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The Democratizing Influence of Intervention

Geoffrey D. Callaghan

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Article abstract

Participation-based arguments in support of courts adopting a large and liberal attitude on intervention were persuasive at the outset of the Charter era. Due to the newness of the document at the time, a compelling case could be made that public participation in Charter challenges was a vital component of developing that document in a way that aligned with the core democratic commitments of the Canadian state. But the persuasiveness of such arguments has waned over time. If one accepts a common law approach to constitutional interpretation – where judicial activism is held in check by way of established precedent – arguments based on the participatory rights belonging to those potentially impacted by court decisions appear to be past their due date. This does not mean, however, that courts no longer have any democratic responsibilities concerning the practice of intervention. The positive contribution this article makes is to establish two alternative bases that can account for that responsibility — one inspired by the role intervention plays in encouraging public deliberation; and a second on the increased confidence the practice instills in judicial decision-making. In both cases, the ground of the responsibility is rather weak and can thus be easily defeated. Nevertheless, that courts have this responsibility at all offers a better explanation for why, even in times when an intervening party might not satisfy the strict criteria pertaining to the practice, there is reason to allow that intervention to proceed.

The Democratizing Influence of Intervention

Geoffrey D. Callaghan[*]

Participation-based arguments in support of courts adopting a large and liberal attitude on intervention were persuasive at the outset of the Charter era. Due to the newness of the document at the time, a compelling case could be made that public participation in Charter challenges was a vital component of developing that document in a way that aligned with the core democratic commitments of the Canadian state. But the persuasiveness of such arguments has waned over time. If one accepts a common law approach to constitutional interpretation – where judicial activism is held in check by way of established precedent – arguments based on the participatory rights belonging to those potentially impacted by court decisions appear to be past their due date. This does not mean, however, that courts no longer have any democratic responsibilities concerning the practice of intervention. The positive contribution this article makes is to establish two alternative bases that can account for that responsibility — one inspired by the role intervention plays in encouraging public deliberation; and a second on the increased confidence the practice instills in judicial decision-making. In both cases, the ground of the responsibility is rather weak and can thus be easily defeated. Nevertheless, that courts have this responsibility at all offers a better explanation for why, even in times when an intervening party might not satisfy the strict criteria pertaining to the practice, there is reason to allow that intervention to proceed.

Les arguments fondés sur la participation à l'appui d'une démarche ample et libérale des tribunaux en matière d'intervention étaient convaincants à l'aube de l'avènement de la Charte. À l'époque, la nouveauté du document permettait d'affirmer qu'il était essentiel que le public prenne part aux contestations fondées sur la Charte de sorte que le texte évolue d'une manière qui soit cohérente avec les engagements démocratiques fondamentaux de l'État canadien. Mais ces arguments ont perdu de leur force persuasive au fil des années. Si l'on retient le principe d'interprétation constitutionnelle selon la démarche de la common law, dans le cadre de laquelle l'établissement de précédents doit servir de protection contre l'activisme judiciaire, les arguments fondés sur les droits de participation des personnes éventuellement touchées par les décisions judiciaires paraissent surannés. Cela ne signifie toutefois pas que les tribunaux n'exercent plus aucune responsabilité démocratique eu égard aux processus d'intervention. Au moyen de cet article, l'auteur fait avancer le débat en établissant deux autres fondements de nature à faire état de cette responsabilité : l'une qui prend sa source dans le rôle que l'intervention joue pour favoriser les délibérations publiques et l'autre qui se rapporte à la confiance accrue dans le processus décisionnel judiciaire qu'inspirent les interventions. Dans les deux cas, le fondement de la responsabilité est plutôt fragile et facile à balayer. Reste que le fait même que les tribunaux aient cette responsabilité explique fort bien que, y compris dans les situations où un tiers intervenant pourrait ne pas satisfaire au critère strict d'ordinaire applicable, il y a lieu de permettre l'intervention.

[*] Geoffrey D. Callaghan is an Assistant Professor in the Department of Political Science at the University of Windsor.

I. INTRODUCTION

Interveners are non-parties to a court proceeding that have been granted permission to make written and/or oral submissions to the court provided they explain how those submissions are uniquely relevant to the dispute under review,[1] refrain from raising any new issues to the proceeding,[2] and avoid making any statements concerning the outcome of the appeal.[3] The practice of intervention has increasingly become a routine part of the Supreme Court of Canada's hearing process. Whereas a mere 62 non-government interveners were granted leave to participate in appeals before the SCC in the first five years of the *Charter* era (1984 -1988), that number ballooned as the era progressed, with an average of 114 interveners participating each year between 2000 and 2008,[4] increasing to an average of 154 participants in the years spanning 2010 to 2019.[5]

The steady growth in intervener participation would no doubt please those who wrote on the practice early in the *Charter* era.[6] The thought at the time was that the expanded review powers that courts would acquire under the *Charter*[7] would result in judicial decisions having a more meaningful and diffuse impact over society, and that a democratic responsibility was therefore owing to increase the involvement of the general public in their hearing processes. This responsibility, a handful of authors maintained, could be discharged by way of the seldom used but already established practice of intervention.[8]

Early arguments in favour of courts adopting a large and liberal attitude on intervention were compelling at the time they were written. But this is arguably no longer the case. While at the outset of the *Charter* era judges could not help but apply a certain degree of creativity in the shape they would put to that document,[9] as time wore on and the law around *Charter* provisions became more concrete, there is reason to believe that much of that creativity would naturally transition into a more mechanical application

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1 *Rules of the Supreme Court of Canada, SOR/2002-156*, r 57.

2 *Ibid*, r 59(3).

3 *Ibid*, r 42.

4 These figures were retrieved from Benjamin Alarie & Andrew Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48:3&4 Osgoode Hall LJ 381 at 398.

5 These figures were retrieved by the author from LexisNexis and the Supreme Court of Canada website, online: <www.scc-csc.ca> [perma cc/8JV6-9QQF]. COVID interrupted the ordinary hearing process at the Supreme Court, which is why I have opted to provide data only until 2019.

The year-over-year breakdown for the interval runs as follows:
2010: 101
2011: 146
2012: 140
2013: 161
2014: 195
2015: 107
2016: 135
2017: 193
2018: 192
2019: 168

6 *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

7 Powers of judicial review are established at sections 24 and 52 of the *Charter*.

8 The *Rules of the Supreme Court of Canada, SOR/2002-156, r 57* first established a discretionary power over intervention in 1878. For more on the practice of intervention in the pre-*Charter* era, see Bernard M Dickens, "A Canadian Development: Non-Party Intervention," (1977) 40 Mod L Rev 666.

9 Rights documents typically rely on open-textured language and the *Charter* is no exception in this regard. This is especially the case with more substantive *Charter* provisions such as ss 2, 7 and 15.

of settled law. The reasoning behind such a transition is grounded in the common law roots of Canada's legal system itself. As David Strauss explains: "[C]onstitutional law is preoccupied, perhaps to excess, with the question of how to restrain judges while still allowing a degree of innovation; the common law has literally centuries of experience in the use of precedent to accomplish precisely these ends."[10] Strauss here highlights a compelling middle-ground strategy struck by the common law – one that has the potential to allay concerns over judicial activism on the one hand, and inflexible constitutional interpretation on the other, at the same time. The ability to refer to past judgements provides courts with a clear framework to guide deliberations over current disputes; and yet because each new dispute may contain unfamiliar but relevant considerations of law, judges may enrich that framework to account for just those considerations. Applying this reasoning to the *Charter* then, while developing precedents around the *Charter* would naturally take some time, eventually courts could come to rely on their own past decisions to guide their interpretative exercises into the future, in turn allowing for an organic, but suitably constrained, development of rights-based adjudication in Canada.

The common law method of constitutional interpretation appears to saddle early arguments in support of intervention with an indeterminate but appreciable time limit — one that at this point has likely passed. After all, when the justification for intervener participation is tied to the 'newness' of a document, removing that condition is tantamount to removing the justification itself. This does not mean, however, that courts can no longer be said to have any democratic responsibilities concerning intervention. The positive contribution this article makes is to establish two alternative bases for that responsibility: one inspired by the role intervention plays in encouraging public deliberation; another by the increased confidence it instills in judicial decision-making. In both cases, and relative to early arguments in support of intervention, the ground of the responsibility is rather weak and can thus easily be defeated. Nevertheless, that courts have this responsibility at all offers a better explanation for why, even in times when an intervening party might not satisfy the strict criteria outlined by the Court,[11] there is reason to allow the intervention to proceed.

The paper proceeds as follows. In part II, I examine early arguments in support of the democratic value of intervention, emphasizing the assumptions upon which those arguments rested and the timeframe constraint they were (arguably) subject to. Parts III and IV explore two ancillary democratic arguments in support of intervention: one that highlights how the practice can be used to shore up public deliberation on important social and political issues; the other examining how the practice may help to bolster public confidence in the judicial institution. The paper concludes in part V by responding to a potential objection to my argument.

II. PARTICIPATORY RIGHTS RATIONALE FOR INTERVENTION

Though scholarly attention directed at the practice of intervention was comparatively lively in the decade following the *Charter*'s inception, even at that time it was limited. Each treatment of the practice was organized around more or less the same argument, with only modest variations between them. The core of the argument was that due to the vast increase in the review powers courts would adopt under the *Charter*, a concomitant democratic responsibility was owing to increase the public's involvement in court

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[10] David A Strauss, "Common Law Constitutional Interpretation" (1996) 63:3 U Chicago L Rev 877 at 887-888 (emphasis added).

[11] Rules pertaining to intervention are captured at rules 42 and 57-59 of the *Rules of the Supreme Court of Canada, SOR/2002-156*, r 57.

proceedings. The practice of intervention offered a ready-made way for courts to discharge this responsibility.

The argument took for granted that the institution of judicial review, especially in the context of a rights document, raises some rather serious democratic concerns. As critics of the *Charter* explained, not only would court judgments have a greater and more diffuse impact on parties not directly involved in a dispute, the processes by which courts were to render those judgments would, at least on some level, grant broad creative license to judicial decision-makers. The underlying concern then was that allowing an unelected, and in some respects unaccountable, judiciary to have the final say on rights-based disputes would impact the Canadian socio-political landscape in a manner antagonistic to the participatory commitments of the democratic state. This is effectively how Alan Borovoy, who at the time was serving as general counsel for the Canadian Civil Liberties Association, expressed the concern. He argued that:

> The effective transfer of so much power to the judiciary raises issues of fundamental fairness. Since the entire community will be increasingly affected for substantially longer periods by the decisions of the Court, larger sectors of the community should be able to participate in the process which produces those decisions. It is simply not fair to limit such participation on the basis of the coincidence of which parties litigate first. Public respect for both the *Charter* and the Court will require a more inclusive process.[12]

Jillian Welch echoed Borovoy's concern in a 1985 paper she wrote on intervention, maintaining that "the *Charter* undeniably vests what are essentially political decisions in the hands of a non-elected judiciary…[p]rocedural mechanisms which ensure the representation of a whole range of viewpoints are thus essential."[13] And Philip Bryden put the point bluntly in a 1987 paper by adding that:

> Generally speaking, the opportunity to develop a sense of the public interest and urge it on those who wield governmental power is regarded as one of the most important, and most desirable, features of life in a democracy. If all this is true, it should not surprise us to find that individuals, and more particularly organizations made up of people with similar interests, have as much desire to influence the exercise of governmental authority by judges as they have to influence the decisions of politicians or administrative agencies.[14]

The democratic argument undergirding each of these statements is as clear as they are consistent. To the extent that a decision-making body enjoys authority over areas that stand to impact the general public, the public ought to have participatory access to the processes by which its decisions are made. In this respect, early arguments in favour of intervention can be viewed as an extension of the familiar democratic rationale for universal suffrage.[15]

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12 Alan Borovoy, "Interventions and the Public Interest (Open Letter to the Supreme Court of Canada)" in FL Morton, ed, *Law, Politics and the Judicial Process in Canada*, 3rd ed (Calgary: University of Calgary Press, 2002) at 263.

13 Jillian Welch, "No Room at the Top: Interest Group Intervenors and Charter Litigation in the Supreme Court of Canada" (1985) 43:2 UT Fac L Rev 204 at 228.

14 Philip Bryden, "Public Interest Intervention in the Courts" (1987) 66:3 Can Bar Rev 490 at 491.

15 Deliberative theories offer an especially strong defense of rationales that support universal suffrage. For a comprehensive review of such theories see André Bächtiger et al, eds, *The Oxford Handbook of Deliberative Democracy* (Oxford: Oxford University Press, 2018).

Arguments grounded on participatory rights are democratically appealing. But there are a few immediate difficulties with applying those arguments within the judicial context. To begin, courts are not like other institutions in a democracy. The entire rationale for assigning constitutional review powers to judicial bodies are precisely because they are well positioned to operate above the fray of majoritarian politics.[16] In this respect, invoking a participatory argument in the context of judicial decision-making at the very least requires some massaging.

But a second difficulty with applying a participation-based argument in the context of judicial institutions relates more narrowly to an assumption upon which the argument rests. Even taking a range of realist beliefs for granted, judges can, and arguably do, restrict the degree of partiality that features in their judgements — a feat that, in common law jurisdictions anyway, they accomplish by drawing on established law to inform the content of their decision-making. The assumption underlying early democratic arguments in support of intervention was that because judges would be shaping the content of the brand-new *Charter*, the public ought to have a say in the more nuanced contours that shape would take on. This was clearly articulated in Borovoy's appeal when he conveyed that "it is simply not fair to limit…participation on the basis of the coincidence of which parties litigate first."[17] But this only begs the question of what happens when the law has matured, and its shape becomes more defined? Should democratic values at that point counsel against the participation of intervening parties due to the threat they pose to a consistent application of the rule of law,[18] or do those values continue to favour the participatory involvement of those parties simply because they stand to be influenced by the decision at issue?

To my mind, this was always going to be an obstacle that democratic arguments in support of intervention early in the *Charter* era would have to face. Such arguments relied too strongly on the idea that judges had no choice but to inject their ideological preferences into the judgements they render — an idea that flies in the face of broader commitments to both the rule of law and the common law foundations upon which Canada's legal system rests. And so, what ended up happening was that those early arguments became cast in a time-sensitive light. It was surely on this basis that former Supreme Court Justice, Michel Bastarache (1997–2008) declared in a 2000 interview with the National Post that **"** because…we have lived with the *Charter* for 18 years and we have a lot of experience in interpreting the *Charter*...[t]here isn**'**t the same need there was in 1982 to obtain help from interveners;"[19] and it was in reference to this same line of reasoning that Bastarache J's colleague, Frank Iacobucci (1991-2004), explained to Kirk Makin of the Globe and Mail that "it**'**s now getting on to be 18 years or so later. Should we be looking at the question [of intervener participation] in different ways?"[20]

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16 The value of an independent judiciary is undoubtedly one of pillars upon which modern liberal democracy stands. For a canvass of issues touching on judicial independence, especially as they appear in the Canadian context, see Adam Dodek & Lorne Sossin, eds, *Judicial Independence in Context* (Toronto: Irwin Law, 2010).

17 See Borovoy, *supra* note 12.

18 This is surely the inspiration for Ted Morton and Rainer Knopf's attack on what they called 'the court party' (see FL Morton & Rainer Knopf, *The Charter Revolution and the Court Party* (Toronto: University of Toronto Press, 2000)).

19 Luiza Chwialkowska, "Rein in lobby groups, senior judges suggest" *National Post* (6 April 2000), online: <www.fact.on.ca/news/news0004/np000406.htm> [perma.cc/ CZ5J-R5KF]).

20 Kirk Makin, "Intervenors: How Many Are Too Many?" *The Globe and Mail* (10 March 2000), online: <www.theglobeandmail.com/news/national/intervenors-how-many-are-too-many/article1037654/> [perma.cc/Z5ED-X643]). Of note is that some commentators have challenged the assumptions upon which the comments of these two former Supreme Court Justices rest. Thompson Irvine, for example, in "Changing Course or Trimming Sails? The Supreme Court Reconsiders" (in David A Wright & Adam M Dodek, eds, *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) at 9) presents evidence that in the 5-year period preceding the comments, the scale at which the Supreme Court reconsidered earlier decisions was in fact comparatively robust.

The remarks of these two former Supreme Court Justices reveal a possible limitation to democratic arguments in support of intervention early in the *Charter* era. A concern at the time would have been that judges could not help but apply a degree of creativity in the shape they would put to that document — a creativity that, while held in check by other interpretive approaches available to the Court,[21] stood to have a significant and lasting impact on the socio-political realities of the Canadian state. As time wore on, however, and the law around *Charter* provisions became more established, that creativity would naturally fade into the background, replaced by a more mechanical application of settled law. The balance would thus shift from a democratic concern for public input at the outset of the *Charter* era to a democratic concern for upholding the rule of law in line with the usual way the judicial role is understood in common law jurisdictions.[22]

III. PUBLIC DEBATE RATIONALE FOR INTERVENTION

Participation-based arguments that for a time were able to explain the nature of the democratic responsibility courts had concerning the practice of intervention arguably no longer apply. Does this mean that the proliferation in intervener participation observed throughout the *Charter* era finds no democratic grounding? In this and the next section, I argue against the inference. At least two other arguments exist for why courts have a democratic responsibility concerning the practice of intervention: the first based on the facilitation of public debate regarding important social and political questions; the second on strengthening public confidence in the legitimacy of judicial decision-making. I will elaborate on the first argument in this section and address the second in the one following.

As we have just seen, early democratic arguments in support of intervention emerged from the very broad claim that the institution of judicial review is illegitimate in a particular respect — that is, it neglects the views of many who stand to be impacted by its decisions. The argument I defend in this section is similarly based on an objection to the legitimacy of judicial review, though one that is far narrower in scope to the participatory concern flagged by early writers on intervention. The objection I have in mind was raised in a 1983 paper by Peter Russell where he took aim at the political implications that would likely surface in the new *Charter* era. One of the implications Russell explored was the detrimental effect the *Charter* could have on public discourse:

> …excessive reliance on litigation and the judicial process for settling contentious policy issues can weaken the sinews of our democracy. The danger here is not so much that non-elected judges will impose their will on a democratic majority, but that questions of social and political justice will be transformed into technical legal questions and the great bulk of the citizenry who are not judges and lawyers will abdicate their responsibility for working out reasonable and mutually acceptable resolutions of the issues which divide them.[23]

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21 See Madame Justice BM McLachlin, "The Charter: A New Role for the Judiciary," (1991) 29:3 Alta L Rev 540.

22 It is important to note that the relation I have drawn between public input and judicial creativity is merely intended to highlight a limitation that early arguments in support of intervention were subject to. Generally speaking, it is neither true that courts require public input to be creative in their interpretive exercises, nor that public input justifies an activist court. It would in this respect be misleading to draw a tight connection between the presence of interveners and the degree to which judicial activism features in court decisions (see Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (New York: SUNY Press, 2002)).

23 Peter Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 61:1 Can Bar Rev 30 at 52.

Russell's challenge on this score was in response to a comment made by then minister of justice, Jean Chrétien, during a committee hearing dealing with the government's proposed constitutional changes. In the course of that hearing, Chrétien maintained that "we are rendering a great service to Canada by taking some of these problems away from the political debate and allowing the matter to be debated, argued, coolly before the courts with precedents and so on."[24] Chrétien's thought was that by transferring debates from the heated floor of the legislature and the commotion of the public square into the calm, orderly environs of the courtroom, the quality of those debates would be greatly improved and Canadians would on balance be better off for it.

Keeping in mind the excessive politicking that had characterized the decade prior to when these comments were made, I think Chrétien's optimistic outlook can perhaps be forgiven. But Russell was justified in turning that optimism on its head. While there is value in the repose with which large, contentious disputes are worked out in the judicial arena, claiming that it is therefore preferable to situate these disputes in that environment for this reason in particular is dubious. This is especially so since, as Russell notes, the formalities that allow the adjudicative environment to operate in the calm, orderly manner it does requires a rather close familiarity with a highly technical language — one that, because most Canadians are not privy to that environment and/or language, is liable to exclude a large sector of the public from enjoying even minimal participatory involvement in those disputes.[25]

From a democratic perspective then, the concern with situating public debate primarily in the environment of the courtroom is two-fold. First, by doing so a large share of the public will be kept from participating in the debate in the first place. Due to rules of standing and the excessive costs associated with bringing a dispute to court, casting the courtroom as the primary location to settle society's disputes is likely to lead many of them to simply go unresolved. As a recent study by Statistics Canada reveals, although 87% of Canadians reported having experienced a legal problem in need of resolution, only a third contacted a legal professional to assist in the resolving of their dispute, and a mere 8% ended up bringing the dispute to a court of law or tribunal.[26] In light of the high barriers to entry then, transferring public debate to the courtroom environment is likely to exclude any number of individuals, many of whom belong to groups that are already underrepresented in those debates.[27]

Second, transferring public debate to the courtroom environment runs the risk of dampening the public's interest in engaging in these debates over time. The idea here is that if the public is under the impression that debates of this sort are the proper mandate of a specialized body, a collective willingness to disengage from those debates in day-to-day life is liable to increase. As an example, take the debate over medical assistance in dying. Suppose a person has a strong moral conviction against society setting up a regime that provides access to medical assistance in dying — a conviction they announce while at a dinner party with friends. It turns out that another guest, a practicing lawyer, is intimately aware of the

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[24] *Minutes of Proceedings and Evidence of the Special Committee of the Senate and of the House of Commons on the Constitution, Issue* No 48 (29 January 1981) at I10.

[25] For statistics on the state of access to justice in Canada, see Canadian Forum on Civil Justice, "Everyday Legal Problems and the Cost of Justice in Canada," (2016) online: <cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>.

[26] See Laura Savage & Susan McDonald, "Experiences of serious problems or disputes in the Canadian provinces, 2021" online: <150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00001-eng.htm>.

[27] As the concluding remarks in the factum prepared by the David Asper Centre for Constitutional Rights in *R v Barton*, 2019 SCC 33, [2019] 2 SCR 579 convey: "Interveners provide an essential access to justice mechanism by which the Court might gain meaningful exposure to the issues experienced by marginalized groups which experience exclusion, exploitation and discrimination" at para 16.

details of the Supreme Court of Canada's judgement in Carter v Canada,[28] which represents the official legal position on the matter.[29] The lawyer-guest calmly explains the Court's reasoning in that judgement, convincing others at the dinner party that the matter is all perfectly in line with the broader jurisprudence the Court has developed around section 7 (the *Charter* provision at issue). The question here is: Has the explanation offered by the lawyer-guest inspired a richer, more informed debate on the matter at hand; or, is it likelier to have brought the debate to a close? The public debate rationale maintains that the latter is at least a good possibility. The air of officiality that accompanies the lawyer-guest's explanation is liable to either intimidate others into keeping their views to themselves, or simply cause them to believe that the matter has been resolved and that no further engagement with the topic is necessary. Either way, the ultimate result will be that the person who arrived at the dinner party with a strong moral conviction on medical assistance in dying will be less willing to engage in a public discussion around that issue in the future.

Now imagine this kind of exchange operating broadly across society. To the extent that court judgments are viewed as the official response to contentious social issues, they run the risk of taking the place of public debate around those issues rather than adding to it. The result of course is that ordinary citizens, like our guest at the dinner party, may become increasingly reluctant to adopt strong views on contentious social issues in the first place.

One potential drawback of constitutionalizing a *Charter* of rights in Canada then is that it may have negatively impacted both the quality and magnitude of public deliberation across society. But how exactly does the practice of intervention fit into this picture? Recall the exact wording of Russell's challenge. His concern was that "questions of social and political justice will be transformed into technical legal questions and the great bulk of the citizenry who are not judges and lawyers will abdicate their responsibility for working out reasonable and mutually acceptable resolutions of the issues which divide them."[30] Russell proposed two remedies to address the concern. First, judges should defer to the intentions of the drafters when developing *Charter* principles and law[31] — a suggestion that, while perhaps merited at the time it was written, was almost immediately rejected by the Court itself.[32] Russell's second proposal was that a mechanism should be established which would facilitate "a wider public capacity for giving consideration to judicial reasons." Since "what is at stake in applying the norms of a constitutional *Charter* of rights to the ever-changing details of our public life is the balance to be struck among our fundamental political values…the public should not be disenfranchised from this area of decision-making."[33]

Russell never mentioned intervention in this regard, but I think the connection is obvious. The point isn't so much that members of the public ought to enjoy a right to participatory involvement in any decision that stands to affect them (the participatory-rights rationale), but that exposing the public to the decision-making arena in which legal judgments are rendered can dilute much of the prestige and

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28 *Carter v Canada (Attorney General),* 2015 SCC 5, [2015] 1 SCR 33.

29 The Superior Court of Quebec's judgement in Truchon v Canada (AG), 2019 QCCS 3792 further developed the jurisprudence on the issue of medical assistance in dying, albeit in a way that complied with the Supreme Court's ruling in Carter.

30 Russell, *supra* note 23.

31 *Ibid* at 53.

32 As Le Dain J argued in R v Therens, 1985, 1 SCR 613 at 638: "…the premise that the framers of the Charter must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the Charter was enacted is not a reliable guide to interpretation." For a general account of the Court's relationship to framers' intent, James B Kelly, Governing with the Charter: Legislative and Judicial Activism and Framers' Intent (Vancouver: UBC Press, 2005).

33 Russell, *supra* note 23 at 53-54.

intimidation that has historically been associated with it. This in turn helps to democratize judicial decision-making by making the arena more inclusive of those who stand to be impacted by its decisions. What intervention offers is a mechanism through which the public can engage with the judicial arena as participants rather than as mere spectators.

It can therefore be argued that intervention offers a partial response to Russell's concern about dampening public debate in both of two directions. Most obviously, it welcomes members of the public into an environment that is laden with live controversies. The mere fact that a mechanism exists for outside parties to participate in court proceedings, even in the limited way offered by intervention, promotes public discourse in a manner that a closed court system cannot. What is more, in providing for this opportunity, intervention also exposes those same members of the public to a language and form of reasoning that is idiosyncratic to the courtroom environment. Both considerations assist in breaking down barriers that can lead to a dampening of public debate — the first by inviting members of the public into an environment where important public debates occur; the second by providing opportunities for the public to actually participate in those debates. In each case, access to justice concerns are mitigated.[34] Sanda Rodgers conveys the point well when she writes that "more voices, expressing broader points of view, is a democratic principle to be encouraged…[as it reflects] part of the Court's public commitment to justice and access to justice."[35] By breaking down barriers to institutional entry, a greater share of the public will be encouraged to rely on that institution in the future — not just by entering the courtroom environment, but by learning its language and operating tendencies. In this respect, while vital political and social questions will continue to be debated in the courtroom, they will be debated by the public in the courtroom, and this could encourage members of the public to take up those same questions outside the courtroom, which would in turn facilitate greater public deliberation around them into the future.

Before moving on, I should quickly address a potential challenge to the argument I have advanced in this section. It is a simple fact that, more often than not, interveners are represented by specialized interest groups — many of whom are an embedded part of the legal apparatus in this country. My claim that the general public can attain greater exposure to the idiosyncratic language and procedures of the courtroom environment through the practice of intervention may in this respect appear fanciful. After all, if intervention is a practice that is used primarily by members of the legal profession, the thought that it broadens the public's participatory access to court proceedings is moot.

Two related considerations mitigate the force of this challenge. First, although it is true that many of the groups that seek and are granted leave to intervene will arrive at the appeal with an already highly specialized knowledge of the law, even these groups are divided between, on the one hand, extant legal associations, and on the other, public interest groups.[36] Concerning the latter, the mandates of such groups

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[34] Although interventions can be costly, they are a far less costly way to participate in a court proceeding than litigation. An Expert Panel at the Court Challenges Program (CCP) has established that the maximum amount a party may be granted for (human rights) litigation is $260,000, whereas the maximum amount available for a (human rights) intervention is $45,000, online (pdf): <pcj-ccp.ca/wp-content/uploads/2023/01/Funding-Guidelines-HRDP-current-as-of-1-January-2023.pdf>). A further consideration is that lawyers often take on intervention work pro bono, which significantly decreases the overall cost to the intervening party.

[35] Sanda Rodgers, "Getting Heard: Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada" in Sanda Rodgers & Shelia McIntyre, eds, The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat (Toronto: LexisNexis, 2010) at 30.

[36] From 2014-2019, of the 24 non-government groups that intervened before the Supreme Court more than five times, ten were legal organizations, while six were public interest groups. In order of number of appearances, the list of legal organizations includes: (1) Criminal Lawyers 'Association (65 interventions); (2) Canadian Bar Association (13 interventions); (3) Advocate's Society (9 interventions); (4) Aboriginal Legal Services Inc. (9 interventions); (5) Canadian Association of Refugee Lawyers (8 interventions); (6) Federation of Law Societies of Canada (6

specifically revolve around legal advocacy and education, and intervention can be regarded as but one of the mechanisms available to execute that mandate.[37] This connects to the general public's access to justice in a non-trivial way. Groups like the Canadian Civil Liberties Association, the David Asper Centre for Constitutional Rights, and the Women's Legal Education and Action Fund — all of whom regularly intervene both at the Supreme Court and appellate court level[38] — act as conduits (or, to employ terminology used by Carissima Mathen, as "intermediaries"[39]) between the courts and the public such that the idiosyncratic language and environment of the former can be translated and/or made understandable to the latter. The capacity for these groups to intervene in critical proceedings before the courts is an important tool toward executing this bridge-building directive.

More importantly, however, while many of the interveners that appear before the Supreme Court will arrive equipped with a specialized knowledge of the law and courtroom environment, this is not true across the board, and this lends weight to the view that current trends concerning intervention are not a baked-in feature of the practice itself. Individuals intervened at the Supreme Court of Canada 53 times over the past 20 years,[40] and many other intervening groups, while of course having access to legal assistance, were not themselves defined by their association to the legal community.[41] What this confirms is that there is nothing formally keeping the public from utilizing the practice of intervention more often. My defense of the public debate rationale is not to be read as an empirical remark on the current state of intervention in Canada, but as an argument on the practice's potential to assuage concerns over the dampening of public deliberation. The claim is that intervention bears the appropriate institutional features to address just these concerns.

IV. INSTITUTIONAL TRUST RATIONALE FOR INTERVENTION

Some readers may remain unconvinced by the public debate rationale I have just defended. They may, for instance, doubt that much of a connection holds between the adjudication of important social and

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interventions); (7) Canadian Council for Refugees (6 interventions); (8) African Canadian Legal Clinic (6 interventions); (9) Barreau du Québec (5 interventions); (10) Canadian Muslim Lawyers Association (5 interventions). In order of number of appearances, the list of public interest groups includes: (1) Canadian Civil Liberties Association (47 interventions); (2) British Columbia Civil Liberties Association (39 interventions); (3) Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (15 interventions); (4) David Asper Centre for Constitutional Rights (13 interventions); (5) West Coast Women's Legal Education and Action Fund (LEAF) (12 interventions); (6) Canadian Constitution Foundation (5 interventions). I am indebted to Jake Norris for compiling these lists.

37 Consider, for example, the David Asper Centre for Constitutional Rights — a group that intervened in thirteen appeals before the SCC between 2014 and 2019. The Centre's most recent Strategic Plan (2020-2025) states that "a guiding principle for the Centre's advocacy work is access to constitutional justice, in particular in relation to vulnerable individuals and groups," and that one of the ways it will maintain this principle is through "continued involvement in appropriate interventions at appellate level courts (independently or in partnership to support other organizations)."; see "David Asper Centre for Constitutional Rights: Strategic Plan (2020-2025), online (pdf): <aspercentre.ca/wp-content/uploads/2020/10/Strategic-Plan-2020-Asper-Centre.pdf>.

38 See the figures at fn 36.

39 See Carissima Mathen, "The Expanding Role of Interveners: Giving Voice to Non-Parties," in Competence & Capacity: New Directions (The 2000 Isaac Pitblado Lectures, Law Society of Manitoba) 85 at 105.

40 Data from 2000-2008 is available at Alarie & Green, *supra* note 4 at 398. Data from 2008-2019 was collected by the author, which were retrieved from LexisNexis and the Supreme Court of Canada website, online: <scc-csc.ca> [perma. cc/8JV6-9QQF].

41 From 2010-2019, for example, over 50 Indigenous communities and a dozen faith-based groups have intervened in appeals before the Supreme Court. This data was collected by the author, which were retrieved from LexisNexis and the Supreme Court of Canada website, online: <scc-csc.ca> [perma. cc/8JV6-9QQF]

political questions in courts of law and the dampening of public debate around those same questions. Moreover, those who do allow for a possible connection in this regard may remain skeptical that intervention plays much of a role in addressing it. I think there is merit to these reservations, though in a way that could end up strengthening the argument I ultimately wish to defend. But more on that later.

In this section, I would like to explore a different democratic rationale for intervention — one that, like the public debate rationale just examined, is not subject to the timeframe constraints that could be levied at early arguments on the practice. The rationale I have in mind turns on the influence that intervention might have over public confidence in judicial decision-making. The idea here is that by allowing interveners to participate in hearing processes, courts may shore up public support either for the particular judgement in that appeal, for judicial decision-making in general, or for both. Concerning the former, and in line with broader rationales around democratic participation, an argument could be made that by allowing outside parties a participatory role in a given decision-making process, the likelihood that those parties will accept the ultimate decision rendered increases — even if that decision goes against the outcome they would prefer.[42] Concerning the latter, the idea is that courts that allow participation by outside parties will come to be viewed as having more overall legitimacy by the public at large, due both to an increase in the viewpoints they are exposed to as well as a broadly-held belief that the judicial decision-making arena adheres to expected standards of transparency.[43]

The institutional trust rationale (as I will call it) was explored by Benjamin Alarie and Andrew Green in a paper they wrote on intervention in 2010[44] — albeit in a way that is distinctive to how I wish to employ the idea. Alarie and Green's objective in that paper was to determine the Supreme Court's motivation for allowing intervener participation in such a high number of appeals. On this question, the authors reject that the institutional trust rationale had much of an influence.[45] They explain that for the institutional trust rationale to account for the Court's treatment of interveners, one would expect "there to be no statistically significant relationship between the presence of interveners (or particular types of interveners) and the decision-making of the Court or particular judges."[46] Alarie and Green's hypothesis is that if the Court were to grant intervener status for no other reason than to bolster its public legitimacy, the participatory involvement of those parties would be enough to satisfy that aim. But if this is true, then the presence of inventing parties should presumably have no bearing on the actual decisions rendered by the Court. Such a conclusion did not align with the authors' findings.[47]

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42 Tom Tyler has conducted a number of studies demonstrating that participants in judicial processes are more likely to accept an unfavourable outcome when they feel they had a meaningful opportunity to participate in the process that led to that outcome. See e.g. Tom R Tyler, "The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities" (1997) 1:4 Personality & Social Psychology Rev 323; Tom R Tyler, "Social Justice: Outcome and Procedure" (2000) 35:2 Inter'l J Psychology 117; Tom R Tyler, "What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures" (1988) 22 Law & Soc'y Rev 103).

43 See Jenny de Fine Licht, "Transparency Actually: How Transparency Affects Public Perceptions of Political Decision-Making," (2014) 6:2 Eur Pol Sci Rev 309.

44 Alarie & Green, *supra* note 4 at 396.

45 Note that in their paper the authors call the rationale 'the acceptance rationale'.

46 Alarie and Green, *supra* note 4 at 409.

47 Daniel Sheppard has challenged the conclusion reached by Alarie and Green, arguing instead that 'the acceptance rationale' is the most plausible explanatory theory concerning intervention on offer. More specifically, Sheppard's review of the data around intervention reveals that the SCC appears to be more interested in the appearance of legitimacy than with actually engaging with the substantive argumentation submitted by intervening parties (see Daniel Sheppard, "Just Going Through the Motions: The Supreme Court, Interest Groups and the Performance of Intervention," in Cheryl Milne & Kent Roach, eds, Public Interest Litigation in Canada (Toronto: LexisNexis, 2019) at 187.

The question I wish to ask concerning the institutional trust rationale is different from the one posed by Alarie and Green. Whereas for Alarie and Green the institutional trust rationale is important for what it can tell us about the behaviour of the Court and/or individual judges, the way I wish to employ the rationale is important for what it can tell us about the manner in which courts and/or judges ought to behave. In other words, my objective is not to evaluate whether or the extent to which increased confidence in the decision-making of a court impacts its behaviour concerning intervention, but whether the rationale offers a democratic reason for courts to adopt a particular behaviour concerning the practice itself. My argument will be that it does.

The argument takes for granted that there is democratic value in promoting confidence in judicial institutions. It is by now well established that "social and political stability and integration increasingly depend on confidence in institutions rather than trust in individuals;" and consequently that "institutions matter more to contemporary democracies than does the quality of interpersonal relations among citizens."[48] Of the many institutions that comprise modern democratic states, confidence in the judiciary is especially important. The issue turns once again on the role the judiciary is seen to play in modern democracies and the distance the institution must have from the machinations of popular politics in order to carry out that role. The argument runs as follows. If courts of law are the neutral arbiters of disputes that arise between and among citizens and governments, their accountability to the public cannot be established through the kinds of responsive criteria that bear on the legitimacy of other public institutions. Quite to the contrary, in fact – their accountability will develop through their independence from the public. This in turn makes facilitating public trust in those institutions a complex undertaking. If courts of law cannot appeal to the public directly to shore up trust in its institutional legitimacy, how can that trust be secured?

The answer is in large part a natural extension of the question itself. Judicial bodies maintain public confidence by dispensing justice in a politically impartial way, which depends on their being independent from the public. Vitally, however, independence in this respect does not amount to disengagement. The way judicial bodies can maintain the public's confidence is by demonstrating impartiality in the course of performing their adjudicative duties — a point which provides insight into the way intervention can help to secure public confidence in courts. Mark Warren's work on institutional trust is instructive in this regard:

> Warranted institutional trust judgments depend on a congruence of three elements: (a) knowledge of institutional norms shared between truster and trustee, (b) the truster's knowledge of the trustee's motivations, which can be inferred from (c) professional role identities combined with sanctions that render officeholders accountable to the norms of office.[49]

The three elements highlighted by Warren should be read in a cascading way, where (c) depends on (b) holding, (b) depends on (a) holding, and (by the law of transitivity) (c) depends on (a) holding. In other words, everything hinges on the presence of a shared knowledge of institutional norms between truster and trustee. In the context of judicial institutions then, the level of trust commanded by a judiciary (trustee) among a democratic public (truster) will in large part depend on the facilitation of a shared knowledge

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[48] Kenneth Newton & Pippa Norris, "Confidence in Public Institutions: Faith, Culture or Performance?" in Susan Pharr & Robert Putnam, eds, Disaffected Democracies (Princeton: Princeton University Press, 2000) 52.

[49] Mark E Warren, "Trust and Democracy" in Eric M Uslaner, ed, The Oxford Handbook of Social and Political Trust (Oxford: Oxford University Press, 2018) 75 at 88.

between the two parties concerning the institutional norms that bear on the former. And facilitating this knowledge will in turn depend on the nature of the relationship between the two. To the extent that the public is kept at an arm's length from the courts, a shared understanding of the norms bearing on that institution will be correspondingly weak. While courts will continue to operate according to norms of impartiality and political neutrality — norms that are exhibited in the nature of the judicial hearing process itself — the public will not be privy to that operation and, as a consequence, will foster a greater tendency to arrive at contrary impressions of the institutional norms bearing on courts. It may be the case, for instance, that members of the public will come to view court decisions as being ideologically motivated, leading them to believe that the institution is nothing more than an extension of the broader political machine (a state of affairs that increasingly finds empirical support in modern democracies[50]).

The point of course is that intervention can assist in facilitating a shared knowledge of the institutional norms bearing on courts, which can then increase public confidence in their operating tendencies. By inviting members of the public into the hearing process as participants, those members will have an opportunity to engage with its institutional norms directly, thereby increasing both their knowledge of, and confidence in, those norms. This in turn stands to increase the level of trust the public has in judicial institutions, which promises to have positive downstream effects over democracy generally.

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Let me rehash the argument I have advanced to this point. A line of reasoning that emerged early in the *Charter* era suggested that because court decisions would increasingly impact public policy decisions in more significant and expansive ways, democratic ideals favoured courts adopting a large and liberal attitude concerning the practice of intervention. The thought was that by allowing outside parties participatory access to legal disputes, courts would be privy to the perspectives of the wider public, which in turn would assist them in arriving at more representative judgements on the matter at hand. I flagged a concern with this line of argument, suggesting that it relied too strongly on the view that the adjudicative exercise was inherently a creative one. I then argued that while it may have been true that courts were required to infuse a degree of creativity in their judgments at the outset of the *Charter* era, there is reason to believe that over time that creative element would (or should) have given way to the more typical adjudicative practice of applying settled law to new and unanticipated cases. What this meant, however, was that the democratic argument favoured by those who wrote early in the *Charter* era was subject to a time constraint: while it offered a compelling reason for why courts should adopt a liberal tack on intervention during the phase in which *Charter* principles and law were being developed, it was less compelling after those principles and law had reached a sufficient level of maturity. In response to this, I introduced two alternative arguments that could ground a democratic rationale in support of intervention — one based on the potential for intervention to bolster public deliberation around issues or disputes that arise in a judicial context; another on the role that intervention may play in increasing confidence in the legitimacy of judicial decision-making.

A clear benefit of explaining the democratic value of intervention by way of the two rationales I have argued for is that it avoids the time sensitivity problem earlier participation-based rationales were subject

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[50] See Sara C Benesh," Understanding Public Confidence in American Courts" (2006) 68:3 J Politics 697; James L Gibson, Gregory A Caldeira, & Vanessa A Baird," On the Legitimacy of National High Courts" (1998) 92 Am Pol Sci Rev 343; John R Hibbing & Elizabeth Theiss-Morse, Congress as Public Enemy: Public Attitudes Toward American Political Institutions (Cambridge: Cambridge University Press, 1995); Gregory Casey, "The Supreme Court and Myth: An Empirical Investigation" (1974) 8 L & Soc'y Rev 385.

to. Indeed, whereas strong democratic considerations exist for why under certain conditions the general public ought not to enjoy participatory involvement in court proceedings, no such consideration exists for why public deliberation should be discouraged or for why public confidence in the courts should not be strengthened. This in turn provides a more realistic view of the weight of the responsibility bearing on courts deriving from the democratic rationales in support of intervention. Because the degree to which intervention stands to improve either the overall quality of public deliberation in society and/or the public's confidence in judicial decision-making is marginal at best, any responsibilities bearing on courts that are grounded on these improvements will be correspondingly weak. What this means is that in times when other democratic values stand to be compromised by allowing an intervention to proceed, democratic arguments in support of intervention will easily be defeated. A court may opt to exclude an intervening party, for instance, on the basis that they pose a threat to the fairness of the procedure itself. Consider in this respect a sentiment expressed by Frank Iacobucci J in the same 2000 Globe and Mail interview referred to earlier in the paper: "You have one person representing the accused and a battery of interveners supporting the Crown, or vice versa [which creates] imbalance."[51] In situations where the fairness of a hearing process stands to be impacted by the presence of interveners, democratic values clearly counsel against their participation. Furthermore, even acknowledging the current ceilings that apply to both written and oral intervening submissions at the SCC,[52] allowing a host of outside parties to participate in proceedings is liable to stretch the already thin resources available to the Court.[53] In each of these respects, courts may have reason to deny intervener status in a given case depending on the other values that stand to be compromised by that intervention.

Even granting all of this, however, the rationales I have defended remain an important consideration in an overall account of the court's responsibilities. What they demonstrate is that if no competing reasons exist for why a certain party should be kept from intervening, there is a democratic responsibility, however weak that responsibility might be, to grant the party leave.

This paints a starkly different picture of intervention to the one we get through participation-based rationales. To the extent that a court's democratic responsibility concerning intervention can be traced to the participatory rights enjoyed by the public, one would think the responsibility would be rather robust.[54] And yet, holding courts to a responsibility of this strength could, for the reasons just explained, lead to a number of anti-democratic results.[55] Grounding a democratic argument for intervention on a more basic right to participation then appears to be a poor fit with the specific role that courts play in the wider context of Canada's democracy.

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51 Makin, *supra* note 20.

52 Whereas historically written submissions could run up to twenty pages and oral submissions up to fifteen minutes, those figures have now been reduced to ten pages and five minutes respectively. See Supreme Court of Canada, Notice to the Profession "Allotting Time for Oral Argument" (March 2017), online: Supreme Court of Canada <scc-csc.ca/ar-lr/notices-avis/17- 03-eng.aspx> [perma.cc/8H5U-MNJW].

53 See Beverley McLachlin, "Remarks to the Council of the Canadian Bar Association at the Canadian Legal Conference" (11 August 2016), online: Supreme Court of Canada <scc-csc.ca/judges-juges/spe-dis/bm-2016-08-11-eng.aspx> [perma.cc/BV5X-JH8C}.

54 It is surely due to the strength that this right carries in the context of a democracy that the section 33 override clause in the *Charter* does not apply to any of the citizens' rights to political participation (under sections 3-5).

55 For more on a democratic-balancing conception of intervention, see Geoffrey D Callaghan, "Intervenors at the Supreme Court of Canada" (2020) 43:1 Dal LJ 33.

V. NON-INSTRUMENTAL RATIONALES FOR INTERVENTION

To draw the paper to a close, I would like to respond to a potential oversight of the way I have presented early arguments on intervention. Some may claim that because I have cast those arguments in exclusively instrumental terms, I have neglected to consider the more persuasive form in which they were packaged — namely, one grounded on the non-instrumental value attached to participation. Hints of this non-instrumental argument can be detected in Philip Bryden's 1987 article on intervention:

> ...the willingness of courts to listen to interveners is a reflection of the value that judges attach to people. Our commitment to a right to hearing and public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect.[56]

The point my imagined critic would have in mind clearly relates to the final italicized sentence of the passage. The claim would be that the responsibility courts have concerning intervention does not arise on the basis of what the practice accomplishes, but because treating individuals with dignity and self-respect is, from a democratic perspective, the appropriate stance for courts to adopt.

While I am sympathetic to the spirit of the claim, arguments like this are open to challenge from two directions. The first relates to something that was explained at the close of the last section. If the basis for parties being granted leave to intervene is that their dignity and self-respect is at stake, one would think that the responsibility bearing on courts to allow those parties to participate would be incredibly strong — almost to the point that any competing considerations would be outweighed by it. I am doubtful that this returns an accurate portrayal of intervention; nor is it one we would be comfortable adopting after weighing the multilayered democratic considerations that bear on courts and the procedures by which they operate.

Additionally, however, there is a risk that a non-instrumental rationale for intervention, in a somewhat counterintuitive way, will result in courts treating intervening parties with less dignity and self-respect than is their due. The thinking here is that if the only reason a party has been granted leave to intervene is to dignify their interest in participating, courts may be tempted to begin patronizing these parties — to treat them as a parent might treat a child who wishes to be included in an important family decision, knowing full well that the child's contribution will not be taken into account at all. Daniel Sheppard flagged this concern in his review of the Supreme Court's treatment of intervening submissions,[57] and it seems to me that it would only get worse if we were to explain the practice primarily through a non-instrumental lens.

This same concern does not arise in the context of the rationales I have argued for in this paper. If the responsibility to grant intervener status is traced, not to the non-instrumental value of participation, but to the facilitation of public deliberation and the shoring up of public trust, there is an incentive for courts to actively engage with intervening parties, ensuing that their participation is an embedded part of the process. Interestingly, this is likely to pay deference to the dignity and self-worth of those same intervening parties to an even greater extent than situations where a court tries to act on the value of participation directly. This is a clear benefit of the rationales I have proposed that account for the democratic value of intervention.

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[56] Bryden, *supra* note 14 at 509 (emphasis added).

[57] See Sheppard, *supra* note 47.

Nevertheless, even if I were to acknowledge that non-instrumental reasons ought to have some bearing on the Court's treatment of intervening parties, the general argument I have defended in this paper would not be irreparably damaged. Surely a range of democratic considerations exist for why courts have reason to endorse the practice of intervention. Perhaps all I have established is that some of these turn on the instrumental role the practice serves in advancing two important aims of democracy. If this is all my argument amounts to, I am satisfied.