

RES JUDICATA AND RULE 19

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Like a fatal drug interaction, the combination of these arguments mortally wounds this motion for joinder.¹

INTRODUCTION.....	401
I. BACKGROUND.....	405
II. THE HISTORICAL PROGRESSION OF COMPULSORY JOINDER.....	407
A. <i>The Necessary Party Rule</i>	408
B. <i>Rigid Indispensable Parties</i>	409
C. <i>Shields v. Barrow: The Predecessor of Rule 19</i>	411
D. <i>The Original Rule 19 and the 1966 Amendment</i>	413
III. RES JUDICATA AND RULE 19: A LOGICAL INCONSISTENCY.....	415
A. <i>An Example: Huber v. Taylor</i>	416
B. <i>The Language and Operation of Rule 19</i>	418
C. <i>Res Judicata and Privity</i>	420
D. <i>“Adequate Representation” and Class Actions</i>	422
E. <i>Similar Language in Rule 24</i>	425
F. <i>Stare Decisis and Levels of Representation</i>	427
IV. AN EXAMPLE OF THE RULE GONE WILD.....	430
CONCLUSION.....	434

INTRODUCTION

Federal Rule of Civil Procedure 19, which requires a court to join persons as plaintiffs or defendants in a case under certain circumstances,² can be a powerful defensive tactic when properly employed.³ Indeed, cases can be thrown out of court for failure to satisfy Rule 19.⁴ Yet despite this drastic consequence, scholars have been only minimally interested in Rule 19

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¹ *County of Santa Clara v. Astra USA, Inc.*, 401 F. Supp. 2d 1022, 1033 (N.D. Cal. 2005).

² See FED. R. CIV. P. 19.

³ See FED. R. CIV. P. 12(b)(7) (dismissal for “failure to join a party under Rule 19”).

⁴ *Id.*

and its application.⁵ All the while, a dubious line of reasoning has crept into some courts' joinder doctrine⁶—reasoning that has led to the dismissal of cases on logically inconsistent grounds. Under this flawed analysis, an absent person's joinder is required under Rule 19 based on the following logic:

1. His legal interests are protected; therefore he will be bound by *res judicata*.
2. He will be bound by *res judicata*; therefore his legal interests are not protected.

Of course, either his interests are protected or they are not—but not both.

The heart of the problem lies in the interaction between Rule 19 and *res judicata*. Rule 19 requires an absent person to be joined if that person's ability to protect his interests is impaired by not being a party.⁷ Some courts have held that the binding effect of *res judicata* on an absent person satisfies this impairment requirement, thus requiring the absent person to be joined.⁸ A basic principle of *res judicata*, however, is that an absent person will only be bound if he is in privity with a party.⁹ Privity exists between a party and an absent person if that party adequately represents,¹⁰ and therefore protects,¹¹ the absent person's interests. Thus, by definition, being bound by *res judicata* means an absent person's interests were protected and his ability to protect his interests was not impaired. It is illogical for courts to require a person's joinder by saying that he will be bound by *res judicata* because the relevant portion of Rule 19 only requires joinder when an absent person's ability to protect his interests is impaired.

Despite the clear logical inconsistency in using *res judicata* as a basis for joinder, the circuit courts are split on the issue. At least two circuits use

⁵ A Westlaw search for articles with "Rule 19" in the title returned only eight results dated after 1967 (Rule 19 was amended into its modern form in 1966). The only one of these articles that deals with Rule 19 comprehensively—as opposed to the Rule's application to a particular substantive area of law—was written over twenty years ago. See Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061 (1985).

⁶ See *infra* Part III.A.

⁷ FED. R. CIV. P. 19(a)(1)(B)(i).

⁸ See, e.g., *Huber v. Taylor*, 519 F. Supp. 2d 542 (W.D. Penn. 2007) (dismissing the case for failure to join a party that was necessary under 19(a)(1)(B)(i) because of the binding effects of *res judicata*), *rev'd on other grounds*, 532 F.3d 237 (3d Cir. 2008) (finding that *res judicata* would not apply to the absent party in this case but not foreclosing the idea that *res judicata* can justify joinder).

⁹ *Taylor v. Sturgell*, 128 S. Ct. 2161, 2172–73 (2008); *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996). Although the Court in *Taylor* specifically avoids use of the term "privity," 128 S. Ct. at 2172 n.8, the term is useful as a collective substitute for the reasons for which an absent person can be bound by *res judicata*. For further discussion of *Taylor*, see *infra* notes 143–147 and accompanying text.

¹⁰ See *infra* notes 137–148 and accompanying text.

¹¹ See *infra* notes 150–175 and accompanying text.

res judicata as a basis for joinder,¹² while two others follow the adequate representation argument presented in this paper,¹³ and two others confusingly appear to use both.¹⁴ This of course begs the question of why, in the face of a logical alternative, some courts persist in using illogical reasoning. There are two possible and interconnected answers.

First, privity was traditionally based on a rigid, relationship-based classification.¹⁵ Under this traditional notion of privity, if the relationship between an absent person and a party was on the list of those relationships that constituted privity,¹⁶ they were in privity. Because of this mechanical application, courts using the relationship-based privity analysis had no reason to examine closely the interaction between adequate representation and Rule 19. Reliance on such precedent without re-examining outdated analysis may explain why certain courts' joinder doctrine is flawed. Relevant opinions involving Rule 19 and res judicata in these jurisdictions have relatively little analysis and instead tend to be based on conclusory statements.¹⁷ Thus, courts may be improperly using res judicata to justify joinder solely by relying on outdated precedent.

¹² The Fifth Circuit and Third Circuit have used res judicata as a basis for joinder in some cases. See, e.g., *HS Res., Inc. v. Wingate*, 327 F.3d 432, 439 (5th Cir. 2003); *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 409 (3d Cir. 1993).

¹³ The Sixth Circuit and Fourth Circuit follow this theory. See *Am. Express Travel Related Servs., Co. v. Bank One-Dearborn, N.A.*, 195 F. App'x 458, 461 (6th Cir. 2006); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Rite Aid of S.C., Inc.*, 210 F.3d 246, 251–52 (4th Cir. 2000).

¹⁴ The First Circuit appears to use both res judicata and the adequate representation argument as a basis for joinder. Compare *Pujol v. Shearson/Am. Express, Inc.*, 877 F.2d 132, 135 (1st Cir. 1989) (“[W]e fail to see how proceeding without the [absent person] would ‘as a practical matter impair or impede’ the [absent person]’s interests, interests that [a present party]’s counsel can adequately protect.”), with *Acton Co. of Mass. v. Bachman Foods, Inc.*, 668 F.2d 76, 78 (1st Cir. 1982) (“[The absent person] . . . might be bound by [the present party]’s suit under the doctrine that res judicata applies not only to the actual parties but also to those in privity with the parties.”). The Ninth Circuit appears to do the same. Compare *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999) (“[A]n absent party’s ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit.”), with *Takeda v. Nw. Nat'l Life Ins. Co.*, 765 F.2d 815, 821 n.7 (9th Cir. 1985) (“Ironically, the closeness of the relationship between [the absent person] and [a present party], which they assert shows that [the absent person]’s interests are adequately represented so that [the absent person] is not a necessary party, is precisely what causes the likelihood of collateral estoppel in future litigation, and thus determines that [the absent person] is a necessary party.”).

¹⁵ *Taylor v. Blakey*, 490 F.3d 965, 970 (D.C. Cir. 2007), *rev'd sub nom. Taylor v. Sturgell*, 128 S. Ct. 2161 (2008).

¹⁶ Lessor/lessee and mortgagor/mortgagee are examples of relationships traditionally recognized as in privity. For further discussion, see *infra* note 140.

¹⁷ See, e.g., *Janney*, 11 F.3d at 409 (“If issue preclusion or collateral estoppel could be invoked against [the absent person] in other litigation, continuation of the federal action could ‘as a practical matter impair or impede’ [the absent persons]’s interests and so Rule 19(a)[(1)(B)(i)] would require its joinder if joinder were feasible.”); *Acton*, 668 F.2d at 78.

A second justification for the use of res judicata as a basis for joinder might be that the expanding breadth of res judicata¹⁸ has made courts wary of a future court invoking the doctrine against the absent person in question. Under this justification, the court will deem an absent person “necessary” if there is a chance a later court will bind him to the judgment in the present case. Although this justification carries more weight than the first, it is still problematic. The problem boils down to the old adage, “two wrongs don’t make a right.” If courts are concerned about the expansion of res judicata—a judge-made issue¹⁹—distorting Rule 19 is not the proper way to address that concern. Instead, courts should attempt to rein in the application of res judicata itself. Indeed, shortly before the publication of this Comment, the Supreme Court issued its first comprehensive guidance on nonparty res judicata, which may ultimately produce this limiting effect.²⁰

Attacking courts’ use of res judicata in joinder analysis is not simply an academic point about logical reasoning, but rather a problem that has serious practical effects. Rule 12(b)(7) requires that a suit be dismissed for failure to join a person required by Rule 19.²¹ Such failure often arises, for example, when the joinder of such a person would destroy the diversity that supports federal jurisdiction.²² When Rule 19 is interpreted with faulty logic, courts dismiss otherwise potentially meritorious cases for improper reasons. In this situation, even if the plaintiff has a state court alternative, a simple logical error undermines the plaintiff’s choice of forum. The court’s flawed reasoning also improperly adds the time and expense associated with filing a new case, in opposition to the stated intent of the Federal Rules.²³

Part I of this Comment introduces the concept of compulsory joinder. Part II reviews the historical progression of joinder, noting that even in its traditional forms, courts and commentators did not view the potentially binding effect of a judgment on an absent person as a proper consideration for joinder.²⁴ Instead, early joinder doctrine was based on the idea that a person should be joined *in order to* obtain a binding effect because she could not be bound in her absence.²⁵ The current formulation of the rule contemplates “practical” prejudice to the absent person but not the poten-

¹⁸ See 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4449 (2d ed. 2007) (“[T]he preclusive effects of judgments have expanded to include nonparties in more and more situations.”).

¹⁹ *Id.* § 4403.

²⁰ See *Taylor v. Sturgell*, 128 S. Ct. 2161 (2008).

²¹ FED. R. CIV. P. 12(b)(7).

²² See, e.g., *R-Delight Holding LLC v. Anders*, 246 F.R.D. 496, 504 (D. Md. 2007).

²³ FED. R. CIV. P. 1 (“[The rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

²⁴ See Part II.A–C.

²⁵ See *infra* notes 56–64 and accompanying text.

tially binding effect of a judgment.²⁶ From the inception of joinder to its modern application, at no time was the binding affect of res judicata contemplated as part of the joinder analysis.

Part III presents the logical argument summarized above and fleshes out the concepts behind Rule 19, res judicata, privity, and adequate representation, as well as how these concepts relate to one another. Part III also shows how these components interact with related legal concepts such as the class action, intervention, and stare decisis. This Part ultimately concludes that res judicata should not be considered in the Rule 19 calculus and courts should instead focus on practical effects that may prejudice the absent person.

Finally, Part IV sets out a hypothetical demonstrating how a court's improper use of res judicata as a basis for joinder can lead to results antithetical to the purpose of Rule 19, namely, protection of the absent person. The example in this Part illustrates why a court's use of res judicata as a basis for joinder is misguided.²⁷ The Comment concludes with a call for the abandonment of res judicata's use as a basis for joinder and for future interpretation of Rule 19 in conformity with the Rule's language and history.

I. BACKGROUND

In our system of civil procedure, the plaintiff holds a great deal of power in determining the structure of litigation.²⁸ First, the plaintiff chooses whether and when to bring an action. If a suit is brought, the plaintiff chooses the jurisdiction and venue, and has the initial power to determine the parties in the case. Plaintiff autonomy is a basic principle of our adversary legal system.²⁹ In certain situations, however, competing interests outweigh plaintiff autonomy, and as a result other actors are allowed to override the plaintiff's initial structural choices.³⁰ Compulsory joinder under Rule 19 is one of these situations.³¹

Compulsory joinder allows a court, by the defendant's or its own motion, to compel a person not originally named by the plaintiff to be joined into the lawsuit.³² The concept of compulsory joinder arose from the equi-

²⁶ See *infra* notes 97–105 and accompanying text.

²⁷ See *infra* notes 203–223 and accompanying text.

²⁸ 4 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 19.02 (3d ed. 2007).

²⁹ See 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1602 (3d ed. 2007); see also Martin H. Redish & Nathan D. Larson, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573 (2007) (arguing that litigant autonomy is a constitutionally protected due process interest).

³⁰ WRIGHT, MILLER & KANE, *supra* note 29, § 1602.

³¹ *Id.*

³² See FED. R. CIV. P. 19.

table notion that courts should not do justice “by halves,”³³ but rather should seek to bring all interested parties together and resolve conflicts as a whole in one action.³⁴ Through its evolution, compulsory joinder has developed a two-tiered classification of potentially interested persons: “necessary” and “indispensable.”³⁵ In their most basic forms, a necessary party is a person who *should* be joined if feasible,³⁶ and an indispensable party is a person without whom the court *cannot* proceed.³⁷ As the following will show, defining exactly who is necessary and who is indispensable is a matter of some debate.³⁸

Federal Rule of Civil Procedure 19, which governs “Required Joinder of Parties,” contains the current definition of compulsory joinder.³⁹ The Rule proceeds in a two-step process. First, a court must decide if a party is necessary under Rule 19(a)(1). A person is necessary when:

- (A) in that person’s absence, the court cannot accord complete relief among existing parties; or
- (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person’s absence may:
 - (i) as a practical matter impair or impede the person’s ability to protect the interest; or
 - (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.⁴⁰

³³ See John W. Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 335 (1957).

³⁴ See generally Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961).

³⁵ The current Federal Rule of Civil Procedure 19 abandons the “necessary” and “indispensable” labels, but the terms are commonly used in practice and are useful as long as their definitions are clear. With respect to the current Rule, a necessary party is a “required party” as defined in Rule 19(a)(1), and an indispensable party is one satisfying the Rule 19(b) requirements for dismissal of the case. See FED. R. CIV. P. 19; *Shields v. Barrow*, 58 U.S. (17 How.) 130 (1854); Reed, *supra* note 33, at 340–56 (discussing *Shields v. Barrow* and the “now familiar division of required parties into categories (necessary and indispensable)”; see also MOORE ET AL., *supra* note 28, § 19.02[2][c]. Throughout this Comment the terms will carry these meanings unless otherwise noted.

³⁶ BLACK’S LAW DICTIONARY 1154 (8th ed. 2004) (entry for “necessary party”) (“A party who, being closely connected to a lawsuit, should be included in the case if feasible, but whose absence will not require dismissal of the proceedings.”).

³⁷ *Id.* (entry for “indispensable party”) (“A party who, having interests that would inevitably be affected by a court’s judgment, must be included in the case. . . . If such a party is not included, the case must be dismissed.”).

³⁸ See *infra* notes 123–126 and accompanying text.

³⁹ FED. R. CIV. P. 19. It is important to note that Rule 19 was recently amended, effective December 1, 2007. Although the substance of the Rule remains unchanged, certain subsections relevant to this Comment were renumbered. In particular, the former 19(a)(1) is now 19(a)(1)(A), the former 19(a)(2)(i) is now 19(a)(1)(B)(i), and the former 19(a)(2)(ii) is now 19(a)(1)(B)(ii). Throughout this Comment, references to subsections conform to the current rule and quotations have been altered for clarity and consistency.

⁴⁰ FED. R. CIV. P. 19(a)(1).

If a person is necessary under Rule 19(a)(1), the court must join that person as a party if feasible.⁴¹ If a person is necessary, but joinder is not feasible,⁴² Rule 19(b) lays out four factors for determining whether the person is indispensable.⁴³ If the balance of these factors dictates that the person is indispensable, the case cannot proceed in his absence and must be dismissed.⁴⁴ If the person is not indispensable, the case will proceed in his absence.⁴⁵

When Rule 19 evolved into its modern form in 1966, its drafters viewed the concept of a necessary party as protecting three distinct interests.⁴⁶ First, requiring joinder of necessary parties under Rule 19 promotes a public policy interest in maximizing judicial efficiency and settling disputes as a whole.⁴⁷ This interest does not focus on those involved with the case itself, but rather on an overriding desire of society to avoid unnecessary additional litigation when one suit will suffice.⁴⁸ Second, Rule 19 protects an absent person's interest in a case from being adversely affected by a judgment when she has not had a chance to represent herself.⁴⁹ The current Rule 19 stresses nonlegal, practical prejudice to the absent person, a concept that is the heart of this Comment and will be addressed at length below.⁵⁰ The final interest protected by Rule 19 is the defendant's interest in avoiding inconsistent obligations or double liability.⁵¹ Each of these interests is represented in the current Rule 19 in subsections 19(a)(1)(A), 19(a)(1)(B)(i), and 19(a)(1)(B)(ii), respectively.⁵²

II. THE HISTORICAL PROGRESSION OF COMPULSORY JOINDER

Before digging deeply into why it is illogical to use *res judicata* as a basis for joinder under the current Rule 19, it is useful to examine the his-

⁴¹ FED. R. CIV. P. 19(a)(2).

⁴² Joinder is not feasible when: (1) the person to be joined is not subject to service of process; (2) joinder would deprive the court of subject matter jurisdiction; or (3) joinder would make venue improper. FED. R. CIV. P. 19(a).

⁴³ FED. R. CIV. P. 19(b).

⁴⁴ *Id.*

⁴⁵ *Id.* Some commentators analyze Rule 19 as a three-step process. *See, e.g.,* Freer, *supra* note 5, at 1076. In the three-step formulation, the second step is a determination of whether or not joinder is feasible. While feasibility is vitally important, the inclusion of that determination as a separate step instead of merely as a prerequisite to the final step is inconsequential to the working of Rule 19. Furthermore, the distinction between a two-step and three-step formulation does not affect the argument in this Comment.

⁴⁶ Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Procedure* (pt. 1), 81 HARV. L. REV. 356, 365 (1967) (citing Reed, *supra* note 33, at 334).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ FED. R. CIV. P. 19(a)(1)(B)(i); *see infra* notes 127–136 and accompanying text.

⁵¹ Kaplan, *supra* note 46, at 365.

⁵² FED. R. CIV. P. 19(a)(1).

torical progression of compulsory joinder and its underlying justifications at various relevant stages—as the Supreme Court famously advised, “a page of history is worth a volume of logic.”⁵³ From its origins in the English Chancery to its modern codification in Rule 19, the idea that an absent person should be joined *because* he will be bound in his absence under *res judicata* has never been an underlying justification for compulsory joinder. To the contrary, traditional formulations required his joinder *in order to* bind him, a notion in line with the traditional concepts of *res judicata* and due process.

Section A below describes the necessary party rule of seventeenth-century English Chancery, when joinder was used to achieve complete justice. Joining all interested persons was desirable, not because they might be bound by a judgment, but because they could not be bound unless they were joined. Section B describes a shift in the late eighteenth century to the indispensable party doctrine, which required that unless all interested parties could be brought before the court the case could not proceed. Section C turns to the rise of the modern two-step compulsory joinder analysis and the use of the necessary and indispensable framework, which came to prominence beginning with the case of *Shields v. Barrow*.⁵⁴ Finally, section D describes the original Rule 19 and its 1966 amendment into its modern form. The Rule now stresses a pragmatic approach to joinder and, more specifically, focuses on practical prejudice affecting absent persons, a consideration not present in the earlier version of the Rule. The historical progression of the joinder doctrine and Rule 19 show that at no time was the binding effect of *res judicata* on an absent person an intended reason for his joinder.

A. *The Necessary Party Rule*

The concepts of compulsory joinder and necessary parties can be traced back to the English Chancery in the late seventeenth century, during which time the Chancery began to develop workable rules governing the joinder of necessary parties.⁵⁵ These rules can be summarized as follows:

1. All persons who are interested in a controversy are necessary parties to a suit involving that controversy, so that a complete disposition of the dispute may be made.
2. Joinder of necessary parties is excused when it is impossible, impractical, or involves undue complications.
3. A person who is not a party, unless represented by one who is a party, is not bound by a decree.⁵⁶

⁵³ *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

⁵⁴ 58 U.S. (17 How.) 130 (1854).

⁵⁵ Hazard, *supra* note 34, at 1255.

⁵⁶ *Id.*

The Chancery developed these rules by balancing a desire for the completeness of judgments with practical considerations.⁵⁷ In the name of completeness, the first rule contemplates a large pool of necessary parties by requiring *all* persons with an interest in the controversy to become parties in the suit.⁵⁸ The second rule considers the practical implications of the first rule and allows the action to continue even in the absence of a necessary party if practical concerns demand such continuation.⁵⁹ The third rule, when read with the first two, concludes that an absent, unrepresented person will not be bound by the decision, even if the person is considered a necessary party with an interest in the controversy under the first rule.⁶⁰

Under these rules, an absent person could only be bound by a judgment if he was “represented by one who is a party,”⁶¹ a notion “akin to the modern idea of privity.”⁶² When a party represented an absent person, the fact that the absent person would be bound by the judgment was not reason to force his joinder. In fact, just the opposite was true: “[J]oinder of the absentee was unnecessary because he would be bound by the result reached as to the parties already present.”⁶³ The purpose of joinder, after all, was to bind an absent person who otherwise would not have been bound by the judgment.⁶⁴ Thus, from its inception, joinder doctrine has not considered the binding effect of *res judicata* as a reason to join an absent person.

B. Rigid Indispensable Parties

Driven by a judicial shift requiring “complete” justice or none at all, the 1780s marked the beginnings of the indispensable party doctrine, which replaced the necessary party rule.⁶⁵ Unlike the necessary party rule, in which courts viewed a person with an interest in a case as one that *should* be joined if possible, the indispensable party doctrine said that person *must* be joined in order for the court to make a final decision.⁶⁶ Under this school

⁵⁷ *See id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1260.

⁶³ *Id.* This result is essentially the same as the argument presented *infra* Part III.

⁶⁴ Hazard, *supra* note 34, at 1266 n.72 (“Two of the cases indicate quite clearly that a person not joined is not bound. Indeed, this was the reason offered why a necessary party should be joined.”). Hazard also describes one case that came to the opposite conclusion, but he concludes that the case “seems not to have been the law then and certainly was not the law in later years.” *Id.* Contemporary writers agreed that “the real basis for compulsory joinder is to ensure that the absentees will be bound.” *Id.* at 1269 (citing GILBERT, THE HISTORY AND PRACTICE OF THE HIGH COURT OF CHANCERY 157–58 (1758); 1 HARRISON, THE ACCOMPLISHED PRACTISER IN THE HIGH COURT OF CHANCERY, ch. I, at 2 (1st ed. 1741)).

⁶⁵ *Id.* at 1271.

⁶⁶ *Id.* at 1273–82.

of thought, all persons with an interest in a suit were considered indispensable, and if practical considerations made it impossible for some interested persons to be properly before the court, the case could not move forward with respect to any party.⁶⁷ Complete justice could not be achieved unless all interested persons were bound by a single judgment.⁶⁸ Because a judgment could not bind absent persons under *res judicata*, such complete justice required joinder of all.⁶⁹ Under this doctrine, a court would not dismiss a suit because an absent person would suffer prejudice as a result of being bound by *res judicata*; the case would be dismissed because the judgment could not bind him.

The indispensable party doctrine had two primary justifications: a jurisdictional argument and a judicial economy argument.⁷⁰ First, the jurisdictional argument suggests that if a court does not have jurisdiction over an interested absent person, the court cannot proceed against any of the present parties.⁷¹ Professor Reed nicely presents this argument and its inherent flaw:

The argument seems to run like this: *A* cannot be bound by a court's judgment if he is not properly before the court; *A* is not before the court; *A* would be bound by the court's judgment in this case; therefore, no judgment can be rendered. Plainly, there are two inconsistent assertions in the series. If *A cannot* be bound by a court's judgment in his absence, he *will not* be bound by the court's judgment in this case. If plaintiff seeks relief against *B*, disclaiming any interest in a judgment against *A*, there is no jurisdictional reason whatever for refusing to render a judgment against *B*.⁷²

The jurisdictional argument fails precisely because the idea that an absent person should be joined *because* she will be bound makes no sense. The purpose of joinder is to allow the court to bind all interested persons in one suit—if an absent person will already be bound there is no need to join her.

The second and more appropriate justification for the indispensable party doctrine was the idea that a court *ought* not proceed without all interested parties in order to avoid inconclusive determinations.⁷³ This justification, grounded in public policy, seeks to minimize litigation and promote judicial economy.⁷⁴ This approach, while more attractive, becomes dis-

⁶⁷ *Id.*

⁶⁸ Reed, *supra* note 33, at 332.

⁶⁹ *Id.*

⁷⁰ *Id.* at 332–34.

⁷¹ *Id.* at 333.

⁷² *Id.*; see also Hazard, *supra* note 34, at 1255 (“[T]he assumption that because the court does not have jurisdiction over the absentee, it can not act with respect to those before it . . . is just plain nonsense.”).

⁷³ Reed, *supra* note 33, at 334.

⁷⁴ *Id.*

torted when rigidly applied.⁷⁵ Although attempting to bring all interested persons together in a single suit makes sense, judicial efficiency should not require dismissal of a suit merely because it lacks an interested person.⁷⁶ Indeed, it would seem quite inefficient for a system charged with resolving controversies to refuse to resolve any controversy that cannot be adjudicated in a single suit. This, however, was exactly what the indispensable party doctrine required and why the two-tiered operation of joinder was later adopted.⁷⁷

C. *Shields v. Barrow: The Predecessor of Rule 19*

The Supreme Court articulated the modern two-step concept of compulsory joinder in its influential 1854 decision *Shields v. Barrow*.⁷⁸ In that case, the Court incorporated both the necessary and the indispensable party designations.⁷⁹ The Court defined necessary parties as:

Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. . . . [B]ut if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties.⁸⁰

It then defined indispensable parties as:

Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.⁸¹

Courts relied on these definitions in numerous future decisions, which subsequently formed the basis for the original Federal Rule of Civil Procedure 19.⁸²

⁷⁵ *Id.* at 335 (“The equitable policy of doing justice ‘entire and not by halves’ . . . represents a wise and useful policy, but it is not a rigid, unyielding barrier beyond which a court is powerless to proceed.”).

⁷⁶ *Id.* (“The mere fact that a second action may be required to determine the totality of issues involved in a controversy is not a bar to the maintenance of the incomplete first action.”).

⁷⁷ Hazard, *supra* note 34, at 1273–82.

⁷⁸ 58 U.S. (17 How.) 130 (1854). For a description of the facts and a thorough evaluation of the decision, see Reed, *supra* note 33, at 340–56.

⁷⁹ Reed, *supra* note 33, at 355 (“The result of *Shields v. Barrow* was to embed in American procedural law the now familiar division of required parties into categories (necessary and indispensable) . . .”).

⁸⁰ *Shields*, 58 U.S. (17 How.) at 139.

⁸¹ *Id.*

⁸² Reed, *supra* note 33, at 340–41.

The Supreme Court definitions, however, were not without fault. One particular problem arose with the concept of separability of interests.⁸³ According to the Court's definition of a necessary party, if an absent person's "interests [were] separable from those of the parties before the court," that person's joinder was favored but not required.⁸⁴ While this definition allowed for more flexibility than the rigid indispensable party doctrine of prior years, the Court did not define clearly what it meant by "separable" interests.⁸⁵ This led to confusion that allowed some courts simply to label the parties they thought ought to be necessary, but not indispensable, as having separable rights, thus stripping the "separable" designation of any real value.⁸⁶

Another interpretational problem resulting from the *Shields v. Barrow* definitions of necessary and indispensable parties concerned the meaning of the phrase "without . . . affecting that interest."⁸⁷ This phrase cannot be interpreted as preventing a court from proceeding in a person's absence if the judgment of the court would be legally binding on the person because a court has no power to bind a person not properly before it.⁸⁸ It has been suggested that this language was meant to bring practical, nonlegal effects⁸⁹ on the absent person into the consideration of joinder—a consideration similar to the amendment of Rule 19 over a century later in 1966.⁹⁰ However, even if this was the Court's purpose, that purpose appears to have

⁸³ *Id.* at 345–46.

⁸⁴ *Shields*, 58 U.S. (17 How.) at 139.

⁸⁵ Reed, *supra* note 33, at 346 ("It helps not at all to say that the rights of the parties, absent and present, are inseparable . . . because that is a result, not a cause. When are the rights of *A* and *B* inseparable? Whenever they must sue together. When must they sue together? Whenever their rights are inseparable.").

⁸⁶ *Id.* ("Judges, with human preference for the simplicity and apparent certainty of pat concepts and rules of thumb, tend to lapse into terminology of joint rights, inseparable rights, and the like, instead of striving (through factual analysis) for a balance of equity and convenience. The reader of many opinions gains the impression that these terms, when used, follow rather than precede the courts' decisions on joinder issues."). Professor Reed goes on to criticize the Court's reliance on separability of interests in *Shields v. Barrow* itself, stating that "[t]he excellent statement of principles governing compulsory joinder was practically ignored, the Court having yielded to the temptation to justify its holding by the application of labels which are barren of meaning in the procedural context." *Id.*

⁸⁷ *Id.* at 343.

⁸⁸ See *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968) ("Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered.").

⁸⁹ For examples of practical or factual effects, see *infra* Part III.B.

⁹⁰ Reed, *supra* note 33, at 343 ("The Court must have meant 'without factually affecting that interest,' since any other interpretation would make the statement pointless. It would be foolish to say that a court is powerless to proceed if it cannot make a final decree without 'legally affecting' the interest of an absent person, since nothing the court can possibly do will legally affect such an interest."); see FED. R. CIV. P. 19(a)(1)(B)(i) (deeming a party necessary when "disposition of the action in the person's absence may as a practical matter impair or impede the person's ability to protect [his] interest"). The 1966 amendment of Rule 19 into its modern form explicitly required a pragmatic approach to joinder analysis and thus presented a fairly stark change in the operation of compulsory joinder. FED. R. CIV. P. 19 advisory committee's note. For further discussion, see *infra* notes 102–105 & 127–136.

been lost on later courts, which instead interpreted this language in line with the jurisdictional fallacy described above.⁹¹ One reason for this could be that when reaching its holding, the Court did not explicitly focus on the practical, nonlegal effects and instead “lapsed into the terminology of ‘separable rights.’”⁹² This unfortunately resulted in the highlighting of “separability” labels in joinder doctrine, while the practical aspects of the Court’s analysis were lost for the next century.⁹³

Even with these problems, *Shields v. Barrow* significantly advanced joinder doctrine by articulating the two-step process still used today. One thing *Shields v. Barrow* did not change was the fact that joinder sought to bring an absent person into the case in order to obtain the binding effect of res judicata and not because the person, in her absence, would be bound.⁹⁴

D. The Original Rule 19 and the 1966 Amendment

When the Federal Rules of Civil Procedure were promulgated in 1938, the original Rule 19, which codified the procedure for compulsory joinder, was highly influenced by the definitions in *Shields v. Barrow* and the case-law following that decision.⁹⁵ Generally, this led to the kind of application problems discussed in the previous section, with the original Rule 19 proving frustrating to interpret and no more workable than the rules derived from *Shields v. Barrow*.⁹⁶ Dissatisfaction with the operation of the original Rule 19 resulted in a flurry of scholarly commentary on compulsory joinder in the late 1950s and early 1960s, just before the Federal Rules were overhauled in 1966.⁹⁷ Because the necessary and indispensable designations in

⁹¹ Kaplan, *supra* note 46, at 361 (“The ‘affecting’ phrase probably contributed to the jurisdiction-fallacy recurrent in the cases.”); see *supra* notes 71–72 and accompanying text. For a list of cases espousing the jurisdictional fallacy, see Reed, *supra* note 33, at 333 n.14.

⁹² Reed, *supra* note 33, at 345.

⁹³ *Id.* at 355 (“[O]ther courts in picking up [the necessary and indispensable] classification . . . adopted also the Supreme Court’s separability-of-rights terminology.”). Following the suggestions of a few influential scholars, Federal Rule of Civil Procedure 19 was amended in 1966 to include the current “as a practical matter” language. FED. R. CIV. P. 19 advisory committee’s note (citing Hazard, *supra* note 34; Reed, *supra* note 33).

⁹⁴ Reed, *supra* note 33, at 343.

⁹⁵ RICHARD L. MARCUS, MARTIN H. REDISH & EDWARD F. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 242–43 (4th ed. 2005) (“The *Shields* approach, dominant as it had been for almost a century, was continued in the new Federal Rule in 1938.”); Reed, *supra* note 33, at 340–41 (“[T]he compulsory joinder provisions of the Federal Rules of Civil Procedure . . . stem more or less directly from the *Shields v. Barrow* formulation.”).

⁹⁶ Kaplan, *supra* note 46, at 363 (“Rule 19, as adopted in 1938 (it remained unchanged up to 1966), did not avoid the defects and frustrations of the courts’ treatment of the required joinder problem during the previous century. Like the *Shields* case, the rule could be read compatibly with the original and better equity, but there was little in its language or mood positively to induce the courts to change their in-durated habits.”).

⁹⁷ See, e.g., Hazard, *supra* note 34; Fleming James, *Necessary and Indispensable Parties*, 18 U. MIAAMI L. REV. 68 (1963); Reed, *supra* note 33; Note, *Indispensable Parties in the Federal Courts*, 65 HARV. L. REV. 1050 (1952).

Rule 19 were “not inherently bad,” the commentary did not focus on replacing them, but rather on creating a way for courts to determine who was a necessary party and who was an indispensable party.⁹⁸ Generally, scholars were dissatisfied with the “shoddy and unimaginative”⁹⁹ separability-of-rights method employed by courts, and instead favored a more fact-based, practical approach in the joinder analysis.¹⁰⁰ As Professor Reed wrote when proposing a superior formulation for joinder rules:

[T]here is nevertheless a very proper reluctance to make a determination which may affect adversely the interests of *A* [the absent person]. The distinction is between affecting *A*'s rights *legally* and affecting them *factually*. Since the court is without power to adjudicate the rights of *A*, it is clear that the court's determination of the controversy between the parties who *are* present will not and cannot legally affect *A*'s rights. But the decision may, *in fact*, affect *A*'s interests, as where he is left with a claim against one of the parties in the first action which, although technically unimpaired, is practically and factually worthless; and it is small comfort to him to be informed that his claim is legally intact. So, although the old jurisdictional bugbear be done away with, courts unquestionably must seek to avoid determinations which will adversely affect absent parties.¹⁰¹

Professor Reed's article and his line of thinking were cited in the Note of the Advisory Committee on the 1966 amendment to Rule 19.¹⁰² In particular, the Advisory Committee noted that “[c]lause [(1)(B)(i) of Rule 19(a)] recognizes the importance of protecting the person whose joinder is in question against the practical prejudice to him which may arise through a disposition of the action in his absence.”¹⁰³ This focus on practical prejudice was inserted into the modern Rule 19 through the addition of the “as a practical matter” language currently contained in 19(a)(1)(B)(i).¹⁰⁴ Commenting on the interests served by the newly amended Rule 19, one member of the Advisory Committee specifically pointed to the interest of “the potential party in avoiding *practical* prejudice by reason of the decision of the cause in his absence.”¹⁰⁵ The language of the Rule, examined in light of the commentary leading up to the amendment of Rule 19, can only be read to espouse consideration of practical or factual effects on the interests of the absent person and *not* the possibility that a person would suffer prejudice from the legally binding effect of a judgment in her absence under *res judi-*

⁹⁸ Reed, *supra* note 33, at 355.

⁹⁹ *Id.*

¹⁰⁰ FED. R. CIV. P. 19 advisory committee's note (citing Hazard, *supra* note 34; Reed, *supra* note 33; Note, *supra* note 97).

¹⁰¹ Reed, *supra* note 33, at 336.

¹⁰² FED. R. CIV. P. 19 advisory committee's note.

¹⁰³ *Id.*

¹⁰⁴ FED. R. CIV. P. 19(a)(1)(B)(i). For the full text of 19(a)(1)(B)(i), see *infra* text accompanying note 127.

¹⁰⁵ Kaplan, *supra* note 46, at 365 (emphasis added).

cata. Thus, the purpose of modern compulsory joinder does not countenance courts using res judicata as a justification for requiring joinder of a party. Rule 19's consideration of the practical effects on the absent person's interests should not be distorted to suggest that the binding force of a judgment on an absent person is reason for her joinder. Indeed, as the next Part demonstrates through detailed examination of the operation of Rule 19, to do so is logically inconsistent.

III. RES JUDICATA AND RULE 19: A LOGICAL INCONSISTENCY

Despite a lack of historical or legal basis, some modern courts have held that when a judgment in a case will bind an absent person through res judicata, the absent person is “necessary” under Rule 19 because such a binding effect would “as a practical matter impair or impede the person's ability to protect”¹⁰⁶ his interest in the litigation.¹⁰⁷ Perhaps this reasoning has intuitive appeal on the surface: if an absent person is barred from representing himself in a subsequent case, such a bar would seem to cause him a very practical prejudice. Intuitive appeal notwithstanding, this Part will show that court use of res judicata as a reason for joinder under Rule 19(a)(1)(B)(i) is misguided and should be abandoned.

Section A introduces the topic by describing a recent case where a court held that an absent person would be bound by res judicata and therefore should be joined if feasible. Section B examines the language of Rule 19(a)(1)(B)(i) and the ways in which the Rule has been interpreted. Section C looks at the law of res judicata, focusing on the requirement that an absent person be in privity with a party to a case in order to be bound by a judgment and how the requirement of privity relates to joinder under Rule 19. Of particular note in section C is the privity requirement that an absent person be adequately represented. This naturally relates to the prerequisite in class actions that absent class members be adequately represented—discussed in section D—a concept that is useful in analyzing adequate representation in the context of res judicata. The class action discussion also touches on the procedural requirements for binding absent class members and how these complex requirements suggest that using res judicata as a reason for joinder is misguided. Section E explores Federal Rule of Civil Procedure 24, which governs intervention of right and shares a significant amount of language with Rule 19(a)(1)(B)(i). Because of this similarity in language and operation, Rule 24 doctrine is useful in interpreting Rule 19. Finally, section F examines two counterarguments based on stare decisis and “levels of representation.” This Part concludes by demonstrating that, by definition, a person in privity with a party in the case *cannot* fulfill the

¹⁰⁶ FED. R. CIV. P. 19(a)(1)(B)(i).

¹⁰⁷ See *infra* notes 108–126 and accompanying text.

requirements of 19(a)(1)(B)(i) and that therefore a person should never be joined because of *res judicata*.

A. An Example: Huber v. Taylor

Lawyer 1 assembles a group of asbestos plaintiffs in State A.¹⁰⁸ He refers the claims to Lawyer 2 in another state.¹⁰⁹ Lawyer 2, gathering together several such plaintiffs groups, settles all the claims.¹¹⁰ After the settlement, the plaintiffs in State A catch wind of plaintiffs groups in the settlement from other states getting a better deal than they did.¹¹¹ They sue Lawyer 2 for, among other things, failing to disclose the terms of the deal properly,¹¹² bringing their action in federal court under diversity jurisdiction.¹¹³ Lawyer 2 seeks to join Lawyer 1 as a defendant under Rule 19 in order to destroy diversity and dismiss the case.¹¹⁴ Can he do it?

In *Huber v. Taylor*,¹¹⁵ the United States District Court for the Western District of Pennsylvania said that he can.¹¹⁶ This answer, on its face, may seem unremarkable, but a deeper look into the court's reasoning reveals the logical fallacy floating around the federal court system. The court held that Lawyer 1 and Lawyer 2 were in privity,¹¹⁷ making any final judgment in the case binding on the absent Lawyer 1 under *res judicata*.¹¹⁸ The court reasoned that because the preclusive effect of *res judicata* would impair Lawyer 1's ability to protect his interest in the case, Lawyer 1 was a necessary party under Rule 19(a)(1)(B)(i).¹¹⁹

What the court failed to address in the analysis is that in order for the parties to be in privity, and thereby bound by *res judicata*, Lawyer 1's inter-

¹⁰⁸ See *Huber v. Taylor*, 519 F. Supp. 2d 542, 548 (W.D. Penn. 2007), *rev'd*, 532 F.3d 237 (3d Cir. 2008).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 549.

¹¹¹ *Id.* at 549–50.

¹¹² *Id.* at 551–52.

¹¹³ *Id.* at 554.

¹¹⁴ *Id.* at 562.

¹¹⁵ 519 F. Supp. 2d 542 (W.D. Penn. 2007), *rev'd*, 532 F.3d 237 (3d Cir. 2008).

¹¹⁶ *Id.* at 573. This case has been reversed and remanded by the Third Circuit. *Huber v. Taylor*, 532 F.3d 237 (3d Cir. 2008). The Third Circuit held that the trial court's finding of privity in this case was erroneous and thus that Lawyer 1 would not be subject to *res judicata* and could not be found a necessary person on those grounds. *Id.* at 251. The Third Circuit did not, however, reject—and implicitly upheld—the notion that *res judicata* is a proper justification for joinder. *Id.* (noting that “where the preclusive effect of an action on any related litigation is speculative, joinder of an absent party is not compulsory under Rule 19(a)(1)(B)(i)”) and thus implying that joinder is compulsory if the preclusive effect is not speculative). The reversal of the trial court's finding of privity does not affect the thrust of this Comment's argument, but rather is an example of the confusion that results from judicial attempts to reconcile the logically inconsistent concepts in Rule 19(a)(1)(B)(i) and *res judicata*.

¹¹⁷ *Huber*, 519 F. Supp. 2d at 569.

¹¹⁸ *Id.* at 567.

¹¹⁹ *Id.* at 569.

ests must be adequately represented¹²⁰—and consequently protected¹²¹—by Lawyer 2 in the litigation. According to the court’s reasoning, at the same time absent Lawyer 1 will be bound by res judicata because his interests are protected, he must be joined because his ability to protect his interests is impaired. These two statements are logically inconsistent—a person’s interest cannot both be protected and require protection. This logical flaw is at the heart of the court’s decision in *Huber*. More properly reasoned, if Lawyer 1 is in privity with Lawyer 2, his joinder should never be required under Rule 19(a)(1)(B)(i) because his interests are already protected, and if he is *not* in privity, joinder under Rule 19(a)(1)(B)(i) should turn on an analysis of “practical” prejudice, as discussed below.¹²²

The court’s use of res judicata in determining Lawyer 1 to be a necessary party in *Huber* is not an anomaly. In fact, the notion that the binding effect of res judicata is practical prejudice under Rule 19(a)(1)(B)(i) appears to be based solidly in Third Circuit precedent.¹²³ At least one other circuit follows the Third Circuit’s reasoning that the binding effect of res judicata impairs or impedes an absent person’s ability to protect her interest.¹²⁴ Yet others hold that when a present party adequately represents an absent person’s interests, the absent person’s ability to protect her interests is *not* impaired, making her joinder not necessary.¹²⁵ Still other circuits appear unable to make up their minds.¹²⁶ Because of this split amongst the circuits,

¹²⁰ The Supreme Court recently gave guidance on the issue of privity in the context of res judicata. *Taylor v. Sturgell*, 128 S. Ct. 2161, 2172–73 (2008). The Court enumerated six categories in which an absent person can be bound by res judicata. *Id.* The only category relevant for the purposes of this Comment is where the absent person is adequately represented by a party. See *infra* notes 143–147 and accompanying text. For further discussion of privity in general, see *infra* notes 137–149 and accompanying text.

¹²¹ See *infra* notes 150–166 and accompanying text.

¹²² See *infra* notes 127–135 and accompanying text.

¹²³ See *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 409 (3d Cir. 1993) (“If issue preclusion or collateral estoppel could be invoked against [the absent person] in other litigation, continuation of the federal action could ‘as a practical matter impair or impede’ [the absent person’s] interests and so Rule 19(a)(1)(B)(i) would require its joinder if joinder were feasible.”).

¹²⁴ See, e.g., *HS Res., Inc. v. Wingate*, 327 F.3d 432, 439 (5th Cir. 2003) (“[T]he presence of the other lessors is not required unless the judgment ‘effectively precludes them from enforcing their rights and they are injuriously affected by the judgment.’” (quoting *Hilton v. Atl. Ref. Co.*, 327 F.2d 217, 219 (5th Cir. 1964))).

¹²⁵ See, e.g., *Am. Express Travel Related Servs., Co. v. Bank One-Dearborn, N.A.*, 195 F. App’x 458, 461 (6th Cir. 2006) (“Thus, [the absent person’s] interests are adequately represented by [a present party], and [the absent person] would not be disadvantaged by not being joined as a party.”); *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Rite Aid of S.C., Inc.*, 210 F.3d 246, 250–51 (4th Cir. 2000) (“If [a present party] is able adequately to represent [the absent person’s] interest, we would be inclined to conclude that [the absent person’s] ability to protect its interest is not impaired or impeded by its absence from this suit.”).

¹²⁶ The Ninth Circuit appears to use both res judicata and the adequate representation argument as a basis for joinder. Compare *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999) (“As a practical matter, an absent party’s ability to protect its interest will not be impaired by its absence from the suit where its interest will be adequately represented by existing parties to the suit.”), with *Takeda v. Nw.*

a closer examination of the interaction between Rule 19, *res judicata*, and privity is worthwhile.

B. The Language and Operation of Rule 19

Federal Rule of Civil Procedure 19(a)(1)(B)(i) states:

A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if: . . . (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect the interest . . .¹²⁷

In order to address the effect that a judgment would have on an absent person, the Rule specifically focuses on "practical" prejudice to the absent person arising from his inability to protect his interest.¹²⁸ The relevant caselaw and literature reveal that the prejudice contemplated by Rule 19 arises in two generic types of cases.¹²⁹

The first situation where an absent party may suffer practical prejudice, termed the "depleted trough," involves a suit seeking a judgment out of a limited fund to which the absent person also claims a legal right to recover.¹³⁰ In this situation, a judgment in the person's absence could deplete the fund from which the absent person could have recovered, effectively

Nat'l Life Ins. Co., 765 F.2d 815, 821 n.7 (9th Cir. 1985) ("Ironically, the closeness of the relationship between [the absent person] and [the present party], which they assert shows that [the absent person's] interests are adequately represented so that [the absent party] is not a necessary party, is precisely what causes the likelihood of collateral estoppel in future litigation, and thus determines that [the absent person] is a necessary party."). The First Circuit does the same. *Compare* Acton Co. of Mass. v. Bachman Foods, Inc., 668 F.2d 76, 78 (1st Cir. 1982) (noting that the absent person was necessary under 19(a)(1)(B)(i) because it "might be bound by [a present party's] suit under the doctrine that *res judicata* applies not only to the actual parties but also to those in privity with the parties"), *with* Pujol v. Shearson Am. Express, Inc., 877 F.2d 132, 135 (1st Cir. 1989) ("[W]e fail to see how proceeding without the [absent person] would 'as a practical matter impair or impede' the [absent person's] interests, interests that [a present party's] counsel can adequately protect.").

¹²⁷ FED. R. CIV. P. 19(a)(1)(B)(i).

¹²⁸ FED. R. CIV. P. 19 advisory committee's note ("Clause [(1)(B)(i)] recognizes the importance of protecting the person whose joinder is in question against the practical prejudice to him which may arise through a disposition of the action in his absence."). The concept of practical prejudice has also been described in the context of the effects of a judgment as a "transformational" effect. *See, e.g.*, FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 11.24, at 618–19 (4th ed. 1992) ("These effects on the nonparty are not the result of *res judicata* rules as such. They flow from the fact that a judgment not only determines issues and claims but also may redefine the relationships of the parties to the litigation with respect to each other, to property, and to their future courses of conduct.").

¹²⁹ *See* Freer, *supra* note 5, at 1083.

¹³⁰ JAMES, HAZARD & LEUBSDORF, *supra* note 128, § 10.12, at 528; Freer, *supra* note 5, at 1083; Note, *supra* note 97, at 1053 ("Probably the most clearly established example of circumstances in which an absent person could be sufficiently affected is that of a suit to obtain payment out of a fund in which the absent person has an interest.").

limiting or destroying his recovery.¹³¹ While this effect on the absent party is indirect because it will not be felt unless he later decides to pursue his legal right, as a practical matter the prior judgment impairs his ability to protect that right.¹³²

The second situation where a person may suffer practical prejudice—broadly termed a “relational effect”—arises when an injunction or declaratory judgment against a present party directly affects the absent person because of her relationship with the parties.¹³³ For example, the success of a group of employees suing for advanced seniority would adversely affect the seniority status of all employees outside the group.¹³⁴ This effect arises because of the relationship between the group members and the non-group members and the status of their relative positions in the company. Those outside of the group suffer a relative deprivation from a judgment favoring the group. A similar situation occurs if a judgment concerning the title of property in one action affects an absent person’s claim of title.¹³⁵ Although the absent person is not bound by any judgment in the action, as a practical matter her relative ability to assert ownership of the property is altered.

While courts properly recognize these two forms of practical prejudice in determining necessary party status, some also improperly consider the binding effect a judgment could have on the absent person through res judicata as a practical prejudice under Rule 19.¹³⁶ As described throughout this Comment, consideration of res judicata in joinder analysis is improper.

The next section describes the legal concepts of res judicata and privity, and how each relates to the language of Rule 19(a)(1)(B)(i). It shows that any party subject to res judicata *cannot* be a necessary party under Rule 19(a)(1)(B)(i) because res judicata only binds a nonparty that is in privity with a party and that, by definition, a necessary party under 19(a)(1)(B)(i)

¹³¹ See, e.g., *Belcher ex rel. Belcher v. Prudential Ins. Co. of Am.*, 158 F. Supp. 2d 777, 779 (S.D. Ohio 2001) (“An absent claimant to a limited fund, such as the proceeds of an insurance policy, is ordinarily considered to be an indispensable party to litigation.”); see also *Carey v. Klutznick*, 653 F.2d 732, 736 (2d Cir. 1981) (holding that states were necessary parties in an action to revise a New York census because of the effect it would have on their representation in Congress, noting that “[i]n effect, House membership is a fund in which fifty states have an interest”).

¹³² JAMES, HAZARD & LEUBSDORF, *supra* note 128, § 10.12, at 528 (“While the claim of a nonparty against the [depleted] fund is not legally extinguished by the judgment, it may as a practical matter be worthless (for instance, when the obligor is insolvent) unless it can be satisfied out of the fund.”); Freer, *supra* note 5, at 1083.

¹³³ See Freer, *supra* note 5, at 1083.

¹³⁴ See, e.g., *Martin v. Wilks*, 490 U.S. 755 (1989) (involving a group of firefighters suing for advancement because of reverse discrimination in a prior action); MOORE ET AL., *supra* note 28, § 19.03[3][c]; Freer, *supra* note 5, at 1083.

¹³⁵ See, e.g., *Rosales v. United States*, 73 F. App’x 913 (9th Cir. 2003) (holding an absent person to be necessary when a court’s action would cast doubt on the absent person’s claim of land ownership); Freer, *supra* note 5, at 1083.

¹³⁶ See, e.g., *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399 (3d Cir. 1993).

cannot be in privity with an existing party. Therefore, court reliance on res judicata in determining necessary party status is misguided.

C. *Res Judicata and Privity*

Generally, res judicata prevents a party to a judgment from relitigating his position.¹³⁷ This judgment, however, typically has no effect on persons who are not parties.¹³⁸ It is unquestioned that res judicata in this basic form does not affect joinder. A person who is already a party to a suit does not need to be joined, and a person not joined generally will not be bound by the judgment and therefore will not suffer prejudice as a result of res judicata. Res judicata, however, becomes more complex with the introduction of another legal concept: privity.

Res judicata binds not only parties to the judgment but also persons in privity with a party.¹³⁹ Traditionally, privity was limited to a specific set of defined legal relationships¹⁴⁰ where the nature of the relationship guaranteed that the absent person's interests were aligned with and adequately represented by a party in the case.¹⁴¹ In such a situation, the absent person was considered "in privity" with that party, and therefore subject to res judicata.¹⁴²

¹³⁷ MARCUS, REDISH & SHERMAN, *supra* note 95, at 1092 ("[Res judicata] refers . . . to the prohibition on relitigating a claim which has already been litigated and gone to judgment."); WRIGHT, MILLER & COOPER, *supra* note 18, § 4449.

¹³⁸ RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, CIVIL PROCEDURE 228 n.c (8th ed. 2003) ("Ordinarily the judgment in an action between *A* and *B* cannot affect *C* in a legal sense. Due process ordinarily dictates that no judgment shall go against *C* or alter her legal position unless she has been summoned as a party and has had an opportunity to present her side of the case.")

¹³⁹ *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 798 (1996) (noting that although a litigant is not ordinarily bound by the judgment in a prior suit to which she was not a party, "there is an exception when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment"); *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876) ("[T]he judgment, if rendered on the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them . . ."); MARCUS, REDISH & SHERMAN, *supra* note 95, at 1164; WRIGHT, MILLER & COOPER, *supra* note 18, § 4448.

¹⁴⁰ As one scholar summarized:

The classic examples are the cases in which a litigant, after the commencement of an action, transferred his interest by sale or assignment. The assignee or vendee is considered to be in privity with the vendor or assignor, and when the latter has lost, the assignee or vendee in privity with the losing party is precluded from relitigating the matter settled in the suit concerning the property. This same concept is applied in the case of lessor and lessee and mortgagor and mortgagee when the transfer is made after the start of the litigation in Suit I. This same closeness sufficient to ground a preclusion is found in the case of various governmental agencies, guardian and ward, corporation and stockholder, and bankrupt and trustee. In community property states, husband and wife may also be held to be in privity. Finally, in the case of a decedent and his successors in interest, the courts have found the closeness necessary to apply the label of "privity."

Allan D. Vestal, *Extent of Claim Preclusion*, 54 IOWA L. REV. 1, 12-14 (1968).

¹⁴¹ See WRIGHT, MILLER & COOPER, *supra* note 18, § 4448.

¹⁴² Vestal, *supra* note 140, at 12 ("The courts have talked in terms of a close relationship, privity, between a participant in the first suit and the person to be precluded in the second. Involved seems to be

More recently, the concept of privity has expanded to include additional bases for binding absent persons.¹⁴³ In *Taylor v. Sturgell*, the Supreme Court gave its first comprehensive guidance on when an absent person can be bound by res judicata.¹⁴⁴ The Court enumerated six categories in which an absent person may be in privity with a party:

1. The absent person has agreed to be bound.
2. The absent person has a succeeding property interest with a party.
3. The absent person controls a party.
4. The absent person, in a second litigation, is controlled by a party in the first case.
5. A special statutory scheme allows for nonparty preclusion within the bounds of due process.
6. The absent person is adequately represented by a party.¹⁴⁵

In the context of 19(a)(1)(B)(i), the first five categories fall away. First, if the absent person has consented to being bound, there is no reason for the court to consider whether or not the case will impair his ability to protect his interests. Second, because only one person (either the party *or* the absent person) will have a given property interest at a given time, succeeding property interests will only be relevant in subsequent litigation and not when contemplating joinder into a single litigation. Third, if an absent person controls a present party, then the absent person has the ability to protect his interests. Fourth, there is no reason to join an absent person that will be controlled in the future without other circumstances that independently justify joinder in the first suit. Fifth, the statutory schemes contemplated by the Court must still satisfy due process requirements. The Due Process Clauses of the Fifth and Fourteenth Amendments protect an absent person from being bound by res judicata unless his interests are adequately represented by a party in the case.¹⁴⁶ Consequently, in order to comply with the requirements of due process, these statutory schemes must guarantee

the idea that the precluded party's interests were represented in the first suit, or that the precluded party should have no greater interest than did the losing party in the first suit.”)

¹⁴³ See *Weinberger v. Tucker*, 510 F.3d 486, 491 (4th Cir. 2007); *Taylor v. Blakey*, 490 F.3d 965, 970 (D.C. Cir. 2007) (“At one time courts tended not to find two parties in privity absent a specific legal relationship between them, but the term ‘is now used to describe various relationships between litigants that would not have come within the traditional definition of that term.’” (quoting *Richards v. Jefferson Co.*, 517 U.S. 793, 798 (1996))), *rev'd sub nom. Taylor v. Sturgell*, 128 S. Ct. 2161 (2008).

¹⁴⁴ 128 S. Ct. 2161, 2172–73 (2008). In *Taylor*, the Court struck down a new basis for binding an absent person known as “virtual representation.” *Id.* at 2178. For a detailed analysis of virtual representation and the Court's decision in *Taylor*, see Martin H. Redish & William J. Katt, *Taylor v. Sturgell, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. (forthcoming 2009).

¹⁴⁵ *Taylor*, 128 S. Ct. at 2172–73. For readability, this list is not in the same order as in *Taylor*.

¹⁴⁶ MARCUS, REDISH & SHERMAN, *supra* note 95, at 1164 (“The concept of privity is rooted in due process, as a non-party should not be bound by a judgment unless he had an opportunity to be heard or was so identified with a party that his *interests were represented*.” (emphasis added)).

adequate representation and can therefore be effectively collapsed into the sixth category. Thus, for present purposes, the crux of privity is adequate representation.¹⁴⁷

In the context of Rule 19(a)(1)(B)(i), a “person’s ability to protect [his] interest”¹⁴⁸ in the litigation determines whether the court considers the person to be a necessary party, not whether the person’s interest is “adequately represented” by an existing party to the suit. Although in conversational language “adequate representation of interests” and “protection of interests” seem equivalent, it is useful to examine briefly the legal boundaries of “adequate representation,” particularly in the context of class action lawsuits. The next section examines the class action prerequisite that absent class members be adequately represented¹⁴⁹ in order to inform the meaning of “adequate representation” in the context of *res judicata*.

D. “Adequate Representation” and Class Actions

A definition of privity that is based on adequate representation is substantially similar to one of the preliminary requirements for a class action under Federal Rule of Civil Procedure 23.¹⁵⁰ Rule 23 requires that “the representative parties will fairly and adequately protect the interests of the class.”¹⁵¹ The similarity between the class action requirement and the definition of privity is unsurprising because in the same way absent class members are bound by a judgment on the class, an absent person in privity with a party is bound by a judgment on that party under *res judicata*.¹⁵² Thus, the

¹⁴⁷ See *Richards v. Jefferson Co.*, 517 U.S. 793, 798 (1996) (recognizing the privity exception to the general *res judicata* requirement of identical parties when “a person, although not a party, has his interests adequately represented by someone with the same interests who is a party” (quoting *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989))); *Weinberger*, 510 F.3d at 491–92 (“The touchstone of privity for purposes of *res judicata* is that a party’s interest is so identical with another that representation by one party is representation of the other’s legal right.”); *Bates v. Twp. of Van Buren*, 459 F.3d 731, 734–35 (6th Cir. 2006) (“The outer limit of the doctrine [of privity] traditionally requires . . . [that] the interests of the nonparty are presented and protected by the party in the litigation.”); see also Herbert Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1459–60 (1968) (“Where a party to the second action was not a party to or in control of the first action he may still be bound if his relationship in the first action is sufficiently close, his interests were adequately represented and there are independent reasons (other than avoiding repeated litigation) for holding the first judgment binding. The result is often explained in terms of the non-party being ‘in privity’ with a party to the first action.”).

¹⁴⁸ FED. R. CIV. P. 19(a)(1)(B)(i).

¹⁴⁹ FED. R. CIV. P. 23(a)(4).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*; see also Note, *supra* note 97, at 1054 (“Indeed, the presumed adequacy of representation is the very foundation of the class action.”).

¹⁵² See John K. Morris, Comment, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered*, 56 CAL. L. REV. 1098, 1119 (1968) (“In class actions and under the doctrine of virtual representation a nonparty may be bound on a basis other than privity. As previously seen, both devices allow preclusion where there is adequate representation, and convenience, necessity, or avoidance of a multiplicity of actions demand such preclusive effect.”).

meaning of “adequate representation” in the class action context informs its meaning in a privity context.

The 1966 amendment of Rule 23 provides valuable insight into the boundaries of adequate representation. Language requiring the class representative to “fairly insure the *adequate representation* of all” was revised to the current requirement that it “adequately *protect the interests* of the class.”¹⁵³ The Advisory Committee states no reason for this change in language,¹⁵⁴ which suggests that it was merely stylistic and that the two phrases are identical in substance.¹⁵⁵ This silence appears to endorse interpreting “protection of interests” as legally equivalent to “adequate representation.” In addition, courts still commonly refer to the language in Rule 23 requiring “protect[ion of] . . . interests”¹⁵⁶ as requiring “adequacy-of-representation,”¹⁵⁷ lending further support to the proposition that the two are legally equivalent. Indeed, even *Black’s Law Dictionary* includes protection of interest in its definition of “adequate representation.”¹⁵⁸ Both the language of Rule 23 and the way it has been interpreted indicate that, when res judicata binds an absent person, that absent person’s interests are legally protected by a party.

The revised language of Rule 23 aside, any discussion of adequate representation must center on the landmark case of *Hansberry v. Lee*.¹⁵⁹ *Hansberry* involved an African American family that purchased a home in a neighborhood covered by a racial covenant preventing minorities from purchasing homes in that neighborhood.¹⁶⁰ In an action brought by neighbors to void the sale, the African American family sought to challenge the validity of the covenant.¹⁶¹ The trial court held that the family could not challenge the covenant because the family was bound by the judgment in a prior class action that had found the covenant valid, and the Supreme Court of Illinois affirmed.¹⁶² The family appealed to the United States Supreme Court,

¹⁵³ FED. R. CIV. P. 23 advisory committee’s note (emphasis added).

¹⁵⁴ *Id.*

¹⁵⁵ WRIGHT, MILLER & KANE, *supra* note 29, § 1765 (“No reason for the change in wording is given in the Advisory Committee’s Note to the 1966 Amendment and it is reasonable to assume that the modification merely is stylistic in character.”).

¹⁵⁶ FED. R. CIV. P. 23(a)(4).

¹⁵⁷ *See, e.g.,* Busby v. JRHBW Realty, Inc., 513 F.3d 1314, 1323 (11th Cir. 2008) (referring to the “adequacy-of-representation requirement” of Rule 23(a)(4)).

¹⁵⁸ BLACK’S LAW DICTIONARY, *supra* note 36, at 1328 (defining “adequate representation” as “[a] close alignment of interests between actual parties and potential parties in a lawsuit, so that the interests of potential parties are sufficiently *protected* by the actual parties” (emphasis added)).

¹⁵⁹ 311 U.S. 32 (1940).

¹⁶⁰ *Id.* at 37–38.

¹⁶¹ *Id.* at 38. The covenant required signatures from 95% of the homeowners in the area to be valid. The trial court found that, in fact, only 54% of the homeowners had signed the covenant. *Id.*

¹⁶² *Id.* at 39–40.

which held that the family's interests were not adequately represented in the prior suit; therefore, they were not bound by its judgment.¹⁶³

In its analysis, the Supreme Court began by outlining the general principle that a person not party to a suit cannot be bound by it.¹⁶⁴ The Court then stated that a class action suit is a recognized exception to the general rule, allowing a court to bind absent class members when their interests are adequately represented by the class.¹⁶⁵ The Court continued, stating that while the Fifth and Fourteenth Amendments do not outline any specific procedure for class actions, "this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the *protection of the interests* of absent parties who are to be bound by it."¹⁶⁶

Regardless of how to determine whether a particular absent person's interests are adequately represented in a given case, the *Hansberry* Court held that "protection of interests" is, if not a legal equivalent, at least a baseline component of adequate representation; as such, a person's interests are protected if she is adequately represented. Logically, if a person's interests are protected, her ability to protect her interests is not impaired, but rather has already been accounted for. Thus, a person who is adequately represented is not impaired in her ability to protect her interests and is not a necessary person under Rule 19(a)(1)(B)(i). Consequently, the notion that an absent person is necessary because she will be bound in her absence, due to privity-induced *res judicata*, is logically inconsistent.

A comparison of due process requirements between joinder and class actions provides another means of interpreting the language of Rule 19. Courts are generally wary of binding absent persons because of the due process considerations already mentioned.¹⁶⁷ The class action, although binding on absent persons, has many practical benefits.¹⁶⁸ In order to assuage due process concerns and yet still take advantage of the benefits of class actions, Rule 23 outlines a series of hoops that a proposed class must jump through in order to bind absent class members.¹⁶⁹ These include satisfaction of the four general requirements for all class actions (numerosity, commonality, typicality, and adequacy-of-representation),¹⁷⁰ proper defini-

¹⁶³ *Id.* at 45–46.

¹⁶⁴ *Id.* at 40–41 ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.").

¹⁶⁵ *Id.* at 41.

¹⁶⁶ *Id.* at 42 (emphasis added).

¹⁶⁷ *See id.*

¹⁶⁸ Most notably, class actions avoid a multiplicity of suits by settling numerous claims in a single action. *See* WRIGHT, MILLER & KANE, *supra* note 29, § 1751.

¹⁶⁹ *See* FED. R. CIV. P. 23.

¹⁷⁰ FED. R. CIV. P. 23(a).

tion of classes and subclasses,¹⁷¹ and certification of the class by a judge.¹⁷² In some cases, Rule 23 additionally requires that absent class members be given notice¹⁷³ and the option to opt out of the class.¹⁷⁴

Rule 19 was drafted at the same time as Rule 23 but without Rule 23's protection for absentees. The complex procedure for binding absent persons in Rule 23 raises the question of whether Rule 19 should be read to allow courts to make substantive decisions about privity and res judicata that could bind absent persons. Based on the protections in Rule 23, the Rules Committee was seemingly aware of the delicate balance between efficiency and due process. It seems unlikely that the same Rules Committee gave judges carte blanche to bind absent persons through the necessary party analysis in Rule 19.¹⁷⁵ The procedural protections in Rule 23 further support the notion that Rule 19 only contemplates practical prejudice suffered by the absent person and that the potentially binding effect of res judicata is not relevant to the determination of necessary parties for purposes of joinder. The next section turns to another multiparty tool in the Federal Rules of Civil Procedure that is useful in interpreting Rule 19.

E. Similar Language in Rule 24

Federal Rule of Civil Procedure 24, which governs intervention, allows a third party to intervene in a lawsuit when she claims an interest in the litigation and when disposition of the case in her absence may “as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.”¹⁷⁶ This language is nearly identical to the language of Rule 19(a)(1)(B)(i),¹⁷⁷ with the notable addition in Rule 24 of a clause disallowing intervention when the intervenor’s interests are adequately represented.¹⁷⁸ This section addresses why Rule 24 contains an “adequate representation” clause while Rule 19 does not and why the argument presented in this Comment is unaffected by this difference in language.

¹⁷¹ FED. R. CIV. P. 23(c)(1)(B).

¹⁷² FED. R. CIV. P. 23(c)(1)(A).

¹⁷³ FED. R. CIV. P. 23(c)(2)(A).

¹⁷⁴ FED. R. CIV. P. 23(c)(2)(B).

¹⁷⁵ See *infra* Part IV for further discussion.

¹⁷⁶ FED. R. CIV. P. 24(a)(2).

¹⁷⁷ Rule 19 deems an absent person “necessary” for a just adjudication when he claims an interest in the litigation and disposition of the case in his absence may “as a practical matter impair or impede the person’s ability to protect the interest.” FED. R. CIV. P. 19(a)(1)(B)(i).

¹⁷⁸ Compare FED. R. CIV. P. 24(a)(2), with FED. R. CIV. P. 19(a)(1)(B)(i). Courts frequently use caselaw interpreting one rule as a guide to interpretation of the other. See, e.g., *United Keetoowah Band of Cherokee Indians of Okla. v. United States*, 480 F.3d 1318, 1324–25 (Fed. Cir. 2007) (citing Rule 24 precedent in analysis of Rule 19); *South Dakota ex rel Barnett v. U.S. Dep’t of Interior*, 317 F.3d 783, 786 (8th Cir. 2003) (citing Rule 19 precedent in analysis of Rule 24).

Intervention and compulsory joinder are fundamentally different. While each seeks to join a person if his absence will result in practical prejudice,¹⁷⁹ the primary difference is *who* is seeking to have that person joined. In the case of compulsory joinder, the judge or a present party forces the absent person into the case.¹⁸⁰ In the case of intervention, the absent person affirmatively seeks to join the case.¹⁸¹ This difference in posture provides a vital distinction between Rule 19 and Rule 24.

With this distinction in mind, the Advisory Committee's note on the 1966 amendment of Rule 24 states that, "[t]he general purpose of original Rule 24(a)(2) was to entitle an absentee, purportedly represented by a party, to intervene in the action if he could establish with fair probability that the representation was inadequate."¹⁸² The operation of Rule 24 thus begins with a presumption that the intervenor is adequately represented in the suit, and the intervenor must overcome this presumption in order to proceed and become a party in the lawsuit.¹⁸³ This presumption of adequate representation is the basis for the clause in Rule 24 disallowing intervention when "[the applicant's] interest is already adequately represented by existing parties."¹⁸⁴ Only when the applicant shows that his interests are *not*, in fact, adequately represented can he move on to show the required practical prejudice he will suffer if the court does not allow him to intervene.¹⁸⁵

In compulsory joinder under Rule 19, however, there is no presumption that the absent person is adequately represented. Instead of analyzing whether a person's interests are adequately represented by an existing party as in Rule 24, the court proceeds directly to decide if the absent person is necessary.¹⁸⁶ With no need to overcome the presumption, as in Rule 24,¹⁸⁷ the "adequate representation" clause is not necessary.

A counterargument to the argument presented in this Comment might flow as follows: (1) Rule 24 includes a provision that specifically makes

¹⁷⁹ See FED. R. CIV. P. 19(a)(1)(B)(i), 24(a).

¹⁸⁰ FED. R. CIV. P. 19.

¹⁸¹ FED. R. CIV. P. 24.

¹⁸² FED. R. CIV. P. 24 advisory committee's note.

¹⁸³ See *id.* (placing the burden of proof for showing inadequate representation on the moving party).

¹⁸⁴ This phrase was employed in the 1966 amendment of Rule 24 to replace the requirement that "[t]he representation of the applicant's interests by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." FED. R. CIV. P. 24 advisory committee's note. The old language sought to articulate the presumption of adequate representation, but proved clumsy and arguably presented a Catch-22. See JAMES, HAZARD & LEUBSDORF, *supra* note 128, § 10.17, at 544 ("The applicants for intervention had to show that they probably would be bound by the judgment (which could only result if they were in fact adequately represented) and also that their interests were inadequately represented (in which case they would not be bound by the judgment)."). The new language was adopted "to eliminate this absurdity and to allow intervention as of right essentially on the same principles as those under the necessary parties rule." *Id.*

¹⁸⁵ See FED. R. CIV. P. 24.

¹⁸⁶ FED. R. CIV. P. 19(a)(1).

¹⁸⁷ See *supra* notes 179–184 and accompanying text.

adequate representation fatal to intervention of right; (2) otherwise, the relevant language of Rule 19 and Rule 24 are identical; therefore (3) the lack of such provision in Rule 19 indicates that adequate representation is *not* fatal to compulsory joinder. This counterargument ignores the differences between Rules 19 and 24 mentioned above as well as the presumption of adequate representation that must be overcome in Rule 24 but not Rule 19.

More accurately, adequate representation only comes into play with compulsory joinder under Rule 19 as part of the discussion of whether the absent person's ability to protect her interests are "as a practical matter impair[ed] or impede[d]."¹⁸⁸ As discussed above, if the absent person is adequately represented, her interests are necessarily protected and therefore she need not be joined in order to protect them.¹⁸⁹ This construction of Rule 19 does not require the additional "adequate representation" clause. Rule 24 does require the clause, however, because of its presumption that the absent person is adequately represented.

F. Stare Decisis and Levels of Representation

Two additional counterarguments to the argument presented in this Comment arise from the concepts of stare decisis and levels of representation. Each fails for the reasons outlined below.

1. Stare Decisis.—Suppose an absent person is not adequately represented in a case and will not be bound by its judgment. Suppose further that this person later brings a second case based on a claim that is similar to the claim in the first case. One might argue that, although the absent person will not be bound by res judicata, he is still subject to the prior decision and stare decisis will, as a practical matter, impair his ability to protect his interests. This argument might suggest that courts relying on res judicata for joinder are not making some grave legal error, but are simply using the wrong Latin phrase to justify joinder. According to such a counterargument, the argument presented in this Comment, while accurate, is of no practical significance. This counterargument fails, however. Not only does it overstate the role of stare decisis, it also disregards consequential differences between res judicata and stare decisis.

Initially, three observations must be made. First, this potential stare decisis argument can only arise when the absent person is *not* adequately represented and therefore not bound by res judicata. If the absent person is adequately represented, she will be bound by res judicata and cannot bring the second suit that stare decisis could affect. Second, Rule 19 is only concerned with an absent person who claims a legal interest in the litigation

¹⁸⁸ FED. R. CIV. P. 19(a)(1)(B)(i); see *supra* notes 127–136 and accompanying text.

¹⁸⁹ See *supra* notes 150–175 and accompanying text.

and only seeks to protect the person's ability to protect *that* interest.¹⁹⁰ Thus, we are only concerned with an absent person who is in some way connected to the first suit, and furthermore, we are only concerned with the way in which she is connected.¹⁹¹ Third, because the absent person is not adequately represented, her legal interest in the litigation must be somehow distinct from the interests of the parties in the case—if the absent person shared the same legal interest as a party, that interest would be adequately represented.¹⁹² So when considering potential stare decisis effects and their relationship to the arguments above, we are concerned only with an absent person who holds a distinct legal interest in a prior suit and who is not adequately represented.

In the traditional sense, stare decisis binds courts to follow prior legal decisions when the same or similar situations arise.¹⁹³ This doctrine only applies, however, to legal and not factual determinations.¹⁹⁴ For example, while stare decisis might bind lower courts to a legal standard for breach of contract, it does not restrict one jury from finding a contract breached and another jury from finding the same contract not breached.¹⁹⁵ Thus, stare decisis should not bind the absent person in any technical sense because his distinct interest either concerns a different legal issue or is factually distinguishable. If his legal interest relates to a different legal issue, stare decisis will have no effect; if his legal interest is factually distinguishable, he will have the opportunity to argue that this distinction is such that the prior suit's holding does not apply to him. Therefore, stare decisis is not binding in the same manner as res judicata, and this counterargument must fail.

Taking this a step further, one might argue that even though stare decisis does not technically bind the absent person, the prior case would be persuasive precedent in a subsequent suit. This persuasive precedent may create an uphill battle for a future litigant, arguably impairing the litigant "as a practical matter" and making her a necessary party in the first suit. Some courts have rejected this argument,¹⁹⁶ but this does not necessarily

¹⁹⁰ FED. R. CIV. P. 19(a)(1)(B)(i).

¹⁹¹ Of course, it is implausible to suggest that every unrelated future litigant who will be affected in any way by the precedent set in one case should be joined into that case.

¹⁹² See *supra* notes 137–147 and accompanying text.

¹⁹³ BLACK'S LAW DICTIONARY, *supra* note 36, at 1443 (entry for "stare decisis").

¹⁹⁴ *Cactus Corner, LLC v. U.S. Dep't of Agric.*, 346 F. Supp. 2d 1075, 1099 (E.D. Cal. 2004) (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001)) ("Even where, under the doctrine of *stare decisis*, a court is generally compelled to abide by conclusions of law made in prior proceedings of higher courts, a court cannot take judicial notice of another court's determination of the truth of those facts.").

¹⁹⁵ Under the doctrine of collateral estoppel, a cousin of res judicata, the issue of breach might be taken away from the jury because it was already decided in the prior suit. This, however, has nothing to do with stare decisis.

¹⁹⁶ *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 407 (3d Cir. 1993) ("We are not sure what the district court means by the phrase 'persuasive precedent.' To the extent it involves the doctrine of *stare decisis*, we are not inclined to hold that any potential effect the doctrine may have on

mean the argument has no merit. Instead, it must be stressed that persuasive precedent is nonbinding in nature and therefore has significantly less severe consequences for absent parties than res judicata. This significant difference makes it extremely shortsighted to suggest that courts' current usage of res judicata in joinder creates results that could just as easily be reached through a stare decisis analysis.

2. *Levels of Representation.*—Suppose an absent person is adequately represented, as required by due process, and will be bound by res judicata. One might argue that adequate representation does not foreclose the possibility that the absent person could represent herself *better* if she were joined into the suit. Envisioning different levels of quality in representation might suggest that, despite being adequately represented, the person's joinder is useful and should pass 19(a) scrutiny. Under such a theory, due process requires a minimum floor of representation in order for an absent person to be bound by res judicata, but because she could do a better job representing herself, resolving the case in her absence impairs her ability to protect her interests as well as she could have if joined. Essentially, this argument concedes that res judicata is not a reason for joinder, but contests the idea that res judicata and joinder are mutually exclusive. While linguistically clever, the argument fails upon closer examination.

The primary problem with an argument based on levels of representation is that it requires improper manipulation of the concept of adequate representation. By definition, if adequately represented, a person's interests are protected;¹⁹⁷ if her interests are protected, her ability to protect them is not impaired.¹⁹⁸ The levels of representation argument suggests that a person's ability to protect her interests might be impaired despite adequate representation if that representation did not rise to a certain level. This can only be achieved if adequate representation does not require protection of interests, which then guts adequate representation of its commonly accepted meaning—the meaning that justifies res judicata. Once adequate representation does not translate to res judicata, a merely adequately represented person will not be bound and therefore has no reason to seek a higher level of representation. The argument thus becomes moot.

In addition, the idea of levels of representation, in the context of Rule 19, flies in the face of Rule 24. Assuming for the sake of argument that increasing the level of representation of the absent person justifies joining her, it follows that she should be able to intervene for the same reason. The absent person should be better able to judge whether she could represent herself more effectively than the present party, who merely represents her

an absent party's rights makes the absent party's joinder compulsory under Rule 19(a) whenever 'feasible.'"). *But see* Pulitzer-Polster v. Pulitzer, 784 F.2d 1305, 1310–11 (5th Cir. 1986) (finding an absent person necessary because a judgment might serve as persuasive precedent in future litigation).

¹⁹⁷ *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940).

¹⁹⁸ *See supra* notes 150–175 and accompanying text.

“adequately.” However, Rule 24 specifically bars intervention when the absent person is adequately represented.¹⁹⁹ Thus, even though the absent person could improve the quality of her representation by intervening, Rule 24 specifically disallows intervention on that basis. Intervention is only allowed under Rule 24 when a person is *not* adequately represented by a party, and *not* when a person *is* adequately represented but would rather represent herself. Any argument based on levels of representation falls apart when applied to intervention—a situation in which the concept of levels of representation makes more sense than it does for joinder—and therefore such arguments must fail.

* * *

Reliance on *res judicata* in determining whether an absent person is necessary and must be joined under Rule 19 is misguided and should be stopped because it is logically inconsistent. Instead, courts should focus on “practical” prejudice, such as the depleted trough²⁰⁰ and relational effects,²⁰¹ as the language of Rule 19 directs.²⁰² This conclusion aligns with the historical progression of joinder and the pragmatic approach endorsed by the 1966 amendments to the Federal Rules of Civil Procedure. Furthermore, in addition to the dangerous effect of dismissing meritorious cases, use of *res judicata* to justify joinder has the potential to undermine the broader purpose of Rule 19(a)(1)(B)(i): protection of the absent person’s interests. As the next Part will show, using *res judicata* to justify necessary party status under 19(a) guarantees adverse practical consequences when the person is not found indispensable under 19(b), undermining 19(a)’s purpose of protecting the absent person’s interest.

IV. AN EXAMPLE OF THE RULE GONE WILD

A troubling situation arises from the view that *res judicata* satisfies the “practical” prejudice contemplated in Rule 19(a)(1)(B)(i). Adopting this view, a court could hold that an absent person will be bound by its judgment and should be joined, but also hold that the case will continue in the person’s absence. This is in direct contrast with the stated purpose of 19(a)(1)(B)(i) and undermines Rule 23’s carefully crafted protections for absent class members; thus, any reading of Rule 19(a)(1)(B)(i) that considers *res judicata* must be invalid.

As previously noted, the modern conception of compulsory joinder is widely recognized as having three justifications: (1) protecting society from

¹⁹⁹ FED. R. CIV. P. 24(a)(2).

²⁰⁰ See *supra* notes 130–132 and accompanying text.

²⁰¹ See *supra* notes 133–135 and accompanying text.

²⁰² FED. R. CIV. P. 19(a)(1)(B)(i).

piecemeal litigation, (2) protecting the potential joinee from the effects of a judgment in his absence, and (3) protecting the defendant from inconsistent judgments.²⁰³ Each of these is mapped into the current language of Rule 19.²⁰⁴ At its core, the purpose of 19(a)(1)(B)(i) is to protect the absent person from undue prejudice by way of a judgment.²⁰⁵ With this purpose in mind, the remainder of this Part will show that finding a party necessary under 19(a)(1)(B)(i) because the judgment would be binding under *res judicata* can actually *guarantee* prejudice to the absent person instead of protecting him from it. The absurdity of interpreting the Rule to produce a result antithetical to its stated purpose further supports the conclusion that reliance on *res judicata* to satisfy 19(a)(1)(B)(i) is misguided.

The heart of this problem lies in the bifurcated necessary and indispensable determinations in 19(a) and 19(b). In applying the Rule, a court must first determine whether or not a person is necessary under 19(a).²⁰⁶ If the court determines the person to be necessary under 19(a) but joinder is not feasible, the court must then proceed through a completely separate indispensability analysis under 19(b).²⁰⁷ Rule 19(b) requires the court to balance four nonexclusive factors,²⁰⁸ and it is not uncommon for a court to determine an absent person necessary under 19(a) but *not* indispensable under 19(b).²⁰⁹ In this situation, the case moves forward in the person's absence.²¹⁰

²⁰³ See *supra* notes 46–52 and accompanying text; see also MOORE ET AL., *supra* note 28, § 19.02[2][c] (“An absentee will be deemed necessary, or ‘required,’ if failure to join it creates any of three potential risks: (1) inability of the court to accord complete relief among the parties; (2) risk of harm to the absentee’s ability to protect its interest; or (3) risk of harm to the defendant by subjecting it to double liability or inconsistent obligations.”).

²⁰⁴ FED. R. CIV. P. 19 advisory committee’s note (“Clause [(1)(A)] stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or ‘hollow’ rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter. Clause [(1)(B)(i)] recognizes the importance of protecting the person whose joinder is in question against the practical prejudice to him which may arise through a disposition of the action in his absence. Clause [(1)(B)(ii)] recognizes the need for considering whether a party may be left, after the adjudication, in a position where a person not joined can subject him to a double or otherwise inconsistent liability.”); see also MOORE ET AL., *supra* note 28, § 19.03[1].

²⁰⁵ FED. R. CIV. P. 19 advisory committee’s note.

²⁰⁶ *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 404 (3d Cir. 1993).

²⁰⁷ *Id.*

²⁰⁸ FED. R. CIV. P. 19(b); see *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109 (1967).

²⁰⁹ See, e.g., *Jaser v. N.Y. Prop. Ins. Underwriting Ass’n*, 815 F.2d 240 (2d Cir. 1987); *Pasco Int’l (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496 (7th Cir. 1980); *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826 (5th Cir. 1975); *Va. Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78 (4th Cir. 1973).

²¹⁰ FED. R. CIV. P. 19(b).

The facts of the *Huber* case are again useful as a starting point for a hypothetical example.²¹¹ In *Huber*, the court determined that Lawyer 1 was in privity with Lawyer 2 and therefore Lawyer 1, although absent, would be bound by a judgment through *res judicata*.²¹² The court thus held that Lawyer 1 was a necessary party under 19(a)(1)(B)(i).²¹³ The court went on to analyze whether Lawyer 1 was indispensable under 19(b) because the joinder of Lawyer 1 would have destroyed the diversity on which the court's jurisdiction was based. The court decided that Lawyer 1 was indispensable under 19(b)²¹⁴ and on that basis dismissed the case.²¹⁵

Taking these facts a step further, suppose that the court, in balancing the 19(b) factors, had determined that Lawyer 1 was *not* indispensable and allowed the case to proceed in Lawyer 1's absence. Lawyer 1 has now been judged to be adequately represented by Lawyer 2 and will be bound by the judgment against Lawyer 2. Lawyer 1 may never have a chance to present his own case and will never have an opportunity to appeal any decision in the case, whether it is the court finding him in privity with Lawyer 2 *or* the subsequent final judgment that will bind him.²¹⁶ Under the court's reasoning in finding Lawyer 1 necessary under 19(a)(1)(B)(i), he suffers practical prejudice from the binding effect of the judgment. In this hypothetical, however, the court has in no way protected Lawyer 1, but instead guaranteed such prejudice by its finding of privity.

Of course, Lawyer 1 may be able to challenge the finding of adequate representation by intervening under Rule 24 or in a later suit.²¹⁷ In this situation, if his claim is meritorious, he is compelled to file a motion or a new lawsuit and will be required to prove that he had nothing to do with a case in which he was never named as a party and never had any say in his representation. The time and expense of this needless litigation, in itself, is a form of practical prejudice that the court has now forced on the absent person, Lawyer 1.²¹⁸

²¹¹ *Huber v. Taylor*, 519 F. Supp. 2d 542 (W.D. Pa. 2007), *rev'd*, 532 F.3d 237 (3d Cir. 2008). For a full analysis and description of the facts, see *supra* notes 108–126 and accompanying text.

²¹² *Huber*, 519 F. Supp. 2d at 569.

²¹³ *Id.*

²¹⁴ *Id.* at 573.

²¹⁵ *Id.*

²¹⁶ See MARCUS, REDISH & SHERMAN, *supra* note 95, at 256 (“An absent party is not before the court and has no status to object to a suit in which it is not joined.”).

²¹⁷ See, e.g., *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd*, 539 U.S. 311 (2003) (holding that a purported class member was not adequately represented during class certification and therefore not bound by the class settlement).

²¹⁸ Professors James, Hazard, and Leubsdorf describe a similar situation in which an absent person is stuck between prejudice coming from a suit to which he was not a party and prejudice from the need to bring another suit to protect his rights: “If *A* obtains an injunction against *B* directing that *B* cease dealing with *C*, *C* ordinarily may not ignore the injunction if he or she has knowledge of it; although *C* is still free to litigate the issues involved, and thereby obtain a judgment that might supersede the injunction, until *C* does so *C* is ordinarily required to observe the obligation the judgment imposes on *B*.”

Considering that the first factor in the Rule 19(b) indispensability analysis²¹⁹ is substantially similar to 19(a)(1)(B)(i), this scenario may seem unlikely. It is nevertheless very possible. Courts have already shown a willingness to find privity when analyzing 19(a).²²⁰ Rule 19(b)'s factor analysis may lead to other factors—such as lack of another forum to bring the suit²²¹—weighing heavily enough to overcome the first factor and require the case to move forward.

Additionally, this scenario allows a suit to bind absent persons without any of the procedural protections afforded to absent persons under Rule 23. As discussed briefly above, Rule 23 contains procedural protections for absent class members such as class certification, notice, and opt-out.²²² A reading of Rule 19 that allows the court to bind absent persons via 19(a), but continue without them via 19(b), produces an effect similar to that of a class action but without Rule 23's protections, undermining the value of those protections. Such a result indicates a fatal flaw in this interpretation of Rule 19.

The purpose underlying Rule 19(a)(1)(B)(i) is the protection of the absent person. However, an absent person is guaranteed to suffer adverse effects from a judgment if the court finds that the person will be bound by res judicata and the case continues under 19(b).²²³ Reading 19(a)(1)(B)(i) in a way that undermines its stated purpose is absurd. This absurdity, particularly in light of the complex procedural protections afforded by Rule 23 to protect an absent person's interest, further demonstrates that res judicata should not be used as the basis for determining an absent person to be necessary under Rule 19(a)(1)(B)(i). This is especially the case when the language of the Rule lends itself to another interpretation that avoids the absurd result—focusing on “practical” prejudice such as the depleted trough and relational effects.

JAMES, HAZARD & LEUBSDORF, *supra* note 128, § 11.24, at 619. While an erroneous finding of privity and an injunction are certainly distinct, in both cases an unrepresented third party is forced to bring his own lawsuit in order to undo a judicial finding made in his absence.

²¹⁹ FED. R. CIV. P. 19(b)(1) (“[T]he extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties . . .”).

²²⁰ See, e.g., *Huber v. Taylor*, 519 F. Supp. 2d 542 (W.D. Pa. 2007), *rev'd*, 532 F.3d 237 (3d Cir. 2008).

²²¹ See FED. R. CIV. P. 19(b)(4).

²²² FED. R. CIV. P. 23.

²²³ It could be argued that if the party found to be in privity with the absent person won the case, the absent person would reap a positive benefit from the finding of privity. This argument fails, however, because the scenario assumes that the absent person was found necessary under Rule 19(a)(1)(B)(i), meaning the judge determined that the absent person will suffer “practical” prejudice by way of res judicata regardless of the ultimate outcome of the case.

CONCLUSION

Interpretation of Rule 19(a)(1)(B)(i) is confused at best. Some courts believe that the binding effect of a judgment on an absent person based on privity and *res judicata* is a reason for labeling him a necessary party. As shown above, this approach is misguided because it departs from the historical and modern purpose of compulsory joinder,²²⁴ it is logically inconsistent,²²⁵ and it can lead to unintended consequences.²²⁶ Instead, when analyzing Rule 19(a)(1)(B)(i), courts should look at the practical effects that a judgment might have on an absent person, as the Rule prescribes.

An approach that looks to practical effects has been uniformly endorsed by pre-amendment commentary,²²⁷ the Rules Advisory Committee,²²⁸ and modern scholarship.²²⁹ Furthermore, shifting from an analysis that juggles both practical and legal effects to one focused on practical prejudice will produce virtually no burden on the courts. A working definition of practical prejudice has already been well established by courts and scholars. This definition includes the depleted trough and relational effects discussed earlier.²³⁰ Courts should simply continue using their precedent on practical effects of a judgment on an absent person and discard use of *res judicata* in this context.

²²⁴ See *supra* Part II.

²²⁵ See *supra* Part III.

²²⁶ See *supra* Part IV.

²²⁷ See Reed, *supra* note 33, at 336 (“The distinction is between affecting [the absent person’s] rights *legally* and affecting them *factually*. Since the court is without power to adjudicate the rights of [an absent person], it is clear that the court’s determination of the controversy between the parties who *are* present will not and cannot legally affect [the absent person’s] rights. But the decision may, *in fact*, affect [the absent person’s] interests . . .”).

²²⁸ See FED. R. CIV. P. 19 advisory committee’s note (“Clause [(1)(B)(i)] recognizes the importance of protecting the person whose joinder is in question against the practical prejudice to him which may arise through a disposition of the action in his absence.”).

²²⁹ See, e.g., FIELD, KAPLAN & CLERMONT, *supra* note 138, at 228 n.c (“Ordinarily the judgment in an action between *A* and *B* cannot affect *C* in a legal sense. . . . *C*, however, may be affected in a *practical sense* by an action between *A* and *B*.”); RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE 776 (4th ed. 2005) (“[A]s a nonparty, [the potential joinee] could not have been bound by claim or issue preclusion. . . . That is why the rule speaks of ‘practical’ (as opposed to ‘legal’) impairment of the absentee’s interest.”); JAMES, HAZARD & LEUBSDORF, *supra* note 128, § 10.12, at 528 (“A court ordinarily has no jurisdiction over a person who has not been made a party to an action before it; thus, no judgment or decree is binding on nonparties, nor is any finding made in the course of arriving at the judgment. It does not follow, however, that judgments are always without practical, substantial effects on nonparties.”); MARCUS, REDISH & SHERMAN, *supra* note 95, at 256 (“Note that the risk under [19(a)(1)(B)(i)] is that ‘as a practical matter’ disposition of the action in the nonparty’s absence would impair or impede the nonparty’s ability to protect its interest. That term is used to indicate that even where the absent party is not bound by a judgment under preclusion law, the judgment may still have the practical effect of impeding its ability.”). Why these statements are sometimes hedged with words like “ordinarily” is not clear. This may simply be a nod to the fact that some courts insist on bringing *res judicata* into the necessary party calculus.

²³⁰ See *supra* notes 128–135 and accompanying text.

There is no reason for courts to continue using faulty reasoning when analyzing Rule 19(a)(1)(B)(i). An approach focused on practical effects is logically sound, is supported by courts and scholars, is reflective of the rationales for joinder, and could be implemented easily. Courts adhering to this superior approach should continue, while courts clinging to res judicata should take notice of their faults and recognize the true meaning of Rule 19(a)(1)(B)(i).

