\)

The district court denied the motion to intervene as of right.\(^ {76}\) First, the district court questioned whether North Carolina law actually empowered the leaders to represent the state sovereign interest.\(^ {77}\) But even if it did, the district court held that, absent an adequacy problem in the attorney general’s representation, the leaders lacked a Rule 24(a)(2) right to intervene.\(^ {78}\) On this final question, the district court concluded that, at most, the leaders had identified “strategic disagreements” with the attorney general, whose approach “fell well within the range of reasonable litigation strategies.”\(^ {79}\)

\(^{68}\) *Id.* at 920.

\(^{69}\) *Id.* at 921 (“The Leaders did not appeal the district court’s order denying their motion to intervene.”).


\(^{71}\) *Berger III*, 999 F.3d at 921.

\(^{72}\) See supra notes 41–44 and accompanying text (discussing the dicta regarding a state’s ability to assign its own agents for litigation).

\(^{73}\) *Berger III*, 999 F.3d at 921.

\(^{74}\) *Id.; see also N.C. GEN. STAT. § 1-72.2(a)–(b)* (2017).

\(^{75}\) *Berger III*, 999 F.3d at 921 (“The Leaders argued, the Attorney General, though winning dismissal of the Governor from the case, had argued only for abstention on federalism grounds and failed to develop the factual record through expert reports . . . . [Based upon conduct in a parallel state-court case and the action in the federal case, the Leaders believed that] the Attorney General’s performance showed that he could not be trusted to defend S.B. 824 . . . .”).


\(^{77}\) *Id.* at *2.

\(^{78}\) *Id.*

\(^{79}\) *Id.* at *3.
On appeal, a panel of the Fourth Circuit reversed this denial of intervention. Sitting en banc, however, the Fourth Circuit affirmed over vigorous dissents. The circuit court noted first the “highly unusual posture” of this case in which the putative intervenors sought to represent the sovereign state interest when “the State of North Carolina’s ‘default’ representative—the Attorney General—has not ‘dropped out of the case.’” Thus, the leaders sought to represent “precisely the interests already represented by the Attorney General in this case.” Given that congruence of interest, the circuit court held that the attorney general enjoyed a strong but rebuttable presumption of adequate representation of the state sovereign interest. On this record, the circuit court held that the district court did not abuse its discretion in finding that the leaders failed to rebut this strong presumption. The U.S. Supreme Court then granted certiorari.

The Supreme Court overruled the Fourth Circuit. The thrust of the Court’s position was that a state’s interests are not always unitary. In some instances, the “practical interests” of various governmental actors will vary, such that the only means of capturing these various “perspectives” would be to have multiple state agents as litigants. Having found that a state’s interest is not necessarily unitary, the Court readily concluded that even though the legislature and the attorney general both purported to represent the state sovereign interest, the attorney general’s “perspective” on that interest could, and did, diverge from the legislature’s.

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82. Id. at 939 (Wilkinson, J., dissenting); Id. at 941 (Niemeyer, J., dissenting); Id. at 942 (Quattlebaum, J., dissenting).
83. Id. at 928 (majority opinion) (citing Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 800 (7th Cir. 2019)).
84. Id.
85. Id. at 930–31, 933.
86. Id. at 934.
88. See Berger v. N.C. State Conf. of the NAACP (Berger IV), 142 S. Ct. 2191, 2206 (2022).
89. Id. at 2197–98.
90. Id. at 2197.
91. Id. at 2205 (“The legislative leaders seek to give voice to a different perspective.”).
D. Narrowing the Issue

Despite this Supreme Court action, state supreme courts, exercising their independent interpretative authority over rules of procedure, are not bound by the U.S. Supreme Court’s Berger opinion. Furthermore, the lower federal courts should cabin the Berger opinion as much as possible from impacting other non-corpooreal entities. As such, it is key to isolate with precision the questions raised in these cases to empower clear analysis in future decisions.

First, although the legislatures in Berger, Kaul, and Hobbs rested their right to intervene, in part, on state law, federal law controls intervention practice in federal court. Following standard Erie doctrine,92 federal law—not state law—determines who may intervene in federal court. As the Court has consistently held since Erie, “Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created . . . . In the Rules Enabling Act, Congress authorized . . . [the] Court to promulgate rules of procedure subject to its review.”93 Furthermore, this is not a contested question—federal law controls procedure in federal court. As the Court has often held, “[c]oncerning matters covered by the Federal Rules of Civil Procedure, the characterization question is usually unproblematic: It is settled that if the Rule in point is consonant with the Rules Enabling Act, 28 U.S.C. § 2072, and the Constitution, the Federal Rule applies regardless of contrary state law.”94 Following these principles, there is no doubt that the right to intervene “is a purely procedural right and, even in a diversity suit, it is the Federal Rules of Civil Procedure rather than state law that dictate the procedures, including who may intervene, to be followed.”95 This view of the primacy of federal law is even more secure in cases such as Berger, Kaul, and Hobbs given that they arise not in

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diversity jurisdiction, but as federal questions.\textsuperscript{96} Federal courts nevertheless interpret the Federal Rules with sensitivity to important state interests and regulatory policies.\textsuperscript{97} Thus, even though Rule 24 controls intervention in federal court, some circuit courts “inform the Rule 24(a)(2) calculus” with state law policy choices that speak to the issue.\textsuperscript{98}

Second, it is key to bear in mind that intervention is distinct from selecting a state’s agent for litigation. The Supreme Court notes that states, or any non-corporeal party for that matter, may select who acts as the state’s agent in court.\textsuperscript{99} And the states may establish procedures, as many have, allowing one agent to substitute for another as the circumstances may require. Further, a state may designate one agent for certain matters and a different agent for others.\textsuperscript{100} Though still in dicta, the Court’s most pointed statement addressing these matters comes from Bethune-Hill.\textsuperscript{101} This opinion, however, did not address intervention directly. Rather, it held that one house of a state legislature suing to enforce the legislature’s unique interest lacked standing,\textsuperscript{102} and, in so holding, offered dicta that a state may designate the agent of its choice to defend state statutes—which again does not address intervention.\textsuperscript{103}

Third, these types of cases do not raise 28 U.S.C. § 2403(b) or Rule 5.1 concerns. Those provisions allow state attorneys general the right of intervention when “a State or any agency, officer, or employee thereof is not a party, . . . [and] the constitutionality of any statute of that State affecting the public interest is drawn in question.”\textsuperscript{104} Cases like Berger, Kaul, and Hobbs, however, do not trigger these statutes precisely because the attorney general is already the named representative of the state. This is to say, section 2403(b) and Rule 5.1 truly address intervention settings precisely because in such instances the

\begin{itemize}
\item \textsuperscript{96} See Berger III, 999 F.3d at 919; Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 797 (7th Cir. 2019); Arizonans for Fair Elections v. Hobbs, 335 F.R.D. 269, 272 (D. Ariz. 2020).
\item \textsuperscript{97} See, e.g., Walker v. Armco Steel Corp., 446 U.S. 740, 750–52 (1980).
\item \textsuperscript{98} Pub. Serv. Co. of N.H. v. Patch, 136 F.3d 197, 208 (1st Cir. 1998); Dep't of Fair Emp. & Hous. v. Lucent Techs., Inc., 642 F.3d 728, 741 (9th Cir. 2011).
\item \textsuperscript{100} Bethune-Hill, 139 S. Ct. at 1951–52.
\item \textsuperscript{101} Id.
\item \textsuperscript{102} Id. at 1950 (“We further hold that the House, as a single chamber of a bicameral legislature, has no standing . . . ”).
\item \textsuperscript{103} Id. at 1952.
\item \textsuperscript{104} 28 U.S.C. § 2403(b); FED. R. CIV. P. 5.1 (similar).
\end{itemize}
state’s interests are not represented, which is not the case in suits like Berger, Kaul, and Hobbs.

Finally, cases like Berger, Kaul, and Hobbs do not raise the question of whether legislators, asserting a legislative interest in defending a law they drafted that is distinct from the sovereign state interest, may intervene.⁹⁵ That question was arguably left open in Bethune-Hill.⁹⁶ Rather, “the unusual question presented” in these cases is whether a court must allow as a matter of intervention not one but “two state entities . . . to speak on behalf of the State at the same time.”⁹⁷

II. RULE 24(A)(2) DOES NOT SANCTION SELF-INTERVENTION

Simply put, courts err in treating the posture of cases like Berger, Kaul, and Hobbs as motions to intervene at all. To be sure, the lower courts were correct in the application of some presumption of adequacy in cases where a non-party seeks to intervene in a case where the party shares the same interest with the non-party putative intervenor.⁹⁸ That presumption assumes, however, that intervention applies at all. In Berger, Kaul, and Hobbs, the putative joining party seeks entry into the

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⁹⁵. N.C. State Conf. of NAACP v. Berger (Berger III), 999 F.3d 915, 921 (4th Cir. 2021) (en banc), rev'd, 142 S. Ct. 2191 (2022) (representing the state sovereign interest only); Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 797–98 (7th Cir. 2019) (same).


⁹⁷. Berger III, 999 F.3d at 928 (quoting Kaul, 942 F.3d at 800).

⁹⁸. See, e.g., STEVEN S. GENSLER & LUMEN N. MULLIGAN, FEDERAL RULES OF CIVIL PROCEDURE RULES AND COMMENTARY, Ch. IV, r. 24 (Feb. 2022 update), Westlaw [hereinafter GENSLER & MULLIGAN 2022] (“[C]ourts start by presuming that an existing party who shares the intervenor’s objectives adequately represents the intervenor’s interests.”). Indeed, every federal circuit to address the issue has adopted some version of a presumption of adequacy when proposed intervenors share an objective or interest with existing parties. See In re Thompson, 965 F.2d 1136, 1142–43 (1st Cir. 1992); Butler, Fitzgerald & Potter v. Sequa Corp., 250 F.3d 171, 179–80 (2d Cir. 2001); Del. Valley Citizens’ Council for Clean Air v. Pennsylvania, 674 F.2d 970, 973 (3d Cir. 1982); Stuart v. Huff, 706 F.3d 345, 353 (4th Cir. 2013); Entergy Gulf States La., L.L.C. v. U.S. EPA, 817 F.3d 198, 203 (5th Cir. 2016); United States v. Michigan, 424 F.3d 438, 443–44 (6th Cir. 2005); Wis. Educ. Ass’n Council v. Walker, 705 F.3d 640, 659 (7th Cir. 2013); FTC v. Johnson, 800 F.3d 448, 452 (8th Cir. 2015); Arakaki v. Cayetano, 324 F.3d 1078, 1086 (9th Cir. 2003); Tri-State Generation & Transmission Ass’n, Inc. v. N.M. Pub. Regul. Comm’n, 787 F.3d 1068, 1072–73 (10th Cir. 2015); Clark v. Putnam Cnty., 168 F.3d 458, 461 (11th Cir. 1999).
case representing the same party in interest that is already present and represented in the suit. That is to say, in these suits we have the same party in interest, the sovereign state, seeking to join in a suit where the defendant already is the same party in interest, the sovereign state interest. This is little more than a party seeking to intervene in its own suit. But a party cannot intervene in its own case. In this Part, then, I show that Rule 24’s text, history, and precedent bar self-intervention.

I begin with the Rules interpretation generally. The Supreme Court does not consistently engage in one approach to Rules interpretation. On the one hand, the Court in Rules-interpretation cases often treats the Rules, for all practical purposes, like statutes. This tends to lead to textualist interpretive approaches. For example, the Court often claims, “We give the Federal Rules of Civil Procedure their plain meaning. As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous.” In such cases, the Court often deploys semantic and syntactic rules of statutory construction, which tend to heavily emphasize textualist tools of interpretation. Further, following this Rules-as-statutes approach, the Court tends to sidestep policy arguments, noting that such policy questions must be sent to the drafters of the Rules. On the other hand, this text-centric


110 See, e.g., Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1172 (2013) (interpreting Rule 54(d)(1) and explaining that as “in all statutory construction cases, we assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose”); see also Bank of Nova Scotia v. United States, 487 U.S. 250, 255 (1988) (noting that the Federal Rules are as “binding as any statute”).


view of Rules interpretation does not always carry the day.114 Indeed, the Court often engages with Rules cases from a decidedly non-textual perspective.115 This policy-driven approach to the Rules has grabbed headlines of late as demonstrated by cases such as Scott v. Harris,116 Wal-Mart Stores, Inc. v. Dukes,117 Bell Atlantic Corp. v. Twombly,118 and Ashcroft v. Iqbal.119 In this family of cases, we see the Court divorce itself from text, often almost entirely, and look predominately to policy.120 Given these extremities of approaches, one could well be left frustrated for lack of direction in approaching a Rules interpretative question, such as whether a non-corporeal party can self-intervene.

In prior work, Professor Glen Staszewski and I attempted to mitigate this frustration. We defended an overarching approach to Rules interpretation that looks to both the plain meaning of the text and the policy goals of the Rules drafters, not the Court itself as an adjudicative body.121 We argued that because the Federal Rules of Civil Procedure are promulgated in a different fashion than statutory enactment, even if legislative history and purpose are not the primary tools of interpretation that a judge might use in a statutory case, they are especially germane in a Rules case.122 Indeed, we started from Justice Frankfurter’s insight that “[p]lainly the Rules are not acts of Congress and

suggest,’ the judge’s job is to construe the statute—not to make it better. The judge ‘must not read in by way of creation,’ but instead abide by the ‘duty of restraint, th[e] humility of function as merely the translator of another’s command.’” (quoting Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 533 (1947)); see also Świerkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) (similar); Amchem. Prods. v. Windsor, 521 U.S. 591 (1997) (similar).


120. See Porter, supra note 114, at 149–53 (recognizing and describing this phenomenon).

121. See Interpretive Theory, supra note 109, at 2227–28 (defending this conclusion because of the intra-branch nature of Rules promulgation and the simultaneous passage of the official advisory committee notes).

122. Id.
cannot be treated as such." Following this methodology, in addition to a Rule’s text, traditional purposive tools of construction are also especially germane to Federal Rules interpretation. This follows because the Rules are promulgated in a different fashion than statutory enactments—by intra-judicial branch promulgation—that lacks the separation-of-powers considerations that surround statutory interpretation and generally drive the normative foundations for a textualist approach. Furthermore, the Rules themselves include the official notes and policy statements as part of their formally enacted documentation, which tends to assuage concerns about the use of legislative history and purposes in the statutory realm. Thus, legislative history and purpose are unique tools of interpretation that a judge should use in a Rules case. As part of this purposive analysis, the interpretation of the Federal Rules “must be guided, in part, by an understanding of the deficiencies in the original version of Rule 11 that led to its revision,” as well as the relevant drafting

123 Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting).
125 Id. at 2186–93.
126 Id. at 2183–86.
127 Id. at 2197–98.
128 See David Marcus, Institutions and an Interpretive Methodology for the Federal Rules of Civil Procedure, 2011 UTAH L. REV. 927, 957 (2011) (arguing that the Rules should be interpreted using a purposivist method); Catherine T. Struve, The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure, 150 U. PA. L. REV. 1099, 1103 (2002) (“[T]he Court should accord the Notes authoritative effect.”); id. at 1158 (“The fact that the Notes proceed through the approval process along with the text also helps to meet textualist objections to their use.”); 28 U.S.C. § 2073(d) (2012). Specifically, section 2073(d) requires that “[i]n making a recommendation under this section or under section 2072 or 2075, the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body’s action, including any minority or other separate views.” Id. The Rules differ greatly from most federal statutes in this regard. Cf. Jennifer Nou, Regulatory Textualism, 65 DUKE L.J. 81 (2015) (claiming that a textualist approach to interpreting administrative regulations should include consideration of the regulatory preamble and other mandatorily created materials that were part of the public record when elected officials reviewed and approved the proposal); see also Colin S. Diver, Statutory Interpretation in the Administrative State, 133 U. PA. L. REV. 549, 570 (1985) (“Congress seldom provides explicit guidance, even in legislative history, on how it wishes courts to interpret statutory language.”); Cass R. Sunstein & Adrian Vermeule, Interpretation and Institutions, 101 MICH. L. REV. 885, 890 n.13 (2003) (“Statutory history shows that it is most unlikely that Congress will enact rules of interpretation that will generally resolve the disputed issues of interpretive choice.”).
Turning back, then, to Rule 24 intervention, one finds that the text, history, and practice of the rule all illustrate that intervention is available only to non-parties.

A. The Plain Meaning of Rule 24(a)(2)

Federal Rule 24(a)(2) governs intervention as of right that is not mandated by federal statute. It reads as follows:

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

. . . .

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.¹³⁰

Rule 24(a)(2)'s text is clear—“existing parties” cannot be a “movant” seeking intervention. The Rule itself distinguishes between the “movant” and “existing parties,” limiting the ability to seek intervention to movants only. These words cannot be synonymous, of course, because it is a “basic principle of statutory construction that different words in the same statute must be given different meanings.”¹³¹ As a matter of plain

¹³¹ Lindsey v. Tacoma-Pierce Cty. Health Dep’t, 195 F.3d 1065, 1074 (9th Cir. 1999), amended by 203 F.3d 1150 (9th Cir. 2000); see also Russello v. United States, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”); Singh v. Att’y Gen. of the U.S., 12 F.4th 262, 273 (3d Cir. 2021) (“[P]arallel provisions in the same statute utilizing different words suggest differing meanings . . . .”); Taracorp, Inc. v. NL Indus., Inc., 73 F.3d 738, 744 (7th Cir. 1996) (“[W]hen interpreting statutes to determine the intent of legislatures: we assume that the same words . . . have the same meaning in a given act and that the choice of substantially different words to address analogous issues signifies a different approach.”); NLRB v. Food Fair Stores, Inc., 307 F.2d 3, 10 (3d Cir. 1962) (applying “the rule of statutory construction which holds that different words appearing in the same statute are presumed to have different meanings . . . .”).
meaning, then, intervention movants cannot simultaneously be existing parties.

This interpretation is further cemented by looking to the plain meaning of the terms “party” and “intervention.” I turn first to the meaning of party as used in Rule 24(a)(2). “Party” was understood to be a plaintiff or a defendant when Rule 24(a)(2) was drafted and revised. The Supreme Court looks to contemporaneous editions of *Black’s Law Dictionary* to supply the plain meaning of a statute, and it has used *Black’s* to define the term “party.” The meaning of “party,” as found in Black’s, was clear both in 1938 when the Rules were promulgated and in 1966, the date of the last substantive revision to Rule 24(a)(2). The third edition of *Black’s Law Dictionary*, which was the current version in 1938, and the fourth edition, which was the current version in 1966, define party as follows:

“Party” is a technical word, and has a precise meaning in legal parlance. By it is understood he or they by or against whom a suit is brought, whether in law or equity; the party plaintiff or defendant, whether composed of one or more individuals, and whether natural or legal persons ... and all others who may be affected by the suit, indirectly or consequentially, are persons interested, but not parties.

The similarity here between Black’s definition of “party” and the text of Rule 24(a)(2) is striking. Rule 24(a)(2) speaks of “movants” who have an “interest relating to . . . the action” and contrasts such persons with “existing parties.” Similarly, Black’s defines “others who may be affected by the suit,” that is, “persons interested,” as “not parties,” contrasting such persons from the “party plaintiff or defendant.” This contemporary usage of “party” further demonstrates that the plain meaning of Rule 24(a)(2) bars motions to intervene from an existing party.

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137. FED. R. CIV. P. 24(a)(2).
Such a strong showing of contemporaneous usage often controls in matters of statutory construction at the high Court. That said, the Court will at times hold that a statutory term was meant to have a dynamic construction that evolves over time and not be limited by its contemporaneous definition. Even adopting this view and giving “party” a contemporary definition does not change its meaning. In fact, the current Black’s Law Dictionary defines “party” as “[o]ne by or against whom a lawsuit is brought <a party to the lawsuit>.” This approach continues, as such, to focus on the formal inclusion of a person to a lawsuit as the definition of “party.”

This same contemporaneous plain-meaning analysis plays out with Rule 24(a)’s use of “intervene.” Both the third and fourth editions of Black’s Law Dictionary define intervention as follows:

In the Civil Law

The act by which a third party demands to be received as a party in a suit pending between other persons.

In Practice

A proceeding in a suit or action by which a third person is permitted by the court to make himself a party, either joining the plaintiff in claiming what is sought by the complaint, or

139. See, e.g., New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019) (adopting the interpretation of “contracts of employment” that prevailed at the time of the statute’s adoption in 1925); Wis. Central Ltd. v. United States, 138 S. Ct. 2067, 2070–71 (2018) (adopting the meaning of “money” that prevailed at the time of the statute’s enactment in 1937); Carcieri v. Salazar, 555 U.S. 379, 388 (2009) (interpreting the statutory phrase “now under Federal jurisdiction” to cover only those tribes that were under federal jurisdiction at the time of the statute’s adoption in 1934); Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612–13 (1992) (adopting the meaning of “commercial” that was “attached to that term under the restrictive theory” when the Foreign Sovereign Immunities Act was enacted in 1976).


141. Party, BLACK’S LAW DICTIONARY (7th ed. 1999) (this edition was the most current in the 2007 Federal Rules restyling project).

142. Intervention, supra note 135; Intervention, supra note 136.
uniting with the defendant in resisting the claims of the plaintiff . . .

As these definitions make clear, only a non-party or a third party may intervene. Indeed, the definition itself contrasts the third party with the existing plaintiff and the defendant, following the structure of Rule 24(a)(2)’s text. And, once again, contemporary usage continues with the third-party/party distinction, defining intervention as “[t]he entry into a lawsuit by a third party who, despite not being named a party to the action, has a personal stake in the outcome.”

Of course, dictionary definitions are not the end-all of a plain-meaning understanding of a statute or rule. The structure of the provision as a whole, which focuses upon the notion that only non-parties may intervene, lends meaning to Rule 24(a)(2) as well. Rule 24 rests at the end of a series of joinder of party rules: namely, Rule 14 for defendant-initiated joinder of third-party defendants, Rule 19 for party-initiated necessary joinder of non-parties, Rule 20 for party-initiated permissive joinder of non-parties, Rule 22 for party-initiated interpleader, and Rule 23 for party-initiated joinder of class actions. Against this structure, “[w]hat distinguishes intervention from these other methods of adding new parties is that it requires action by an outside party who seeks a seat at the table.” Rule 24, then, clearly sits structurally as the one mechanism by which non-parties can themselves initiate joinder. We know this by the lack of non-party initiated joinder mechanisms in the other Rules, the use of “intervene” in the text, and by the title of the provision itself. The textual meaning of Rule 24(a)(2) could not be more plain: only non-parties may seek intervention.

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143. Intervention, supra note 141.
146. While the title of a statutory provision cannot limit the plain meaning of statutory text, it can offer support to the plain-meaning constructions within the text. See Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co., 331 U.S. 519, 528–29 (1947) (referring to “the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text,” and noting that “[t]he interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.”); United States v. Tidwell, 521 F.3d 236, 246 (3d Cir. 2008) (noting that statutory title reinforces interpretation of text and structure of statute); United States v. Williams, 474 F.3d 1130, 1132 (8th Cir. 2007) (same).
B. Rule 24(a)(2)’s Drafting History

The legislative history of Rule 24(a)(2) also fully supports the notion that only non-parties may intervene. Professor James Moore was a primary architect and drafter of the Federal Rules. Moore tells us directly that intervention controls whether “non-parties may come into a pending litigation to protect interests that are jeopardized thereby or to expedite the hearing of a claim or defense.” Once again, we find that intervention is open only to non-parties.

And this is no surprise given the history of intervention as a tool of Anglo-American law. Professor Caleb Nelson’s work offers the definitive contemporary account of the evolution of intervention in federal practice. Professor Nelson shows that intervention has its roots in admiralty law where non-parties required a mechanism to join in rem suits that could adjudicate property to which they had an interest. Similarly, Nelson traces the historical practice in equity of allowing only non-parties the right to intervene. These pre-Rules cases at law were less uniform. Some courts allowed non-parties to intervene only with a claim of interest in property, while others allowed the non-party to have a mere interest in the success of the existing parties. But still, this older practice allowed only non-parties to intervene. Rule 24, as Nelson recounts, largely codified this older equity practice, following the general trend of the Rules drafters to incorporate equity norms into the Rules. Moreover, the official Advisory Committee Note states that

147. See REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE 2 (1937) (“The rules, other than those on depositions, discovery, and summary judgments, were drafted under the supervision of Charles E. Clark, the Reporter, on whose staff James William Moore, Joseph M. Friedman, and others have rendered valuable service.”); George W. Pugh, Moore’s Federal Practice, 22 L.A. L. REV. 907, 907 (1962) (describing Moore as having been “Chief Research Assistant on the Reporter’s Staff of the Supreme Court’s Advisory Committee in its preparation of the Federal Rules”).


150. Id. at 300–04.

151. Id. at 304–08.

152. Id. at 308–09.

153. Id. at 311–15.

Professor Moore’s article, quoted above, formed the basis for Rule 24.155

The drafters substantially revised Rule 24(a) most recently in 1966, yet still they maintained the insistence that intervention may only be done by non-parties.156 At that time, the drafters of Rule 24(a) sought to harmonize intervention by right with Rule 19 necessary joinder. Specifically, Rule 24(a) was amended to clarify that a person “is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i),” mandatory joinder.157 Accordingly,

[i]ntervention of right is . . . [the] counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion.158

Rule 19, of course, applies only to a “person . . . [who] must be joined as a party.”159 That is to say, Rule 19 applies to join “absent persons” only.160 This legislative history that links Rule 24(a)(2) and Rule 19 practice intervention speaks only to non-parties.

C. The Court’s Rule 24(a)(2) Practice

In addition to the text, structure, and legislative history, the Court’s precedent establishes that intervention is a mechanism

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155. See WILLIAM D. MITCHELL, CHAIRMAN, ADVISORY COMMITTEE ON RULES FOR CIV. PROC. ET AL., FINAL REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE (1937) (“This rule amplifies and restates the present federal practice at law and in equity.”).
156. Nelson, supra note 134, at 329–36 (2020). The drafters have revised Rule 24 since, such as the inclusion of Rule 5.1 in 2006, which had the effect of removing language from Rule 24(c). See STEVEN S. GENSLER & LUMEN N. MULLIGAN, FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY (2021). Rule 24(a)(2), however, has not been substantially altered.
158. Id. (citing DAVID W. LOUISELL & GEOFFREY C. HAZARD, PLEADING AND PROCEDURE: STATE AND FEDERAL 749–50 (1962)).
159. FED. R. CIV. P. 19(a)(1).
160. GENSLER & MULLIGAN, supra note 156, at Rule 19 (Rule 19 applies only to “absent persons”).
only for non-parties, not preexisting parties, to enter suits from which they are absent. Predating the advent of the Federal Rules by more than twenty-five years, in the *Rocca v. Thomas* decision, the Court held that intervention “covers the right of one to interpose in, or become a party to, a proceeding already instituted . . .”161 The Court continues to deploy this non-party definition of the right to intervene after the promulgation of the Rules. For example, in 1964, it held that “third parties might intervene to protect their interests . . .”162 More clearly, in 1967, the Court held that “intervention as of right” is only warranted when “a third party asserts a right that would be lost absent intervention.”163 Again, in 1988, the Court focused upon “nonparty” status in seeking to intervene.164 Justice Scalia commented that intervention was open only to third parties,165 further cementing the key insight that intervention is only available for non-parties. And coming full circle, in 2009, the Court quoted *Rocca*, again confirming that intervention is open only to non-parties.166

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Simply put, only a non-party may seek intervention. Rule 24(a)(2)’s text demands this conclusion. The Rule’s legislative history equally requires this conclusion. And the Court’s practice under the Rule conforms to this conclusion. As such, in cases like *Berger, Kaul*, and *Hobbs*, the legislature representing the state’s interest cannot intervene in its own case when the attorney general is defending the state’s interest. Such a scenario is little more than a party intervening in its own suit.

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166. *See United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) (“[W]hen the term [to intervene] is used in reference to legal proceedings, it covers the right of one to interpose in, or become a party to, a proceeding already instituted.”) (quoting *Rocca*, 223 U.S. at 390).
III. SAME PARTIES IN INTEREST

Not so fast, you might say! Sure, a party cannot intervene in its own case. But is that what is really happening in *Berger, Kaul, and Hobbs*? Isn’t one defendant the state attorney general and the putative joining defendant a separate party, the legislature? Indeed, the Court makes this precise argument in *Berger*.167

In these cases, however, the answer is no. It is an “inescapable fact that an artificial entity can only act... through its individual officers or agents...”168 Following this same logic, “[t]he State is a political corporate body [that] can act only through agents.”169 This need for the state to act only through agents also applies when the state engages in litigation.170 As such, one must take care not to elide the agent of the party in interest, the attorney general or the legislature, with the actual party in interest itself, the sovereign state. In this Part, I will show that *Ex parte Young* doctrine entices just such a conflating of agent with the party in interest. But, I argue, this is error as it is the party in interest, not the nominal party, that counts for Rule 24(a)(2) purposes in official capacity cases.

A. Ex parte Young: Nominal and Real Parties in Interest

Justice Gorsuch, writing for the majority in *Berger* and citing *Ex parte Young*, held that the legislature’s intervention was not the action of the same party. “As a formal matter and consistent with principles of sovereign immunity, the NAACP has not sued the State. Only state officers are or may be ‘parties’ here—and, so far, the legislative leaders are not among them.”171 This argument, as I lay out below, should not have carried the day.

*Ex parte Young*,172 with its nominal listing of government officials as parties in suits against the state, drives this “who’s

170. Hollingsworth v. Perry, 570 U.S. 693, 710 (2013) (“To vindicate that interest or any other, a State must be able to designate agents to represent it in federal court.”); see also House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1951 (2019) (citing id.).
171. See *Berger IV*, 142 S. Ct. at 2203.
the party” confusion in Berger. This is not to tear down the importance of this opinion.173 “Indeed it is not extravagant to argue that Ex parte Young is one of the three most important decisions the Supreme Court of the United States has ever handed down.”¹⁷⁴ Rather, it is a reminder that Ex parte Young is based upon the “legal fiction” that the named person in an official capacity suit is not the state itself for Eleventh Amendment purposes.¹⁷⁵ But, of course, the real party in interest in an official capacity suit is the state itself.¹⁷⁶ The Berger opinion, as such, errs by treating the listed, nominal party in an Ex parte Young suit as something other than a fictive placeholder for the real party in interest.

173. But, of course, there are critics. See, e.g., James Leonard, Ubi Remedium Ibi Jus, or, Where There’s a Remedy, There’s a Right: A Skeptic’s Critique of Ex Parte Young, 54 SYRACUSE L. REV. 215, 217 (2004) (describing Ex parte Young doctrine as an “anomaly” and a “fiction”); David P. Currie, Ex Parte Young After Seminole Tribe, 72 N.Y.U. L. REV. 547, 548 (1997) (arguing that sovereign immunity is a rotten idea to be remedied, but “if the Constitution is defective it should be amended, not ignored”); Akhil Reed Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1480 (1987) (describing the Court’s Eleventh Amendment jurisprudence as incoherent, leaving litigants “with . . . an ad hoc mishmash of Young and Edelman, of full remedy and state sovereignty, of supremacy and immunity, of law and lawlessness”); William A. Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction, 35 STAN. L. REV. 1033, 1044 (1983) (describing Ex parte Young and its progeny as “jerry-built” and “complicated” by “use of fictions”); Charles Warren, Federal and State Court Interference, 43 HARV. L. REV. 345, 375 (1930) (arguing that the doctrine “promotes collisions” between the states and the federal government).


Ex parte Young doctrine operates as an exception to Eleventh Amendment immunity. Eleventh Amendment sovereign immunity is the privilege of a state not to be sued without its consent in federal court. Textually, the Eleventh Amendment overturns the Chisholm v. Georgia opinion, which took jurisdiction over a state in a suit brought in diversity by a citizen of a different state. Following Hans v. Louisiana, the Court reads the Amendment, more broadly than its plain text, as standing for a general state immunity principle. In broad strokes, the notion is that the states’ traditional court immunity remains, “except as altered by the plan of the Convention or certain constitutional Amendments.” States, however, may waive their own immunity. Congress may abrogate it under certain conditions. But without waiver or valid abrogation, federal courts lack jurisdiction to adjudicate a private person’s suit against a state.

Ex parte Young stands as an essential exception to this broad immunity principle. In Ex parte Young, the state of Minnesota passed a series of civil and criminal regulations capping railroad passenger and freight prices. The railroad shareholders sought to enjoin the enforcement of these laws, which they believed to be unconstitutional under the Due Process Clause. The plaintiff shareholders sued Minnesota State Attorney General Young in his official capacity to enjoin

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178. 2 U.S. 419 (1793).
180. 134 U.S. 1 (1890).
186. See Mulligan, supra note 177, at 272–77.
188. Id. at 127–28.
189. Id. at 129–30.
him from enforcing the regulatory regime in federal court.\textsuperscript{190} The attorney general asserted Eleventh Amendment immunity, refused to submit to the authority of the federal court, and began to enforce the state regulations.\textsuperscript{191} The federal court, then, had the attorney general arrested by federal marshals.\textsuperscript{192} The attorney general in turn filed a habeas corpus petition with the Supreme Court for release.\textsuperscript{193}

In reviewing the petition, the Court first held that the state regulations at issue violated the Due Process Clause.\textsuperscript{194} The Court next held that a suit for injunction could proceed against the attorney general, not as an agent of the state, but in his individual capacity.\textsuperscript{195} The Court reasoned—very much akin to the old English common law—that when a state official acts unconstitutionally, the official does not act as the state per se because the federal Supremacy Clause overrides the unconstitutional state law.\textsuperscript{196} At the same time, however, the Court reasoned that this same official is the state for state action purposes, as this is a necessary concession in order to “permit the federal courts to vindicate federal rights.”\textsuperscript{197}

In the years since, the Court has been more transparent in labeling the inherent tension in \textit{Ex parte Young} as a legal fiction.\textsuperscript{198} Professor Kenneth Culp Davis summed this up well:

You may get relief against the sovereign if, but only if, you falsely pretend that you are not asking for relief against the sovereign. The judges often will falsely pretend that they are not giving you relief against the sovereign, even though you know and they know, and they know that you know, that the relief is against the sovereign.\textsuperscript{199}

\textsuperscript{190} Id. at 129.
\textsuperscript{191} Id. at 132–34.
\textsuperscript{192} See id. at 134.
\textsuperscript{193} Id. at 126.
\textsuperscript{194} Id. at 145–47.
\textsuperscript{195} Id. at 161 (“His power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States circuit court.”).
\textsuperscript{196} Id. at 159–60.
\textsuperscript{199} Davis, supra note 174, at 435. Attorney General Young argued this very point in his briefing: “Counsel for the plaintiffs contend . . . that these actions are not against the state, and yet at the same time they argue with equal vehemence
This understanding of *Ex parte Young* doctrine now rests as blackletter law. This legal fiction permits plaintiffs to seek injunction and other prospective relief against state officials in their official capacity for federal constitutional violations.200

Thus, to avoid Eleventh Amendment immunity when seeking injunctive relief, plaintiffs must name, not the state, but state officials in their official capacities in the pleading captions.201 As a result, it is understandable that some would view a suit against the state attorney general as a claim against the attorney general as the real party in interest. From that erroneous vantage, the state legislature could be viewed as a different party than the attorney general. They are different names in the pleading captions, after all.

But this understanding of *Ex parte Young*, as the Court has held, would overinflate mere “empty formalism”202 designed to ensure the supremacy of federal law. We should not confuse these nominal parties in *Ex parte Young*-type pleadings for the real parties in interest. As the Court held in *Idaho v. Coeur d'Alene Tribe of Idaho*, “[t]he real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading.”203 The Court went on to highlight the need to focus on the party in interest—the state—not the fictive nominal party. It held that “[a]pplication of the

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200 See *Stewart*, 563 U.S. at 267 (Roberts, C.J., dissenting) (“*Ex parte Young* rests on the ‘obvious fiction’ that such a suit is not really against the State, but rather against an individual who has been ‘stripped of his official or representative character’ because of his unlawful conduct.”) (quoting *Coeur d'Alene Tribe*, 521 U.S. at 270); Tarrant Reg'l Water Dist. v. Sevenoaks, 545 F.3d 906, 911 (10th Cir. 2008); Hill v. Kemp, 478 F.3d 1236, 1255–56 (10th Cir. 2007); Guzman-Vargas v. Calderon, 672 F. Supp. 2d 273, 295–96 (D. P.R. 2009).

201 See, e.g., *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (holding that the plaintiff “may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*”).

202 *Coeur d'Alene Tribe*, 521 U.S. at 270 (1997); see also *Stewart*, 563 U.S. at 266 (Roberts, C.J., dissenting) (critiquing the majority for extending “the fiction of *Ex parte Young*—what we have called an ‘empty formalism’”).

203 *Coeur d'Alene Tribe*, 521 U.S. at 270.
Young exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.\textsuperscript{204} That is to say, the real party in interest matters in these suits, contrary to focusing on the nominal party which forms the basis of the Court’s Berger opinion.

\section*{B. The State Is the Real Party in Interest}

The real party in interest, of course, is the person who, under the governing substantive law, possesses the contested enforceable rights.\textsuperscript{205} Here it is the state’s rights, not the nominal defendant’s rights, that are at issue, making the state the real party in interest. Indeed, the entire goal of an Ex parte Young suit is to tie the hands of the state.\textsuperscript{206} As such, in official capacity suits, the real party in interest is the state. On this point the Court has been quite clear. No amount of Ex parte Young Eleventh Amendment fiction should confuse us.

In fact, the Court has reached this issue of fictive party name versus party in interest in Ex parte Young suits before. In Kentucky v. Graham,\textsuperscript{207} the Court ruled that a suit against a state official in the individual’s official capacity “is not a suit against the official personally, for the real party in interest is the [state] entity.”\textsuperscript{208} The Court reiterated this in Coeur d’Alene, holding that “[t]his commonsense observation of the State’s real interest when its officers are named as individuals has not

\footnotesize
\textsuperscript{204} Id.
\textsuperscript{205} Cranpark, Inc. v. Rogers Grp., Inc., 821 F.3d 723, 730 (6th Cir. 2016); see also Payroll Mgmt., Inc. v. Lexington Ins. Co., 815 F.3d 1293, 1299 n.10 (11th Cir. 2016); RK Co. v. See, 622 F.3d 846, 850 (7th Cir. 2010); In re Signal Int’l, LLC, 579 F.3d 478, 487 (5th Cir. 2009); Rawoof v. Texor Petroleum Co., 521 F.3d 750, 756 (7th Cir. 2008); Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186, 193 (2d Cir. 2003); Consul Gen. of Republic of Indon. v. Bill’s Rentals, Inc., 330 F.3d 1041, 1045 (8th Cir. 2003); Whelan v. Abell, 953 F.2d 663, 672 (D.C. Cir. 1992); Va. Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 83 (4th Cir. 1973).
\textsuperscript{206} Ex parte Young, 209 U.S. 123, 174 (1908) (Harlan, J., dissenting) (“No relief was sought against him individually, but only in his capacity as attorney general. And the manifest, indeed the avowed and admitted, object of seeking such relief, was to tie the hands of the state so that it could not in any manner or by any mode of proceeding in its own courts, test the validity of the statutes and orders in question.”); see also GENSLER & MULLIGAN 2022, supra note 108, at 509 (“Rule 17(a)’s primary focus is upon plaintiffs (or those positioned as claimants) and not those defending against claims.”). But see Eaton Corp. v. Westport Ins. Co., 332 F.R.D. 585, 587 (E.D. Wis. 2019) (“It does not follow that the concept of real party in interest does not apply to defendants.”).
\textsuperscript{207} 473 U.S. 159 (1985).
\textsuperscript{208} Id. at 166.
escaped notice or comment from this Court, either before or after Young.”209 Thus, given that the state in cases like Berger, Kaul, and Hobbs is already the real defendant party in interest, it is a nonstarter for any person to also seek intervention as the state. The state, as the party in interest, is already present.210

Moreover, the Court has held that potential official capacity intervenors represent the state as the real party in interest. In Karcher v. May, the New Jersey attorney general declined to defend the constitutionality of a mandatory-moment-of-silence statute in public schools.211 As such, the speaker of the New Jersey House of Representatives and the president of the New Jersey Senate intervened as defendants212 in their official capacities representing the state’s interests.213 The legislative leaders, however, lost their leadership posts.214 As a result, the Court held that the legislative leaders lacked official capacity status and that their attempt to appeal in their personal capacities failed for lack of standing.215 In so holding, the Court distinguished between their prior official capacity status and their personal capacity status. The Court held that “[t]he concept of ‘legal personage’ is a practical means of identifying the real interests at stake in a lawsuit. We have repeatedly recognized that the real party in interest in an official-capacity suit is the entity represented and not the individual officeholder.”216 Thus, we see again that the Court looks to the real party in interest to determine party status in Ex parte Young suits.


210. One could contend that these statements from Graham and Coeur d’Alene Tribe are not holdings. In Graham, the particular facts of the case presented saw the defendants sued in their personal capacities. Kentucky v. Graham, 473 U.S. 159, 161. Coeur d’Alene Tribe raised the issue of whether a suit brought in a personal capacity can, as a function of a real-party-in-interest analysis, be one that is against the state. Coeur d’Alene Tribe, 521 U.S. at 270. Nevertheless, because the party-in-interest status in both Graham and Coeur d’Alene was an essential proposition along the Court’s chosen decisional path of reasoning, which was actually decided upon using the facts of the case, the better view is that these issues decided are holdings. See Michael Abramowicz & Maxwell Stearns, Defining Dicta, 57 STAN. L. REV. 953, 1065 (2005) (defining holding).


212. Id. at 75.

213. Id. at 76.

214. Id.

215. Id. at 77–78.

216. Id. at 78.
Despite *Ex parte Young*'s fictive approach to Eleventh Amendment immunity, it is clear that the Court holds that the real party in interest in official capacity suits is the state. Similarly, it holds that putative intervenors seeking to join in their official capacities are also the state pursuant to a real-party-in-interest analysis. The inescapable conclusion, then, is that, in suits like *Berger, Kaul*, and *Hobbs*, the courts face an attempted intervention by the same party in interest that is already a defendant. And, as discussed above, Rule 24(a)(2) cannot support such self-intervention.

IV. A BACKDOOR SEPARATION-OF-POWERS PROBLEM

The *Berger* majority is not deaf (How could it be given the case law?) to the argument that in *Ex parte Young* suits the state is the real party in interest. In what it labeled as a functional view, the Court recognizes that the state is the party in interest but rejects the notion that the sovereign interest is a singular concept.

I begin with the Court’s holding on this score. The Court began with a recognition of the importance of the party in interest in intervention questions—a starting point enmeshed in the text, history, and purpose of Rule 24(a)(2). “Functionally, of course, this suit implicates North Carolina’s sovereign interests regardless of the named parties.”217 Despite this recognition of the real party in interest, the Court then moved to an atextual, ahistorical, and non-purposive emphasis upon an interest having multiple perspectives, which it conflated with the nominal-party status. “Yet . . . a plaintiff who chooses to name this or that official defendant [i.e., the nominal party] does not necessarily and always capture all relevant state interests.”218 Doubling down on this notion, the Court held that “full consideration of the State’s practical interests may require the involvement of different voices with different perspectives.”219 “To hold otherwise,” the Court concluded, “would risk allowing a private plaintiff to pick its preferred defendants and potentially

218. *Id.*
219. *Id.*
silence those whom the State deems essential to a fair understanding of its interests.”

In this Part, I take up the Court’s error of focusing upon the nominal party, or “perspectives” to use the Court’s language, instead of the party in interest, or what the Court refers to as the “functional” party. First, on the record in Berger, even if state interest is not singular, it was in this case. Second, the notion of a state interest as non-singular with multiple “perspectives” is atextual, ahistorical, and non-purposive as it relates to Rule 24(a)(2) analysis. Third, this multiple-perspectives-on-an-interest approach is ripe with pragmatic challenges. And, most importantly, the Court’s approach invites state law separation-of-powers difficulties.

A. Not on This Record

The Court grounded its holding on the notion that a state is a “they,” not an “it.” Thus, from this vantage point, these different branches of the state can have different perspectives on the state’s sovereign interest. But in Berger, the interest perspectives did not diverge.

In Berger, the attorney general and the legislature had the same goal (i.e., their perspectives on the state’s interest converged). As the Fourth Circuit held, and the Supreme Court did not overrule, the legislative leaders sought to represent “precisely the interests already represented by the Attorney General in this case.” Indeed, the legislative leaders sought to represent the sovereign “interests of the State of North Carolina” in defending S.B. 824, the voter identification bill at the center of the dispute in Berger. And, in fact, both the attorney general and the legislature sought to ensure the constitutionality of S.B. 824. Moreover, as noted above, the legislative leaders could not seek to represent any unique interest of the legislature because they abandoned that argument. And the attorney general is required by statute to

220. Id.
221. Id. at 2205.
222. Id.
224. Id. at 921.
225. Id. at 921–23.
226. Id. at 921 (“The Leaders did not appeal the district court’s order denying their motion to intervene.”).
defend state statutes, such as S.B. 824. As the text of Rule 24(a)(2) makes clear, then, the legislature definitionally lacks an interest different from the “state’s” that the attorney general already represents.

The Berger majority’s invention of “perspectives” offers little to alter this analysis. The Court held that, although the interests of the state were the same, the “perspectives” of the attorney general and the legislative leaders differed because the legislature focuses on “defending the law vigorously on the merits without an eye to crosscutting administrative concerns” such as obtaining guidance for the administration of upcoming elections. Of course, this notion of unique legislative perspective was forfeited. Notably, the majority did not address this forfeiture issue.

B. Where Does the Court’s “Perspective” Come From?

Beyond the record in Berger, the more telling issue here is the atextual, ahistorical, and non-purposive nature of the Court’s opinion. As discussed in detail above, Rule 24(a)(2) addresses “interests” of “parties” and “movants.” What is missing from Rule 24(a)(2) is any use of “perspective,” which is the locus of the Court’s decision. Here, I turn to a critique of the Berger Court’s atextualist turn.

A textualist approach to Rule 24(a)(2) cannot accommodate a focus upon “perspective” as part of an intervention as of right analysis. As discussed above, the Court often deploys a textualist, Rules-as-statutes approach to Federal Rules of Civil Procedure questions. From this Rules-as-statutes perspective, use of atextualist terms such as “perspective” has no place. The Court, when in this mode of Rules interpretation, decidedly rejects policy arguments and the like in favor of a hyper-textualist interpretive stance. Moreover, from my preferred

229. See id. at 2212 (Sotomayor, J., dissenting).
230. See FED. R. CIV. P. 24(a)(2); supra Part II.
231. Berger IV, 142 S. Ct. at 2203.
232. See supra notes 109–113 and accompanying text (discussing the Rules-as-statutes approach).
233. See id. (outlining the strictly textual approach that eschews policy arguments).
234. Id.
purposivist view, perspective should play no role as it is not a
notion grounded in the Advisory Committee Notes, purposes of
Rule 24, or its history.\footnote{235}{See supra Part II.}

Such an atextual, ahistorical, non-purposive turn is not
without precedent in Rules cases, however.\footnote{236}{See Porter, supra note 114, at 131–42 (identifying and describing two
distinct methodologies of Rules interpretation invoked by the Roberts Court).} Indeed, the Court
often engages with Rules cases from a decidedly non-semantic,
non-purposivist vantage point.\footnote{237}{Id. at 136–42; see also Mulligan & Staszewski, supra note 115, at 1195–
97.} This inherent-authority approach to the Rules\footnote{238}{See Mulligan & Staszewski, supra note 109, at 2199–2211 (critiquing this
approach).} has come to the fore in many high-
profile cases such as \emph{Scott v. Harris},\footnote{239}{550 U.S. 372 (2007).} \emph{Wal-Mart Stores, Inc. v. Dukes},\footnote{240}{564 U.S. 338 (2011).} \emph{Bell Atlantic Corp. v. Twombly},\footnote{241}{550 U.S. 554 (2007).} and \emph{Ashcroft v. Iqbal}.\footnote{242}{556 U.S. 662 (2009).} In this family of cases, the Court divorces itself from
text almost entirely and looks predominantly to policy that the
Justices set themselves.\footnote{243}{See Porter, supra note 114, at 149–53 (recognizing and describing this
phenomenon).} That is to say, in this family of cases, the policy the Court sets is not one reflected in the Rules
themselves or the Advisory Committee Note, but rather one of
the Justices’ own making. The invention of an atextual, non-
purposive “perspective” as an aspect of Rule 24(a)(2) analysis in
\emph{Berger} fits squarely in this family of cases.

Indeed, when the Court acts in this inherent-authority
mode—from the use of video evidence in summary judgment to
certification of class actions to the use of “perspective” in
intervention—the Court’s interaction with the Rules can hardly
be described as the straightforward exercise of textual
interpretation.\footnote{244}{See id. at 136–37.} Moreover, the Court has not provided any
principled explanation for when deviation from its textualist or
purposivist approaches to Rules cases should occur, nor has it
acknowledged that it is adopting a fundamentally different
interpretive methodology in these cases.\footnote{245}{See Marcus, supra note 128, at 928 (claiming that the Court’s interpretive
methodology in Rules cases varies “wildly and inexplicably”); Porter, supra note 114, at 142, 156 (describing “the Roberts Court’s interpretive bipolarity,” and}
that such inherent-authority cases always lead to poor outcomes from a policy perspective; but rather, these cases result from the Justices’ own view of what constitutes sound policy—not the text or legislative history of the Rules.

_Bell Atlantic v. Twombly_ is a ready example. The Court had, prior to this 2007 opinion, affirmed the “no set of facts” standard for interpreting compliance with Rule 8(a)(2) under _Conley v. Gibson_ for decades. The Court rejected this accumulation of precedent in _Twombly_, an antitrust class action suit against several telecommunications providers. The issue for the Court was that the complaint asserted only that the defendants had colluded in violation of the antitrust laws without providing any specific factual allegations of that unlawful agreement. While this bare allegation survived a Rule 12(b)(6) challenge under the _Conley_ standard, the _Twombly_ Court overruled _Conley_. Famously, the _Twombly_ opinion now requires courts to disregard all recitals in a complaint that are mere legal conclusions and assess whether the well-pleaded factual allegations state a “plausible” claim for relief. The opinion crafted a new and more demanding test for assessing the sufficiency of complaints.

Key for this discussion, however, is that the Court predicated this standard on its policy choice to avoid the high costs of discovery and related incentives to settle unmeritorious cases. Indeed, the consensus among commentators recognizes _Twombly_ as a pronouncement regarding the policy underlying recognizing “the Court’s lack of transparency and self-reflection about its” disparate approaches).

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248. _Id._ at 565 n.10.

249. _Id._ at 561.

250. _Id._ at 563 (retiring the key passage from _Conley_).

251. _Ashcroft v. Iqbal_, 556 U.S. 662, 678 (2009) (“[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”) (quoting _id._ at 570).

252. _See GENSLER & MULLIGAN_, _supra_ note 156, at Rule 8.

pleading requirements in federal court—not as an interpretation of Rule 8(a)(2)’s text. Indeed, proponents of the opinion welcomed it not because of its textual exegesis, but because it limited discovery costs. Similarly, opponents focus their ire on the policy implications of Twombly as opposed to textual interpretive difficulties. Much the same point has been made about the so-called summary judgment trilogy cases, where the Court enacted its own policy preferences that did not align with the Rule’s text.

Berger, then, is just such a Court-chosen policy opinion. “Perspective” lacks any textual hook or any foundation in purposivist analysis. Rule 24(a)(2)’s text, history, and purposes all focus on “interest,” “parties,” and “movants.” As

254. See Twombly, 550 U.S. at 579 (Stevens, J., dissenting) (noting the same).
255. See Lynn C. Tyler, Recent Supreme Court Decision Heightens Pleading Standards, Holds Out Hope for Reducing Discovery Costs, 77 U.S.L.W. 2755 (2009); Mark Herrmann et al., Plausible Denial: Should Congress Overrule Twombly and Iqbal?, 158 U. PA. L. REV. 141, 142–47 (2009) (arguing that Twombly and Iqbal were properly decided in an adjudication, are correct interpretations of Rule 8, and set sound policy).
256. See Robert G. Bone, Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849 (2010); A. Benjamin Spencer, Plausibility Pleading, 49 BOS. COLL. L. REV. 431, at 448–50, 461–73 (2008) (detailing the many ways in which the Twombly rule deviates from past practice, the text, the intent, and the legislative history of Rule 8); Mulligan & Staszewski, supra note 115, at 1197 & nn.35–39 (describing these critiques and collecting sources). There were some interpretation-based critiques as well. See RICHARD A. POSNER, HOW JUDGES THINK 55 (2008) (contending that the Court in Twombly could not possibly have based its decision on “legalist” principles); Marcus, supra note 128, at 974 (“Every relevant indicator suggests that the Court misinterpreted Rule 8 in Twombly and Iqbal.”).
257. See Adam N. Steinman, The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy, 63 WASH. & LEE L. REV. 81, 94–111 (2006) (arguing that the trilogy cases are an example of procedural reform through reinterpretation that do not comport with the text of Rule 56). This point about methodology should be kept separate from the policy merits. That is to say, one can agree with the policy outcome in the trilogy, as we do. See Martin H. Redish, Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix, 57 STAN. L. REV. 1329, 1343 (2005) (“[T]here exists no justification for imposing any burden on a movant for summary judgment that would not parallel the burden that party would have at trial prior to moving for judgment as a matter of law.”); EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 85 (2d ed. 2000) (similar). Yet still note that this policy outcome is not couched within the text of Rule 56. See Rules Interpretive Theory, supra note 109, at 2202.
258. See FED. R. CIV. P. 24(a)(2) (deploying the terms “interest,” “parties,” and “movant,” but not “perspective”); supra Part II (discussing Rule 24(a)(2)’s text, history, and purposes).
Staszewski and I have argued previously, such free-wheeling approaches to Rules cases are contrary to statute.\textsuperscript{259}

The inherent-authority approach to Rule 24(a)(2) fails because the Rules Enabling Act trumps the Court’s pre-statutory inherent authority to establish procedure. Of course, in the absence of statute, the Supreme Court and lower federal courts have implied powers that cannot be dispensed with because they are necessary to the exercise of all others.\textsuperscript{260} At the same time, the Court has itself held, “Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States.”\textsuperscript{261} And Congress has acted. It passed the Rules Enabling Act in 1934, which now controls all federal rulemaking.\textsuperscript{262}

Because Congress has so strongly acted here, any attempt to replace this structure in favor of an inherent-authority approach to Rules construction is to ignore statute. As Professor Catherine Struve concludes, “[T]he prior existence of inherent judicial authority concerning a particular matter . . . [of procedure] should, in any event, be irrelevant to the Court’s interpretation of a Rule governing the matter.”\textsuperscript{263} Indeed, all agree that the Rules Enabling Act is delegated rulemaking authority from Congress—not a codification of inherent court power.\textsuperscript{264} The Rules Enabling Act, furthermore, contemplates that major policy changes to the Rules should be accomplished pursuant to the rulemaking process.\textsuperscript{265} Moreover, the committee process and notice-and-comment procedures that limit the Court’s ability to dictate the precise content of the Rules have

\textsuperscript{259} See Rules Interpretive Theory, supra note 109, at 2205–06.


\textsuperscript{261} Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941) (footnote omitted).


\textsuperscript{264} Id. at 1125; see also Porter, supra note 114, at 176.

\textsuperscript{265} See Struve, supra note 263, at 1130 (“Accordingly, since the Enabling Act conditions the delegation of rulemaking power on the Court’s use of the prescribed procedures, it appears to require the Court to resort to those procedures when seeking to change a Rule.”); Marcus, supra note 245, at 933–36 (agreeing that the terms of the Rules Enabling Act are best understood to counsel interpretive restraint, but recognizing the limitations of a formal approach and the need for institutional analysis in this context).
been required by Congress since 1988. The Court has not possessed a full-throated, non-statutorily constrained license to control civil procedure by way of inherent authority since at least 1872. Any suggestion that the Court is free to ignore the force of the Rules simply fails to acknowledge the commands of the Rules Enabling Act. Yet, the Berger Court does just this ignoring of the Rules Enabling Act by inventing “perspective” as an element of Rule 24(a)(2) analysis.

C. Pragmatic Challenges

Once the Court, applying Rule 24(a)(2) or any other Rule, leaves text and purpose as interpretive tools, it risks unintended consequences. One would readily predict such poor consequences here when the Court allows self-intervention under the guise of affording multiple atextual perspectives in an intervention analysis.

As it turns out, there is good reason for the pre-Berger consistent practice by the lower courts of barring self-intervention. Interpreting Rule 24(a)(2) to require intervention where a proposed intervenor and an existing party represent the same party in interest would create poor outcomes for courts and litigants. For example, in litigation involving governmental parties, such intervention would create an “intractable procedural mess.” Once this intervention door is opened, there is no reason why an unlimited number of state actors could not seek intervention in federal suits—ranging from any individual legislator who voted for the law under review to any individual county that supports it. “Allowing a single entity, even a state, to have [multiple] independent parties simultaneously representing it” could (and likely would) create a scenario where the attorney general and these various state agents would “take inconsistent positions on any number of issues,” from “briefing schedules, to discovery issues, to the

269. See supra Part I (outlining the lower courts’ consistent rejection of self-intervention before Berger IV).
270. Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 801 (7th Cir. 2019).
ultimate merits of the case.”271 In such a scenario, “[t]he district court would . . . have no basis for divining the true position of the State . . . on issues like the meaning of state law, or even for purposes of doctrines like judicial estoppel.”272 In short, transforming a state party into a hydra undermines the federal courts’ ability to manage important cases and the state’s own sovereign interests.

Moreover, these consequences would not be limited to government party suits, because the Federal Rules of Civil Procedure are trans-substantive.273 In the corporate setting, for example, self-intervention would allow multiple corporate employees to intervene in suits brought against an entity. All of them could claim to represent the same corporate interest. Not only would this outcome create the same manageability concerns discussed above, but it would also upend well-established derivative lawsuit doctrine. In derivative lawsuits, before shareholders are permitted to step into the shoes of the corporation and represent that interest, they must satisfy an extremely high burden: they must show that the corporate board—that is, the designated representative of the corporation—has failed to act.274 A self-intervention approach would give shareholders (not to mention board members, executives, and individual employees) an end run around the demanding standard they have long faced, requiring federal courts to permit their intervention, by right, as a corporation’s additional “agents.” Such an outcome is untenable.

271. Id.

272. Id. at 801–02.


274. See, e.g., Ross v. Bernhard, 396 U.S. 531, 534 (1970) (noting that in derivative lawsuits, equity courts have established as a “precondition for the suit” that the shareholder demonstrate that “the corporation itself had refused to proceed after suitable demand”).
D. State Constitutional Challenges

So, what is really going on in these self-intervention motions now made under the guise of “perspective”? In reality, these represent a backdoor attempt to violate state separation-of-powers principles that would not likely withstand direct judicial review. That is, these motions are, functionally speaking, state law separation-of-powers violations.

Let’s step back for a moment and reframe our discussion. The Court in Bethune-Hill reaffirmed the concept that federal constitutional law is silent as to who acts as a state’s agent in federal court, so long as rules regulating federal court litigation are satisfied.275 This opinion lays out a two-prong test for who represents the state in federal court: (1) state law selection of an agent for litigation and (2) conformity to federal court litigation requirements.276 In Bethune-Hill, the Court concluded that the Virginia House of Delegates failed prong one of this test because a state statute assigned the power to litigate on behalf of the state near exclusively to the attorney general.277 By contrast, in Hollingsworth, while the state supreme court held that the proposition proponents were appropriate agents under state law to represent the state,278 the Court dismissed for lack of standing—a prong-two problem.279 To this point, I have argued that cases such as Berger, Kaul, and Hobbs, like Hollingsworth, face prong-two challenges: namely, the inapplicability of Rule 24(a)(2) to these situations because the state cannot self-intervene. In this Section, I turn to prong-one challenges to cases like Berger, Kaul, and Hobbs, focusing on the serious separation-of-powers concerns raised by legislative joinder seeking to represent the state itself.

This separation-of-powers issue arises because representing the federal or state government in litigation is an executive power. At the federal level, there is no doubt that the power to litigate on behalf of the United States is an executive power. Article II of the Constitution assigns the President the power and duty to “take Care that the Laws be faithfully executed.”280

276. Id.
277. Id. (citing VA. CODE ANN. § 2.2–507(A) (West 2017)).
278. Hollingsworth, 570 U.S. at 703.
279. Id. at 706, 715.
280. U.S. CONST, art. II, § 3. One could argue that the Executive Branch’s authority to enforce the laws is granted, not by the Take Care Clause, but rather
In *Buckley v. Valeo*, the Court held that “[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts the responsibility to ‘take Care that the Laws be faithfully executed.’” These authorities clearly place the representation of the United States’ sovereign interest with the executive branch of government.

This same analysis applies to most, if not all, of the states. The state constitutions all list the attorney general as an executive officer. Indeed, forty-eight of them list the attorney general as an executive officer free from gubernatorial control, being subject in forty-three states to an independent-election requirement. Of course, the broad powers of state attorneys general arise from the hazy mists of the English common law tradition and vary from state to state. Yet even with these ancient origins and variations state to state, “[t]ypically state constitutions describe the attorney general as ‘the legal officer’ of the state . . . [vesting] authority for the attorney general to represent the state’s interests in litigation.” Indeed, “in virtually all states, the Attorney General is designated the state’s chief legal officer,” with some attorneys general by the seemingly more sweeping and unconditional Vesting Clause, which provides that “the executive power” shall be vested in the President. See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

281. 424 U.S. 1, 138 (1976) (invalidating provision of the Federal Election Campaign Act that authorized a committee of non-Executive Branch members to enforce the Act by initiating civil lawsuits in the name of the United States); Springer v. Gov’t of the Philippine Islands, 277 U.S. 189, 202 (1928) (“Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement.”).

282. There is a circuit court and scholarly discussion of whether qui tam cases violate that principle. This issue is beyond the scope of this Article and, moreover, only reinforces that government-run litigation is an executive power, regardless of whether outsourcing that power to private actors comports with the Constitution. *Compare* Riley v. St. Luke’s Episcopal Hosp., 262 F.3d 749 (5th Cir. 2001) (en banc) (holding that qui tam is constitutional) with Ara Lovitt, *Fight for Your Right to Litigate: Qui Tam, Article II, and the President*, 49 STAN. L. REV. 853 (1997) (arguing that qui tam violates the Constitution).


284. Id.

285. Id. at 2449–50.

286. Id. at 2452.

287. Johnstone, supra note 6, at 1477.

288. See Marshall, supra note 283, at 2452.
holding that status by constitutional command and some by statute.

The implication here is clear—absent a highly unusual state separation-of-power approach, state legislatures are not vested with the executive power to litigate as the state itself. Rather, the states all create attorneys general as executive officers and near-universally invest that office as the state’s chief legal officer.

The same textual argument that drives the conclusion that representing the federal government in court is an executive power applies in the states. “[E]very state constitution, like the U.S. Constitution, provides in substance that the chief executive shall ‘take care’ or see to it that the laws are faithfully executed.”

This is the same textual starting point that grounds the federal law conclusion that representing the federal government is an executive power. Thus, the Buckley holding, that controlling litigation is an executive power, is compelling in the state constitutional law setting as well. And in nearly every state, as noted above, this executive power is vested with the attorney general.

Moreover, this separation-of-powers concern with allowing the legislature to represent the state is heightened in most states as compared to the federal standard. Explicit separation-of-powers clauses, a common feature of state constitutions, push the conclusion that controlling litigation on behalf of the state is an executive power. Take the Virginia Constitution, for example. Article III, section 1 states: “The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time . . .”

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291. Norman R. Williams, Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage, 154 U. PA. L. REV. 565, 639 (2006); see also id. at 639 n.287.

292. See Buckley v. Valeo, 424 U.S. 1, 138 (1976). Of course, this opinion would not bind the states, but would merely be persuasive.

293. VA. CONST. art. III, § 1.
Thirty-five states have similar textual separation-of-powers provisions. Moreover, in applying these textual separation-of-powers provisions, many state judges conclude that their state constitution demands “a more rigid separation between the branches than exists at the federal level.”

Applying these principles here, the conclusion follows: Representing the state in court is the duty of the state attorney general, often as a state constitutional directive. Any attempt to alter that constitutional duty by state statute would invite constitutional challenge. And, of course, the “state courts have the power to determine whether state laws are consistent with or conflict with their state constitutions.” And even in those states where the attorney general’s duty to represent the state is purely statutory, the power of representing the state is necessarily an executive one. Thus, assigning this power to litigate as the state to the legislature would itself violate state separation-of-powers doctrine, which is often more rigid than federal doctrine.

From this perspective, allowing the legislature to join a federal suit as the state itself grants the legislature a power through the back door that it could not take through the front door. Consider the constitutional backdrop in North Carolina, where the Berger case arose: The North Carolina Constitution has a textual separation-of-powers provision and it creates

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297. See N.C. CONST. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.").
the attorney general as an executive officer. As noted above, the power to litigate on behalf of the state is an executive power. Nevertheless, a state statute purported to allow the North Carolina statehouse leaders “as agents of the State” to join suits when a case challenges the constitutionality of a state law. This North Carolina statute seems clearly void as a matter of state constitutional law, which is a conclusion noted, in dicta, by both the federal district court and the Fourth Circuit majority en banc in Berger.

The Court addressed this issue briefly and incompletely. Of course, the Court lacks authority to interpret state constitutional law, which is really the point here. It held that the North Carolina Constitution allows a state statute to direct the scope of the attorney general’s power. This is to say, North Carolina law seems to allow statute to regulate which executive officers represent the state in litigation. From that rather commonplace observation, the Court quickly noted that “the Board [failed to] identify anything to support its suggestion that the State's executive branch holds a constitutional monopoly on representing North Carolina's practical interests in court.”

Thus, citing no North Carolina law, the U.S. Supreme Court concluded that the North Carolina Constitution allows the

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298. See id. art. III, § 7, cl. 1.
300. N.C. GEN. STAT. § 120-32.6(b) (2017).
303. See Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 630–33 (1875) (holding that the Court’s statutory power to review state court decisions is limited to matters of federal law, although reserving whether Congress could assign it more power); BP P.L.C. v. Mayor & City Council of Balt., 141 S. Ct. 1532, 1540 (2021) (confirming the continued validity of Murdock); Michigan v. Long, 463 U.S. 1032, 1043 (1983) (holding the Court lacks power on certiorari from the state courts to review truly independent interpretations of state constitutional law); Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945) (“The reason is so obvious that it has rarely upon thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.”).
305. Berger IV, 142 S. Ct. at 2202–03.
legislature “authority to defend state law on behalf of the State.”  

Wait, what just happened! Under the guise of federalism, the U.S. Supreme Court held, citing no law, that the North Carolina Constitution allows the legislature to carry out the executive function of defending a lawsuit because the legislature could assign other executive officials, other than the attorney general, to defend a lawsuit. The Court errs in two ways with this unprecedented move. First, the Court’s conclusions of North Carolina law seem to be an error of North Carolina constitutional law analysis for the very separation-of-powers concerns I outlined above. Second, and more to the point, the U.S. Supreme Court lacks the power to opine about state law.

Allowing the North Carolina legislature, or any state legislature, to join as the state itself under federal procedural law, then, is little more than a backdoor way to achieve a result that is most likely void as a matter of state constitutional law. State constitutional law, as a general matter, will not allow the legislature to use this executive power. Yet, self-intervention achieves this same result. Failing to recognize this pragmatic impact would lead to the worst kind of formalist approach to separation of powers. The courts, therefore, should focus on the function that joinder would play here: granting the legislature the executive power to litigate by representing the state itself. The federal courts should not be partners in such a sleight-of-hand maneuver.

306. Id. at 2203.
307. See supra notes 283–304 and accompanying text (discussing state separation of powers); Brief of Former North Carolina Supreme Court Justice Robert F. Orr as Amicus Curiae in Support of Respondents, Berger v. N.C. State Conf. of the NAACP, 2022 WL 525076, at *3 (Feb. 16, 2022) (No. 21-248) (former Republican North Carolina Justice with eighteen years of experience in the state appellate courts showing that the statute at issue here, allowing the legislature to represent the state sovereign interest, “would violate the North Carolina Constitution”). No other party or amicus contradicted this position.
308. See supra note 232.
Of course, I am reasoning here in broad strokes about the laws of fifty different states. This raises the danger of making one-size-fits-all claims about fifty different legal regimes.\textsuperscript{311} And, of course, states are free to organize themselves for litigation purposes as they see fit.\textsuperscript{312} I do not intend to make such slapdash claims or wrongly deny that a state may organize itself in a number of ways. It is, of course, permissible and possible that a state with a radically different approach to separation of powers could conclude that its legislature can litigate as the state itself without a state constitutional violation.\textsuperscript{313} It is essential to recall, however, that federal law, including the Rules of Civil Procedure, preempts state law in federal court procedural matters.\textsuperscript{314} This means, then, that the federal courts will take a uniform approach to joinder that will not factor in the potential for such a unique state approach to separation of powers.\textsuperscript{315} And given that most, if not all, states face separation-of-powers concerns with legislative self-intervention, this necessity of taking a uniform federal approach to joinder militates against allowing multiple representatives to defend the same state interest.

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\textsuperscript{312} See Hollingsworth v. Perry, 570 U.S. 693, 710 (2013) (observing that although “[t]hat agent is typically the State’s attorney general,” states may make a different choice); Planned Parenthood of Wis., Inc. v. Kaul, 942 F.3d 793, 802 (7th Cir. 2019) (“W)e can see no reason why a federal court would bat an eye if a state required its attorney general to withdraw from his representation and allow another entity, including a legislature, to take over a case.”).


\textsuperscript{314} See supra notes 92–98 and accompanying text.

In sum, the Berger Court errs in allowing a single party in interest to intervene in its own case in an effort to allow different “perspectives” to gain party status. First, even if this interpretation of Rule 24(a)(2) made legal sense, the record in Berger does not show that there were different perspectives to air. Second, and more important, the notion of a state interest as non-singular with multiple “perspectives” is atextual, ahistorical, and non-purposive to Rule 24(a)(2). Third, this multiple-perspectives-on-an-interest approach is ripe with pragmatic challenges that will impact any number of non-corporeal entities—not just state governments. And lastly, focusing back on state governments, the Court’s approach invites state law separation-of-powers difficulties. As such, the Court should not have invented a new “perspectives” approach to intervention as of right in Berger.

V. SUBSTITUTION NOT INTERVENTION

What is a legislative body to do, then, if intervention is a nonstarter, to engage in public interest litigation beyond amicus briefing? Two paths present themselves. First, it may seek substitution of the nominal official capacity party under Rule 25(d) in cases where the executive defendant fails to defend. And second, it may attempt to present an interest other than the state’s and seek intervention that is not a self-intervention. In this Part, I address this first matter in detail, while touching upon the latter in passing.

A. Substitution and Real Party in Interest

I turn first to substitution. This same party-in-interest approach to party status controls elsewhere in the Federal Rules. Indeed, in official capacity suits, real party-in-interest, not nominal, status governs Rule 25(d) analyses. Rule 25(d) addresses situations where an official officeholder ceases to hold office while a suit is in progress. The Rule states: “An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer’s successor is automatically

316. See GENSLER & MULLIGAN, supra note 156, at Rule 24 n.141 (“The ability to file an amicus brief is not a substitute for intervention of right under Rule 24(a).”).
substituted as a party.” While the Rule speaks in terms of substitution of parties, its focus is on the preservation of the state’s representation. In fact, more accurately, Rule 25(d) is best understood as a substitution of the nominal party provision, not a substitution of the real-party-in-interest provision.

Rule 25(d) achieves this end by focusing upon the real party in interest. The Court in Lewis v. Clarke directly so held:

In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official’s office and thus the sovereign itself. This is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation. The real party in interest is the government entity, not the named official.

Any other approach would “glorify form over substance and reality.”

It is no accident that the courts now read Rule 25(d) from this real-party-in-interest point of view. Prior to 1961, the Supreme Court in a series of opinions, most notoriously Snyder v. Buck, treated the named individual in official capacity suits as the real party in interest, leading to a host of injustices. The Rule Advisory Committee, in the 1961 amendments, altered Rule 25(d) to refocus the courts on the government’s role as the real party in interest in official capacity suits. Speaking directly to official capacity defendants, the Advisory Committee

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317. Fed. R. Civ. P. 25(d); see also Fed. R. App. P. 43(c)(2) (similar approach for appellate cases).
319. Id. (internal citations omitted).
320. Fleming v. Goodwin, 165 F.2d 334, 338 (8th Cir. 1948); see also Negron Gaztambide v. Hernandez Torres, 145 F.3d 401, 415 (1st Cir. 1998) (“When the official capacity defendants entered office, they were substituted automatically as representatives of the Commonwealth, which is the real party in interest in the official capacity suits. As the current officeholders, their lack of participation in events prior to their ascendency to office does not alter their substantive rights.”) (internal emphases omitted).
323. Id. at 235–40 (discussing how the 1961 amendments to Rule 25(d) ensure a focus on the real party in interest, the government, by automatic substitution of official capacity defendants).
concluded: “The amended rule will apply to . . . any action brought in form against a named officer, but intrinsically against the government or the incumbent thereof whoever he may be from time to time during the action.” The Advisory Committee thus acknowledged the fictive nature of *Ex parte Young* suits and crafted a rule that does not let that immunity sleight of hand interfere with a real-party-in-interest focus.

Professor Benjamin Kaplan reaches the same conclusion in his near-contemporaneous discussion of the 1961 Rule 25(d) amendments:

This pleading style reflects the well-known theory—whether it is a peculiarly fictive theory need not be here debated—which regards the officer as shorn of official status in the degree that his conduct is illegal, and thus permits the action to be effectively maintained despite “sovereign immunity” or the eleventh amendment. But the purpose of the action is still to get relief against the one who occupies the office at the time of judgment, and for that reason rule 25(d) applies to the narrow procedural issue of substitution.

Rule 17(d)’s text also supports this conclusion. Rule 17 is the capacity and real-party-in-interest provision. The rule focuses on public officers in subsection (d), which states: “A public officer who sues or is sued in an official capacity may be designated by official title rather than by name, but the court may order that the officer’s name be added.” As the 2007 Advisory Committee Notes recall, this provision was once part of Rule 25(d).

This prior positioning highlights that the same focus on party in interest, which forms the hallmark of Rule 25(d) analysis, controls in Rule 17(d). The text, moreover, demands this approach to official capacity suits by stating that a pleader need not even state the office holder’s name because the real party in interest is the government.

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326. *Fed. R. Civ. P. 17*, advisory committee note (2007) (“Former Rule 25(d)(2) is transferred to become Rule 17(d) because it deals with designation of a public officer, not substitution.”).
B. Berger, Kaul, and Hobbs as Substitution Cases

Why this discussion of substitution of nominal parties in official capacity suits? Because it explains why the Court allows legislatures to defend state statutes when the relevant executive officials refuse. While the Court has discussed these matters as intervention questions, they are better understood as substitution of the nominal party under Rule 25(d).

I discussed Karcher v. May above. There, the New Jersey attorney general declined to defend the constitutionality of a state statute. As a result, the speaker of the New Jersey House of Representatives and the president of the New Jersey Senate intervened as defendants in their official capacities representing the state’s interests. The Court (given that the parties framed the case as intervention when the real issue was one of standing) treated the legislative leaders as intervenors. Better practice would have been to view this as substitution of the nominal party. In Karcher, one, and only one, defendant party in interest was present in the case—the state of New Jersey. Properly understood, there was no joinder of a new party in interest. Rather, because the present party in interest lacked representation, the more appropriate motion would have been a Rule 25(d) substitution. Indeed, Rule 25(d)’s text and purpose, substituting nominal parties in the face of the failure of governmental representation, more closely maps the situation in Karcher than self-intervention by the same party in interest does.

327. See supra notes 211–216 and accompanying text.
329. Id.
330. Id. at 76.
331. Id.
332. Id.
333. See Echevarria-Gonzalez v. Gonzalez-Chapel, 849 F.2d 24, 31 (1st Cir. 1988) (‘[W]hen the action is brought against a public officer in his official capacity, the manipulation of names is merely a technicality that should not interfere with substantial rights.’) (internal citations omitted); Zellmer v. Nakatsu, No. C10–1288MJP, 2011 WL 6210631, at *2 (W.D. Wash. Dec. 13, 2011), aff’d in part, rev’d in part sub nom, Zellmer v. Constantine, 520 F. App’x 564 (9th Cir. 2013), vacated in part, 2015 WL 417994 (W.D. Wash. Jan. 30, 2015) (‘Although the text of Rule 25(d) specifically mentions situations where a public officer who is a party to a suit ‘dies, resigns, or otherwise ceases to hold office,’ the rule’s logic applies to all situations where the real party in interest in an official capacity suit is the governmental entity, not the individual officeholder.’).
The Court faced a similar assumed intervention in *Hollingsworth v. Perry*. Here, California by popular referendum passed restrictions upon same-sex marriage, known as Proposition 8, which immediately brought a lawsuit to enjoin. No state executive or legislative official would defend Proposition 8. The district court allowed the proponents of Proposition 8 to intervene as defendants. On appeal, this triggered a certified question to the California Supreme Court asking whether the Proposition 8 proponents, who were not otherwise agents of the state, could represent the state’s interests. The California high court held that they could. The U.S. Supreme Court, as in *Karcher*, assumed the intervention below, yet dismissed for lack of standing to appeal. As in *Karcher*, the better approach here would have been to have viewed this as a Rule 25(d) motion to substitute the nominal party. There remained but one party in interest, the state of California, which cannot intervene in itself. The defect to be cured there was one of lack of nominal party, a Rule 25(d) substitution problem, not the addition of a new party in interest, a Rule 24 issue. If standing had not been a problem, substitution of the proper replacement nominal party would be superior to a motion to intervene in oneself.

Following this approach, the better path in *Berger*, *Kaul*, and *Hobbs* would be to treat such motions as ones for substitution. But unlike *Karcher* and *Hollingsworth*, substitution in cases like *Berger*, *Kaul*, and *Hobbs* should fail off the top. And why? Because the attorney general is defending and there is not a failure of nominal representation to remedy. But in a different case, one in which there was an attorney general’s failure to defend and where there was a nominal party with standing, Rule 25(d) substitution should be available to an...

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335. *Id.* at 702.
336. *Id.*
337. *Id.* at 703.
338. *Id.*
339. *Id.* at 706. Of course, the *Hollingsworth* holding raises the nominal-versus real-party-in-interest problem again. The U.S. Supreme Court’s standing analysis focused upon the nominal defendants, which to be sure is the key feature of an *Ex parte Young* analysis. Yet the California Supreme Court had ruled that the real party in interest was the state. Reconciling standing, *Ex parte Young*, and focus on the real party in interest is beyond the scope of this Article.
340. See generally Matthew I. Hall, *Standing of Intervenor-Defendants in Public Law Litigation*, 80 FORDHAM L. REV. 1539 (2012) (outlining the unique nature of Article III standing as it relates to official capacity defendants). See also
alternative nominal defendant to safeguard the real party in interest’s defense.\textsuperscript{341}

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In closing, these self-intervention motions are better understood as motions to substitute the nominal official party under Rule 25(d). Rule 25(d) focuses on the real party in interest, which maps the proper locus of these \textit{Ex parte Young} party issues. Further, unlike the self-intervention confusion that results from a Rule 24(a)(2) motion, Rule 25(d) is designed specifically to swap out nominal official capacity parties. And finally, such an approach better deals with situations in which the primary official capacity defendant fails to defend.

CONCLUSION

I end where I began, with the near-tautological statement that parties cannot intervene in themselves. Neither the text, history, nor practice under Rule 24(a)(2) would allow self-intervention. The courts should not allow the \textit{Ex parte Young} fiction to alter this approach. And finally, allowing legislative intervention as a matter of federal law obscures a functional separation-of-powers violation. For these reasons, the courts should limit the impact of the \textit{Berger} decision. The state supreme courts, exercising their independent interpretative authority over rules of procedure, should not replicate the U.S. Supreme Court’s errors. And the lower federal courts should cabin the \textit{Berger} opinion as much as possible from impacting other non-corporeal entities.