Legal Theory, **24** (2018), 255–290.

doi:10.1017/S1352325218000149

NONPARTY PARTICIPATION AS A (PARTIAL) REMEDY TO PROCEDURALIST CONCERNS OVER JUDICIAL REVIEW

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ABSTRACT
The argument I defend in this paper takes for granted that the proceduralist indictment against judicial review is at least partly justifiable, and that a complete theory of democratic legitimacy will therefore attempt to address it to the greatest possible degree. I examine how the indictment can be addressed via the practice of nonparty participation, whereby members of the general public may seek participatory involvement in a court proceeding despite not being directly implicated by the dispute at issue. Through this practice, courts acquire a means to expose themselves to a cross-section of societal influences, which in turn can be said to improve the legitimacy of the decisions they render from a procedural perspective. Importantly, however, such legitimacy will not be transmitted spontaneously, as if the mere fact that courts allow nonparties to participate is all that is needed to address the proceduralist's concern. The crux of my argument is that only when the practice is conceived in a particular way, and is subjected to the appropriate conditions, does it have a genuine chance of realizing its legitimating promise.

In recent decades a lively interest has developed around the tendency of courts to grant participatory status to parties not directly connected to the action before the court. The interest is especially pronounced in United States jurisprudential scholarship (as it is in this jurisdiction that the practice has gained the most prominence[1]) but is in no way absent other jurisdictional contexts. In each case, studies tend to focus on the reasons judges have for granting participatory status to particular groups,[2] or

1. Recent data suggest that since 1990, at least one amicus brief had been filed for over 90 percent of the appeals to the U.S. Supreme Court. *See* PAUL M. COLLINS, JR., *FRIENDS OF THE COURT: INTEREST GROUPS AND JUDICIAL DECISION-MAKING* (2008).

2. *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 *U. PA. L. REV.* 743 (2000) (for the U.S. context); Lorne Neudorf, *Interventions at the UK Supreme Court*, 2 *CAMBRIDGE J. INT'L & COMP. L.* 16 (2013) (for the UK context); George Williams, *The Amicus Curiae and Intervener in the High Court of Australia: A*

why those groups have decided to pursue their objectives via the court in the first place.[3] This is not surprising. As virtually all jurisdictions leave it to the discretion of the court to either grant nonparty status or not, it becomes a live, and indeed empirical, matter to determine the conditions under which they actually choose to do so. My concern in this paper deviates from this research tendency. Rather than focusing on the behavioral characteristics of judges and/or interest groups, my interest here will attend to the normative significance nonparty participants can have over a court proceeding. In particular, what I would like to examine is whether and to what extent the practice of nonparty participation can offer a way forward concerning one of the more persistent problems in political and legal philosophy—namely, the debate between proceduralists and outcome theorists on the question of the legitimacy of judicial review.

This is a relatively fresh way to approach the topic. Although a number of scholars have written about the democratic influence nonparty participation can have over courts,[4] none to my knowledge have addressed the topic specifically in relation to the proceduralist's indictment of the illegitimacy of decisions rendered by judicial review bodies. This to my mind has compromised the persuasive force of those previous attempts. Whereas most arguments have invariably been tethered to a particular jurisdictional context (usually the author's own), my own argument will begin by asking the abstract question "What kind of practice would nonparty participation have to be for it to truly address the proceduralist's concern?" The answer, it may be surprising to learn, deviates quite significantly from the way the practice operates in most jurisdictions at present. The upshot of course is that if there are good democratic reasons to improve the procedural legitimacy of the judicial review process, and if nonparty participation is considered a viable candidate to aid in this respect, it must first undergo some major alterations both in how the practice is conceived and concerning

Comparative Analysis, 28 *Fed. L. Rev.* 365 (2000) (for the Australian context); Benjamin R. D. Alarie & Andrew J. Green, *Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance*, 48 *Osgoode Hall L. J.* 381 (2010) (for the Canadian context).

3. *See* Susan M. Olson, *Interest-Group Litigation in Federal District Court: Beyond the Political Disadvantage Theory*, 52 *J. Pol.* 854 (1990) (for the U.S. context); Sangeeta Shah, Thomas Poole & Micheal Blackwell, *Rights, Interveners and the Law Lords*, 34 *Oxford J. Legal Stud.* 295 (2014) (for the UK context); Lindy Willmott, Ben White & Donna Cooper, *Interveners or Interferers: Intervention in Decisions to Withhold and Withdraw Life-Sustaining Medical Treatment*, 27 *Sydney L. Rev.* 597 (2005) (for the Australian context); Gregory Hein, *Interest Group Litigation and Canadian Democracy*, in *Judicial Power and Canadian Democracy 214 (*Paul Howe & Peter H. Russell eds., 2001) (for the Canadian context).

4. Philip Bryden has emphasized "the importance of public participation in decision-making even where such participation is not required by law" (Philip Bryden, *Public Interest Intervention in the Courts*, 66 *Can. Bar Rev.* 490, 506 (1987)); Harriet Samuels has suggested that "[t]hird party interventions can be used defensively to prevent the courts from whittling away at women's rights in the name of human rights" (Harriet Samuels, *Feminist Activism, Third Party Interventions and the Courts*, 13 *Feminist Legal Stud.* 15, 37 (2005)); Ruben Garcia has argued that the practice is "an integral part of participatory democracy" (Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 *Fla. St. U. L. Rev.* 315, 320 (2008)); and the list goes on.

the standards by which it is implemented. This at bottom is the argument I wish to defend in this paper.

The argument develops in three parts. In Section I, I offer a brief summary of the debate between proceduralists and outcome theorists on the question of the legitimacy of judicial review, taking for granted that my reader is more or less acquainted with the major themes of that debate. The argument in Section I will be limited to an explanation of why we are forced to privilege a decision-making procedure that includes judicial review bodies to one that does not if our goal is to retain aspects of both positions in our overall theory of democratic legitimacy. In Section II, I specify the kind of nonparty participation I am interested in examining —first with respect to the motivations giving rise to a nonparty's desire to participate in a court proceeding, and second concerning the level of involvement she can expect to enjoy in her participatory role. I then introduce a conceptual distinction concerning the way nonparty participation may be conceived in practice, which I frame along the same lines as the more general proceduralist–outcome theorist dialogue over democratic legitimacy. My claim is that it is possible to construe nonparty participation from either a process-driven or results-driven perspective, and that only the former is appropriate if our interest is to address the proceduralist indictment head on. In Section III, I outline the kinds of conditions that would appropriately be applied to nonparty participation under a process-driven view of the practice. Each of these conditions, I argue, derives from their capacity to resolve two problems that could very well undermine the proceduralist's wider concern—the first turning on the time-sensitive nature of judicial decision-making and the second on the political equality problems that seem inevitably to follow. I draw the paper to a close by offering final remarks.

I. COMPETING CONCEPTIONS OF DEMOCRATIC LEGITIMACY

Theorists differ on the role that procedure and outcome play in establishing democratic legitimacy. Whereas for the proceduralist the primary source of legitimacy is located in the way some decision has been made, the outcome theorist casts her focus toward the substantive result of that decision. This in turn goes to limit the kind of mediation that is available between them. Although it is perfectly conceivable that a proceduralist would want to incorporate the notion of outcome in her overall assessment of legitimacy, she is theoretically prohibited from claiming that even the most substantively attractive results are legitimate if they have not been produced by way of a democratic procedure. Conversely, while the outcome theorist may believe that democratic procedures add to the legitimacy of its result, she is compelled to argue that substantively superior results remain legitimate even in cases where this condition has not been met.

This kind of underlying tension makes the question of the legitimacy of judicial review an especially contested one between the camps. Since on the one hand, judicial review allows judicial decisions to supplant those that have been made by way of legitimate democratic procedures, the institution cannot in and of itself be considered legitimate on procedural grounds alone. But since on the other hand, the very aim of judicial review bodies is to stem majoritarian influences from adversely affecting the democratic procedures in question, its legitimacy resurfaces in relation to the quality of the outcomes that are produced thereby. The problem of course is that when assessed within the context of the underlying commitments of each position, both the proceduralist and the outcome theorist present rather compelling cases.

How then are we to navigate this debate? Most theorists have opted to focus on either the relative strengths of the position they support or the relative weaknesses of the position they do not.[5] Some have attempted to show how the competing position can be undermined by its own unique set of commitments,[6] or that it is based on a faulty set of assumptions.[7] Very few have tried to reconcile the positions directly by mediating between them. Among those who belong to this final set is Corey Brettschneider, who, in his paper "Balancing Procedures and Outcomes Within Democratic Theory," rightly notes that "a good theory of democracy will not choose between a pure emphasis on either outcome or procedure but should incorporate both."[8] Brettschneider's proposal is that appellate judges should aspire to balance the procedural pedigree of decisions they have been asked to review against the quality of their results when evaluated on the basis of their substantive features alone. Only in this way, he says, can courts "embrace a commitment to democratic procedures while [at the same time] recognizing their limits."[9]

Now as far as the adjudicative responsibilities of judges go, Brettschneider's proposal may be perfectly sound. But as a resolution to the debate between the proceduralist and the outcome theorist on the question of the legitimacy of judicial review, his proposal misses the mark. What Brettschneider appears to overlook is that the proceduralist's concern at bottom has nothing to do with the widespread or systematic failure of judges to defer strongly enough to the way a decision they have been

5. For the outcome-related argument, *see* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1997) and JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). For the proceduralist argument, *see* JEREMY WALDRON, LAW AND DISAGREEMENT (1999) and Corey Johanningmeier, *Law and Politics: The Case Against Judicial Review of Direct Democracy*, 82 IND. L.J. 1125 (2007).

6. *See* Jeremy Waldron, *The Core Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

7. *See* TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999); WIL WALUCHOW, A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE (2006).

8. Corey Brettschneider, *Balancing Procedures and Outcomes Within Democratic Theory: Core Values and Judicial Review*, 53 POL. STUD. 423, 424 (2005).

9. *Id.* at 425.

https://doi.org/10.1017/S1352325218000149 Published online by Cambridge University Press

asked to review has been made, but to the fact that *asking judges to review decisions in the first place lacks democratic legitimacy*. Suggesting then that judges pay closer attention to the procedural pedigree of a decision before they choose to overturn it seems to eschew the nature of the proceduralist's indictment altogether.

In this respect, the problem with Brettschneider's response appears to be his choice to locate it in the context of judicial review itself. Indeed, as even he acknowledges: ". . . at first glance it might seem my position is the same as [the outcome theorist's]."[10] But for reasons I will now explain, Brettschneider really had no choice in the matter. To the extent that his goal was to mediate between the proceduralist and outcome-theorist positions, he was more or less compelled to situate his proposal where he did.

Consider for a moment what each side in the debate has to say about outcomes. For the proceduralist, an outcome cannot be considered democratically legitimate unless it has been produced by way of a democratically legitimate procedure. This is so no matter how ostensibly attractive the outcome may be from a detached democratic perspective. The reverse is of course true for the outcome theorist, who contends that, regardless of the way an outcome was produced, if certain democratic criteria are satisfied, it ought to be considered democratically legitimate. Now because outcomes are produced by way of procedures and not the other way around, the procedure that brings about some preferred result x is open to being manipulated in a way that the preferred result x is not. And when we apply this insight to the debate at hand, what it means is that in order to reconcile the outcome theorist's position with that of the proceduralist, the adjustment will quite necessarily have to be made on the process side of things. What is more, since in this particular debate the outcome theorist's argument *just is* that judicial review is the procedure that leads to the best overall results, if we wish to retain even a measure of that position in our overall theory of legitimacy, we are theoretically obliged to opt for a system that includes that form of decision-making to one that does not. This in turn greatly reduces the options available for how the two positions can be reconciled. Like Brettschneider, we are more or less compelled to situate our proposal within a system that includes judicial review, and from there make attempts to *recover from within that system* certain mechanisms that can improve its standing from a procedural perspective.

For his part, Brettschneider offers us one such mechanism: judges ought to take procedural pedigree into account when issuing their decisions. But for the reasons already touched on, this proposal does very little to address the proceduralist's concern directly. A much better mechanism, at least from the perspective of the proceduralist, would dispose of the kind of judge-relative standard implicit in Brettschneider's solution altogether, opting instead for a more neutral procedural instrument available to courts. It

10. *Id.* at 426.

is precisely here where nonparty participation becomes a viable candidate. Since the practice of nonparty participation has the capacity to expose judicial decision-makers to the same types of influence that operate in other, perhaps more procedurally legitimate, venues, it appears to be just the kind of practice that can help to mitigate proceduralist concerns over the legitimacy of judicial review *from within the judicial review process itself*. Indeed, given that the basis of those concerns rests on the perceived disconnect between judicial decision-making and the deliberative influence the general public has over it, a practice that serves to reestablish some of the general public's influence within that context would appear to be the perfect antidote to the concern as stated. The remainder of the paper will be dedicated to examining just how credible this intuition is.

II. NONPARTY PARTICIPATION

My choice to use the vague expression "nonparty participation" to describe a practice more commonly referred to as "intervention" or "*amicus curiae*"[11] is deliberate. As my aim is to keep the argument in the paper as general as possible, using jurisdictionally sensitive terms like these, with the particular connotations that go along with them, would potentially threaten that pursuit. Nevertheless, since the way nonparties participate in court proceedings is not homogenous across jurisdictions, or even uniform within the same jurisdiction, before I launch into the pursuit fully I will have to circumscribe more finely how I intend the reader to understand the term in respect of the argument I wish to make.

A. Motivation for Seeking Nonparty Status

Nonparty participation can be distinguished along at least three lines. The first concerns the particular set of motivations giving rise to a nonparty's request to participate in a court proceeding. Nonparties will have either (a) disinterested or (b) interested reasons for seeking leave to participate, the former typically (but not always) initiated by the court, and the latter typically (but not always) initiated by the nonparty itself. The historical status of an *amicus curiae*, for instance, would fit quite well into the former category, (a), where, as a "friend of the court," it was the role of the nonparty to "advise or assist the court in arriving at its decision and not to represent the interests of any party or cause."[12] Given this role, the court would

11. Although historically distinct, the way the terms operate in practice is at this point increasingly difficult to distinguish. *See* Susan Kenny, *Interveners and Amici Curiae in the High Court*, 20 ADELAIDE L. REV. 159, 159–160 (1998); Christina Murray, *Litigating in the Public Interest: Intervention and the Amicus Curiae*, 10 S. AFR. J. HUM. RTS. 240 (1994); Michael K. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?*, 41 AM. U. L. REV. 1243, 1243–1250 (1992); John Bellhouse & Anthony Lavers, *The Modern Amicus Curiae: A Role in Arbitration?*, 23 CIV. JUST. Q. 187 (2004).

12. S. Chandra Mohan, *The Amicus Curiae: Friends No More?*, 2 SINGAPORE J. LEGAL STUD. 352, 366 (2010).

https://doi.org/10.1017/S1352325218000149 Published online by Cambridge University Press

ordinarily be the initiating party in that relationship and not the other way around.[13] The latter, "interested" category, (b), on the other hand, can be divided into two subcategories depending on whether (a') the nonparty has been "identified by either the claimant or defendant as being directly affected by the case"[14] or (b') the action was triggered by the nonparty itself. Those who seek a participatory role entirely on their own (b') will of course do so for a variety of reasons, but we can roughly narrow them down to (a″) reasons of a private interest or (b″) reasons of a public interest.

The kind of nonparty participation I am interested in examining follows (b) through its three iterations. In other words, *my aim is to examine the status of a nonparty participant under conditions where it has been initiated by the nonparty itself for the purpose of (what can roughly be called) reasons of a public interest.* I will elaborate on each of these components as the paper unfolds.

B. Level of Involvement of the Nonparty

A second distinction concerns the level of involvement nonparties can expect to enjoy over the legal proceeding in which they feature. At the less intensive end of the spectrum, a nonparty may be asked to provide informal legal arguments or factual information to one or more of the parties to the case,[15] or to offer a formal or expert witness statement to the court.[16] More entrenched roles will allow the nonparty to submit their own written statements of fact and/or opinion, and in some cases the nonparty will actually be granted leave to express those statements orally.[17]

My interest in this paper fastens to the latter, more independent kind of involvement a nonparty can have in a given court proceeding. I have already explained that my focus is on nonparties whose involvement in the case has been initiated of their own accord, and we can now see that this involvement will potentially be quite extensive, including as it will the

13. *See* Ernest Angell, *The Amicus Curiae: American Development of English Traditions*, 16 *Int'l & Comp. L.Q.* 1017 (1967); Samuel Kristov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 *Yale L.J.* 694 (1963). Note that that the way amicus curiae operates in current jurisdictions seldom meets this historical criterion. In the United States, for instance, federal district courts, "have permitted the amicus to actively engage in oral argument, to introduce physical evidence, to examine witnesses, to conduct discovery, and even to enforce previous court decisions upon party-participants to the litigation." Lowman, *supra* note 11, at 1246.

14. Note that Section 19.2(2) of the *Civil Procedure Rules* of the United Kingdom allows courts to add an interested party either if it is "desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings" or "if there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

15. *See Regina v. the Lord Chancellor, ex parte Witham* [1997] 2 A11 ER 799.

16. *See* Brief of U.S. District Judge Lewis A. Kaplan as Amicus Curiae, Stein v. KPMG, LLP, 486 F.3d 753 (2d Cir. 2007).

17. Rule 37(3)(a) of the *Rules of the Supreme Court of the United States* provides that "an amicus curiae brief in a case before the Court for oral argument may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 3(b) of this Rule."

possibility of making a written (and perhaps oral) submission to the court, even with the intent to introduce points of view radically different from the ones raised by the direct parties to the case.[18] Although some have argued that this kind of protracted nonparty involvement serves to undermine the practice more generally,[19] in respect of the argument I wish to make in this paper, the opposite is nearer to the truth. To the extent that nonparty participation has the potential to remedy proceduralist concerns over the legitimacy of judicial review, it is more or less necessary that it be designed on the basis of relatively liberal standards of access. This of course does not mean that nonparties ought not to face *any* restrictions with respect to their involvement in a given court proceeding, only that there must be procedurally relevant reasons for such an imposition. Elaborating on this claim will be the express purpose of Section III of the paper.

C. Functional Conceptions of Nonparty Participation

By far the most important distinction concerning the argument I wish to make turns on the functional role nonparties are presumed to play in a given proceeding, and how the practice ought to be understood on that basis. The conception most frequently invoked both by the courts and in the academic literature is an explicitly *results-driven approach*. Here, nonparties are considered valuable to the extent that they can supply the court with information that will lead to better, or more correct, legal judgments.[20] Allusions to this kind of approach can be found in any number of places. The Right Honorable Baroness Hale of Richmond has recently expressed that "[o]nce a matter is in court, the more important the subject, the more difficult the issues, the more help we need to try and get the right answer. . . . [F]rom our—or at least my—point of view, provided they stick to the rules, [nonparty participants] are enormously helpful."[21] Former *Supreme Court of Canada* Puisne Justice Michael Bastarache appears to agree with the Baroness's general sentiment, suggesting that "because . . .

18. *See* Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 *J. APP. PRAC. & PROCESS* 523, 531–537 (2003) for a good description of nine different kinds of briefs that may be filed by an amicus curiae in the United States.

19. *See* Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 *U. RICH. L. REV.* 361 (2015); Brianne Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 *DUKE L.J.* 36, 37 (2011); John Harrington, *Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?*, 55 *CASE W. RES. L. REV.* 667 (2005); Andrew P. Morris, *Private Amici Curiae and the Supreme Court's 1997-1998 Term Employment Law Jurisprudence*, 7 *WM. & MARY BILL RTS. J.* 823 (1999).

20. The conception is commonly referred to as "the legal model" in the literature. *See* Kearney & Merrill, *supra* note 2, at 775–779. As Kearney and Merrill note, it is "without doubt the 'official' conception of how information, including that provided by [nonparty participants], influences judges." *Id.* at 776.

21. Baroness Hale, Who Guards the Guardians? *Public Law Project Conference: Judicial Review Trends and Forecasts* (October 2013), http://www.publiclawproject.org.uk/resources/144/who-guards-the-guardians. Note also that of the four functional theories outlined by S. Chandra Mohan for amici curiae in the United States, only one escapes a purely instrumental description. *See* Mohan, *supra* note 12, at 367–376.

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we have lived with the [*Canadian Charter of Rights and Freedoms*] 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 [nonparty participants]."[22] U.S. Seventh Circuit Chief Judge Richard Posner is much more cynical in his assessment of the practice, arguing that "[a]fter 16 years of reading [nonparty] briefs, the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinize these motions in a more careful, fish-eyed, fashion."[23] Despite the fact that each of these judges arrived at distinctive, and in some instances even contrary, assessments on the usefulness of nonparty participation, what each remark shares in common is a clear reliance on viewing the practice for the results it can be expected to produce. The idea is that nonparties are valuable to the extent, and *only* to the extent, that they can be said to assist the court in executing its own independent function.

A similar conception is evident in much of the academic writing that has been done on the subject. John Harrington, for instance, has argued that "while a [nonparty participant] may be valuable in certain cases, these cases are rare . . . [and thus] a broad policy of unchecked [nonparty] participation in the federal courts of appeals is inappropriate,"[24] while his colleague, Helen Anderson, adds that although "[j]udges may like the assistance of [nonparty participants] because it helps them feel more assured about their decision . . . imposing no limit on the number and content of [nonparty] briefs can perhaps undermine respect for the court's role or at least confuse the public about what courts actually do."[25] Former University of Chicago Law School professor Philip Kurland minced no words when he suggested that the courts' adoption of a liberal policy toward nonparty participants would "encourage what is, for the most part, a waste of time, effort, and money in a useless function,"[26] and even Rubin Garcia, who in a recent paper explicitly set out to recite the democratic qualities of nonparty participation, contends that grant of leave should be limited to those who will "add [something] new to the arguments already made by the parties [to the case]."[27] Once again, the common thread among each of these passages is the view that nonparty participation has value only in relation to the assistance it can provide judges. The suggestion is that when it fails to meet this criterion, it would be better if the practice were excised altogether.

This, however, is only one way to view the role played by nonparty participants. There is another. A second way to conceive of the role they play is to pivot from the assistance such parties may provide judges in carrying out

22. Luiza Chwialkowska, *Rein in Lobby Groups, Senior Judges Suggest*, NAT'L POST, April 6, 2000.
23. *Ryan v. Commodity Futures Trading Commission*, 125 F.2d 1062 (7th Cir. 1997).
24. Harrington, *supra* note 19, at 699.
25. Anderson, *supra* note 19, at 411.
26. Philip B. Kurland, *The Business of the Supreme Court*, 50 *U. CHI. L. REV.* 628, 647 (1983).
27. Garcia, *supra* note 4, at 351.

their own independent duties toward the improvements they make to the legitimacy of the decision-making process itself. This is an explicitly *process-driven approach* to nonparty participation and is clearly the conception I wish to defend here.

The conception can be traced to at least three related considerations: (1) the increasing politicization of courts; (2) the use power-holders make of courts; and (3) the fact that dissent among judges tends to increase in the wake of nonparty participation.

1. The Politicization of Courts

The first and most familiar consideration in favor of viewing nonparty participation for its process-related features is the simple fact that courts of law the world over have over the past several generations become increasingly politicized[28]—an observation made not only by many of the academics who work in the area,[29] but one that is now accepted by members of the legal profession itself.[30] To the extent that this is true, one would think that the kinds of influences to which judiciaries are exposed when rendering their judgments ought to be adjusted to account for this fact. The ensuing passage by Ronald Dworkin is instructive in this regard:

> . . . that law should be made by elected and responsible officials seems unexceptionable when we think of law as policy; that is, as a compromise among individual goals and purposes in search of the welfare of the community as a whole. It is far from clear that interpersonal comparisons of utility or preference, through which such compromises might be made objectively, make sense even in theory; but in any case no proper calculus is available in practice. Policy decisions must therefore be made through the operation of some political process designed to produce an accurate expression of the different interests that should be taken into account. The political system of representative democracy may work only indifferently in this respect, but it works better than a system that allows non-elected judges, who have no mail bag or lobbyists or pressure groups, to compromise competing interests in their chambers.[31]

Putting aside for the moment that Dworkin himself believed rights-based decision-making to be a matter of principle and not policy,[32] of particular

28. *See* Torbjorn Vallinder, *The Judicialization of Politics—A Worldwide Phenomenon: Introduction*, 15 *Int'l Pol. Sci. Rev.* 91 (1994).

29. The list of people who have written on this topic is far too protracted to include here, but for a concise account of a number of arguments related to the area, *see* Daniel Butt, *Democracy, the Courts and the Making of Public Policy*, *The Foundation for Law, Justice and Society, University of Oxford* 23 (2006), http://www.fljs.org/content/democracy-courts-and-making-public-policy.

30. *See* Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 *J. Pol.* 1062 (2009); William Mischler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision-Making: A Micro-Analytic Perspective*, 58 *J. Pol.* 169, 173 (1996).

31. Ronald Dworkin, *Taking Rights Seriously* (1977), at 84–85.

32. *See id.* at 84–86.

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interest here is the way Dworkin frames the concern in question. His claim is not that legislatures are categorically better at making decisions on policy-related questions than the judiciary, but that by dint of their institutional features—most centrally the one that allows them "to produce an accurate expression of the different interests that should be taken into account"—they just so happen to be in a better *procedural* position to do so. It is precisely on this point that conceiving nonparty participation on the basis of its process-related features begins to have some purchase. If it is true that courts engage in a form of decision-making that carries important policy implications for society, and if one strong reason for why legislatures are better suited to handle such decisions is that they are more exposed to "lobbyists and pressure groups" than are courts, then by exposing courts to similar kinds of public forces, the two would seem to be placed back on a par.

The point is made salient when we consider it against the particularities of the analogy in question. As the literature on the subject makes clear, lobbyists at the legislative level typically employ one of two methods to wield influence over decision-making: they will either (1) "offer campaign contributions or other politically valuable resources in exchange for services or legislative favors;" or (2) endeavor to "affect policy outcomes by providing relevant information to the lawmaker."[33] Clearly it is the second of these two strategies that Dworkin has in mind when referring to the legitimating influence lobbyists can have over policy-making. What is more, it is the only aspect that has even facial application to the practice of nonparty participation. Because judges are in most instances not subject to electoral contests, they are largely isolated from the first strategic model, (1), employed by lobbyists at the legislative level. But where the analogy becomes especially promising from the point of view of nonparty participation is that even when we narrow the discussion to the particular role an outside party may play in transmitting valuable information to the relevant decision-maker, (2), it still seems to be preferable to its legislative counterpart.

Two concerns that are commonly leveled at the lobbying industry (especially in the United States) are based on: (a) its clandestine nature; and (b) the pervasive "revolving-door" phenomenon that seems to accompany it. Both concerns serve to undermine the legitimacy of lobbying *even when considered on the basis of the informational role it plays*. Concerning (a), and aside from the obvious lack of transparency that follows from covert meetings between interest groups and political decision-makers, there is a related concern that the issues discussed at lobbyist meetings "are never examined or contested . . . Members don't usually have to make a stand on these

33. Morten Bennedson & Sven E. Feldman, *Lobbying Legislatures*, 110 *J. Pol. Econ.* 919, 920 (2002). For in-depth discussions on each of these aspects of lobbying, *see* Keith E. Schnakenberg, *Informational Lobbying and Legislative Voting*, 61 *Am. J. Pol. Sci.* 129 (2017) (for the informational model) and David Austen-Smith, *Campaign Contributions and Access*, 89 *Am. Pol. Sci. Rev.* 566 (1995) (for the campaign contribution model).

matters or face public scrutiny,"[34] which means that there is an accountability problem as to the actual decisions being made. Concerning (b), the fact that over 25 percent of lobbyists working in Washington at one point worked on Capitol Hill[35] stokes fears about fairness of access and consequently about whether those who enjoy such access are likely to represent accurately the interests of the general public.[36]

Neither of these concerns pertains to nonparty participation before a court of law. Nonparties are required to submit their interventions in written form, and any oral arguments they make are transcribed and available for public consumption. They do not have an opportunity to meet with judges behind closed doors, and they are accountable for any claims put forward in the course of their involvement in a case. What is more, there is little reason to believe that a revolving-door scenario will come to infect the practice since the incentive structure that undergirds it is clearly tethered to the kind of disaggregated access that goes along with closed-door meetings unique to the legislative context. For all of these reasons, then, it would be misleading to suggest that the role played by lobbyists is in any direct sense duplicated by nonparty participants before courts of law *even when we consider that role on the basis of its informational character alone*. The analogy is far more tailored to the specific role lobbyists play in testifying before congressional committee hearings, where because the information that is exchanged is controlled by strict rules of formal procedure, a number of its more troublesome aspects from a legitimacy point of view are largely circumvented.

2. Assuaging the Grip Power-Holders Have on Courts

A second point in favor of conceiving nonparty participation for its process-related features turns on an insight advanced by Ran Hirschl in the course of his more general critique of the global constitutional trend toward the adoption of systems of judicial review. In *Toward Juristocracy*, Hirschl makes a good case—one he situates in the context of four modern constitutional movements[37]—for what he calls the "hegemonic preservation thesis." The thesis states that: "[t]he most plausible explanation for voluntary, self-imposed judicial empowerment is . . . that political, economic, and legal power-holders who either initiate or refrain from blocking such reforms estimate that it serves their interests to abide by the limits imposed by

34. DAN CLAWSON, ALAN NEUSTADTL & MARK WELLER, *DOLLARS AND VOTES* (1998), at 68.

35. *See* TIMOTHY M. LAPIRA & HERSCHEL F. THOMAS, *REVOLVING DOOR LOBBYING: PUBLIC SERVICE, PRIVATE INFLUENCE, AND THE UNEQUAL REPRESENTATION OF INTERESTS* (2017), at 11.

36. Consider, for instance, that a 2011 study by the *National Journal* surveying 300 of the top congressional staffers in Washington reported that 93 percent were of Caucasian descent, 68 percent were male, and virtually all had at least obtained a bachelor's degree from a postsecondary institution. Dean Praetorius, *Congressional Staffers: Who Are the People Behind the Scenes?*, *HUFFINGTON POST/NAT'L J.*, June 17, 2011.

37. These include the semirecent constitutional developments in Canada, Israel, New Zealand, and South Africa. *See* RAN HIRSCHL, *TOWARD JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004), at ch. 1.

increased judicial intervention in the political sphere."[38] Hirschl's thesis effectively puts normative arguments in favor of judicial review on their head. If in reality systems of judicial review do not serve the democratic function outcome theorists claim they do (viz, by acting as a check on the consolidation of stratified power in society) but serve precisely the opposite function (viz, act to bolster that consolidation) then there seems to be little reason from an outcome-related perspective to keep them around at all.

Now granting for a moment that Hirschl's thesis is correct, it seems to me that conceiving nonparty participation on a process-driven approach attracts a good deal more force. By ensuring that a mechanism is in place whereby members of the general public can participate in court proceedings, the insidious move toward juristocracy Hirschl observes happening all over the world would be confronted head on. This is so because, as Hirschl asserts, the primary reason power-holders have decided to transfer power to the judicial branch in the first place is because it represents "an efficient way to overcome the growing popular backlash against [their] ideological hegemony and, perhaps more important, an effective short-term means of avoiding the potentially negative political consequences of [their] steadily declining control over the majoritarian decision-making arena."[39] If this much is true, then by exposing the judiciary to those same popular influences, the general public can (to an extent at least) recast the negative political consequences power-holders are exposed to in more traditional legislative arenas within the judicial arena itself. This in turn would serve to frustrate much of the animating purpose of vesting an expansive decision-making authority in the hands of judges in the first place.

The entire line of reasoning is, importantly, not just theoretical. A multitude of studies have suggested that the number of participants on a given nonparty brief tends to influence how favorably that brief will be received by judges,[40] and this suggests that judges, just like electorally accountable

38. *Id.* at 11.

39. *Id.* at 51.

40. For judges' concern about the legitimacy of the court, *see* Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 *Am. J. Pol. Sci.* 795 (1997); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 *Am. Pol. Sci. Rev.* 87 (1993). For judges' concern about their decisions being overridden, *see* Lee Epstein & Jack Knight, *The Choices Justices Make* (1998) and James A. Stimson, Michael B. MacKuen & Robert S. Erickson, *Dynamic Representation*, 89 *Am. Pol. Sci. Rev.* 543 (1995). For the law clerk perspectives, *see* Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 *J. L. & Pol.* 33 (2004). Note also that the author of one well-known study whose results questioned the veracity of this claim was careful to explain that

> I caution the reader regarding the utility of the affected group hypothesis [the hypothesis that "the mere presence of a large number of interests on one side of the dispute" influences the Court to a greater extent than the legal or political arguments contained

representatives, are prone to being moved by popular influence in their decision-making. This vindicates the current line of reasoning to an even greater degree. As Hirschl explains, despite much rhetoric to the contrary, modern judicial review bodies have for the most part done an exceedingly poor job of protecting socioeconomic rights—a failing we can trace to the almost universally adopted negative approach they have taken to interpreting rights more generally.[41] What Hirschl's study shows is that we cannot simply assume that the outcomes that are produced by way of judicial review processes will spontaneously contribute to the overall democratic value of society, as if the mere fact that such processes exist is enough to secure their functional aim. Even if we grant, for reasons well articulated by the outcome theorist, that unelected review bodies play an indispensable role in protecting democratic values more broadly conceived, those bodies may themselves benefit from being exposed to influences beyond their pure institutional design in order to more successfully execute that role. We can think of the point in terms of a counterbalance: just as judicial review bodies serve the indispensable democratic function of neutralizing a range of deficiencies that face elected legislatures,[42] nonparty participation can be thought to serve the inverse function with respect to the judicial review bodies themselves—it pulls the pendulum back into a resting position, as it were. What such participation offers is a way for judicial review bodies to rectify their own deficiencies, most of which will be the result of the very same procedural strictures that have allowed them to perform the democratic function that makes them so politically valuable in the

> in the brief (Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 *Law & Soc. Rev.* 807, 814 (2004)] as operationalized here. Specifically, while I am confident in the results that a relative advantage of amicus participants does not increase the likelihood of litigation success, I am hesitant to call the affected groups hypothesis lifeless. Here I have assumed that an advantage of amicus briefs, relative to one's opponent, represents the fact that the litigant possesses more opportunities to present the Court with alternative or reframed arguments than does the litigant's opponent. While I doubt this assumption is completely unjustified, I nonetheless recognize that it is not operationalized. Thus, I believe it is imperative to acknowledge that fact that it still may be affected groups that increase litigation success.

Collins, *Friends of the Court*, *supra* at 828.

41. *See* Hirschl, *supra* note 37, at 168, where he writes:

> there is much to question regarding the claim that bills of rights have been or are likely to be agents of effective reform in advancing progressive notions of distributive justice. That the evidence of this is unclear is particularly significant, since concern for these interests is a cornerstone for validating and enhancing judicial authority. Yet the data presented here point in the opposite direction. Whereas the constitutionalization of rights does have crucial importance in affirming marginalized identities and enhancing the status of individual freedoms, its independent impact on ameliorating the socioeconomic status of historically disenfranchised groups is often exaggerated.

42. On this particular point, *see* Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (2012), at chs. 3, 4.

https://doi.org/10.1017/S1352325218000149 Published online by Cambridge University Press

first place. In this way, even on the leery portrait of judicial politics that Hirschl advances, nonparty participation can be seen as serving the essential function of safeguarding judicial bodies against exposure to patently undemocratic pressures that may be operating as a consequence of their own institutional conditions.

The point becomes even more explicit if we consider it in the context of an insight advanced by Marc Galanter in his famous 1974 paper "Why the 'Haves' Come Out Ahead." What Galanter conjectured in that paper was that the very way legal systems are designed has a tendency to favor the "haves" over the "have-nots" among society's members since (among other things) they are the ones with the necessary resources to take a protracted view of the law.[43] Supposing this to be true—and a number of studies have since confirmed Galanter's hypothesis[44]—by limiting a dispute to the actual parties to the case, this relational advantage will only be entrenched further. This then further reveals the importance of viewing nonparty participants for the process-related features they bring to a proceeding. As Charles Epp notes in a more recent review of Galanter's work:

> . . . where once the universe of organized interest groups consisted largely of producer groups, in recent decades there has been significant growth in the number and diversity of non-producer advocacy groups claiming to represent the interests of one shotters. As a result of these various developments, some kinds of "have nots" have gained some of the structural prerequisites for repeat playing once held nearly exclusively by a narrow category of organizational repeat players, and thus these "have nots" have come out less far behind.[45]

In this way, just as nonparties may help to internally insulate the judicial process from the concern Hirschl flags over its intentional exploitation by existing power-holders, they may serve as well to militate against any nonintentional biases that are inherent in the system itself.

3. An Increase in Dissent Among Judges

The final consideration supporting a process-driven view of nonparty participation is perhaps the most vital to my case. The consideration draws on research by Paul Collins[46] and others[47] that suggests that in the wake of

43. Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc. Rev.* 95 (1974), especially Figure 3 at 125.

44. *See generally* Volume 33, Issue 4 of *Law & Society Review* (1999), which was an issue dedicated exclusively to the question "Do the 'Haves' Still Come Out Ahead?".

45. Charles R. Epp, *The Two Motifs of "Why the 'Haves' Come Out Ahead" and Its Heirs*, 33 *Law & Soc. Rev.* 1089, 1093–1094 (1999).

46. Paul M. Collins, Jr., *Amici Curiae and Dissensus on the U.S. Supreme Court*, 5 *J. Empirical Legal Stud.* 143, 166 (2008); Collins, *supra* note 1, at ch. 6.

47. Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, *Acclimation Effects and Separate Opinion Writing in the U.S. Courts of Appeals*, 84 *Soc. Sci. Q.* 792 (2003); Forrest Maltzman, James F. Spriggs II & Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (2000); Paul J. Wahlbeck, James F. Spriggs II & Forrest Maltzman, *The Politics of Dissents and Concurrences on the U.S. Supreme Court*, 27 *Am. Pol. Q.* 488 (1999).

https://doi.org/10.1017/S1352325218000149 Published online by Cambridge University Press

nonparty participation, a resultant tendency emerges for dissent to increase among judges. This is significant first of all because it helps to establish the priority of a process-driven approach over its more common results-driven rival; but even more significantly, it could actually serve to undermine the descriptive plausibility of the results-driven approach as a general matter. Let me begin by explaining the rationale behind this more extreme claim.

We have seen that on a results-driven approach to nonparty participation, nonparties are considered valuable insofar as they provide the court with information that will potentially contribute to a better, and ultimately more correct, legal judgment. Now a narrow way of understanding this approach is to interpret the standards "better" and "more correct" in an objective sense—perhaps along the lines of Dworkin's "right answer thesis"[48]—where of a range of possible responses the court could return on some matter, some will be closer to the uniquely "right" one, and some will be further away from it. I take it that many judges conceive nonparty participation along exactly these lines, which is a point well illustrated (albeit in small sample) by the three judicial passages referred to earlier. But if we are in fact to understand the role played by nonparty participants in this way, then the research presented by Collins becomes difficult to explain. As he notes: "[nonparty] briefs do much more than signal a case's salience to the Justices. Instead, these briefs provide the Justices with legal and policy argumentation that frequently expands on the reasoning presented by the direct parties to litigation,"[49] which, he claims, is what ultimately leads to an increase in dissents.[50] This finding seems to be completely at odds with the theoretical commitments of the kind of "right answer" approach to nonparty participation we are currently examining. According to that approach, one of two explanations would seem to follow from Collins's insight: either (a) the expanded reasoning provided by nonparties would specify where the direct parties to the case had gone wrong (legally speaking), which would allow the Justices to correct what would have been a faulty judgment on the merits of the adversarial contest itself; or (b) that expanded reasoning would act not necessarily to correct, but rather to enrich, the account of the law provided by the direct parties, which in turn would give the Justices a broader canvass from which to construct their judgments. In either case, the conclusion reached does not seem to square with the empirical data. If the former (a) were true, one would think there would be an increase in consensus judgements delivered by the courts, those judgments having a tendency to align around the corrected legal account offered by the nonparty rather than the debunked arguments submitted by the direct parties to the case. If instead the latter,

48. Ronald Dworkin, *Judicial Discretion*, 60 *J. PHIL.* 624 (1963); Ronald Dworkin, *Review: Wasserstrom: The Judicial Decision*, 75 *ETHICS* 47 (1964); DWORKIN, *supra* note 31, at chs. 2, 3, 4, 13.

49. COLLINS, *supra* note 1, at 151.

50. *Id.* at 166 (note that Collins's study is specific to the U.S. Supreme Court).

(b), was correct, although we might in this case see a proliferation in the number of judgements rendered, they would tend to be *concurring* in nature rather than dissenting. This is so because what the nonparty would have provided would not be an altogether *different* account of the law, but merely a more *elaborate* one.

A process-driven approach to nonparty participation does a much better job at explaining why the result Collins arrives at obtains. The reason dissensus among judges tends to increase in the wake of nonparty participation is not because such participation helps to *clarify* the decision they ought to reach, but because it *complicates* that decision. And when the decision in question turns on something as complex and inherently moot as the proper interpretation of a country's constitutional document, not only should this state of affairs be expected, it ought very much to be desired. As Jeremy Waldron is only too happy to remind us in the course of his own case against judicial review: people disagree, and because they do, to the extent that decisions made on their behalf are justifiable, they ought to take that disagreement seriously.[51] This is just one reason Waldron believes legislative bodies are better positioned than judicial bodies to make democratic choices,[52] and the data returned by Collins suggests that nonparty participation promotes precisely the kind of disagreement Waldron has in mind in this respect.

But this is of course not the only way to interpret the meaning of "better" or "more correct" on a results-driven approach to nonparty participation. Courts and academics alike sometimes speak as if nonparty participants are helpful because they allow judges to arrive at "more rounded" decisions than they might otherwise,[53] which I take to mean decisions that better reflect the interests and concerns of the population at large. Could this not be taken as an iteration of a results-based approach that is equally

51. *See* WALDRON, *supra* note 5.
52. As Waldron writes:

> The point of a legislative assembly is to represent the main factions in the society, and to make laws in a way that takes their differences seriously rather than in a way that pretends that their differences are not serious or do not exist. That such a body cannot usually proceed on the basis of deliberative consensus is thus not an embarrassment, but a tribute to this particular approach to the making of laws: the idea is that we will make our laws in full cognizance of our disagreements, not in a way that attempts to finesse them.

Id. at 27.

53. *See* Kearney & Merrill, *supra* note 2, at 783; Murray, *supra* note 11; Nancy Daly, *Amicus Curiae and the Public Interest: A Search for a Standard*, 12 *LAW & POL'Y* 389 (1990); John Koch, *Making Room: New Directions in Third Party Intervention*, 48 *U. TORONTO FAC. L. REV.* 151 (1990); Bryden, *supra* note 4; Kristov, *supra* note 13, at 711; Lucius J. Barker, *Third Parties in Litigation: A Systemic View of the Judicial Function*, 29 *J. POL.* 41, 56 (1967); *see also* Section 8.8.2 of the *Supreme Court Practice Directions* in the United Kingdom, where it is said that "[l]eave is given to such bodies to intervene and make submissions . . . in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain."

capable of addressing the proceduralist's concern as the process-driven approach I have been arguing for? Perhaps. But if it is, it is an approach that effectively reduces to the kind of process-driven conception I have advanced anyway. To commit oneself to the position that a "better" or "more correct" legal judgement is one that at least partially reflects the interests of society at large is to commit oneself at the same time to the idea that *it is the process and not the result* that essentially matters. Or, to put it another way, it is to argue that the result one wishes to obtain is a product of the way it was produced rather than a freestanding entity that the procedure in question may or may not bring about. So, on this view, although nonparty participants can indeed be said to improve the quality of the decision-making of the court, the way they do so is through the participatory role they play in the decision-making *process* rather than in directing the judge to what is objectively a "better" or "more correct" *decision*. In this respect, even if we interpret the results-driven approach to nonparty participation in a way that reflects some of the commitments of the process-driven conception, we still ought in the end to assign normative priority to the latter approach over the former.

* * *

Let me now briefly summarize the argument I have advanced in this section. My aim in this section has been to argue that a process-driven approach to nonparty participation is a viable alternative to the more common results-driven approach on the basis that: (1) decisions handed down by courts will oftentimes have broad policy implications for society and are thus subject to many of the same democratic arguments in support of the public having influence over them that we find in other areas of political decision-making; (2) power-holders are wont to employ the relatively undemocratic procedural conditions surrounding systems of judicial review to their favor and nonparty participation can help to mitigate this incentive; and (3) dissent, a healthy aspect of any democratic decision-making process, tends to increase when nonparties are allowed to participate in legal proceedings.

Now, importantly, none of what I have said here is meant to imply that the two competing approaches outlined in the section are in any sense incompatible—clearly the practice of nonparty participation can, and most likely often does, serve both process-related and outcome-related functions simultaneously. My point here is limited to the suggestion that when and if these different ways of conceiving nonparty participation should ever conflict in practice, there is good reason to privilege the process-driven approach I have argued for over its results-driven alternative—something that, at present, seems quite far off. As we will begin to see more starkly in the next section, the way the practice is organized in most jurisdictions currently would suggest that it is the results-driven approach and not its process-driven rival that enjoys priority. This will of course have

repercussions for how the practice should be understood in those jurisdictions, but more importantly will impact the persuasiveness of any argument that wishes to claim that the decisions courts render are somehow made more legitimate by its presence. My own argument will be that only when the practice is organized in a particular way—one that deviates quite significantly from its current instantiations—does it in fact have a realistic chance of achieving this aim.

III. RULES THAT SUPPORT A PROCESS-DRIVEN VIEW OF NONPARTY PARTICIPATION

Some may be of the view that for nonparty participants to have the kind of legitimating influence over the court I have claimed they can, few if any rules ought to be applied to them. The argument would be that because the aim of the practice, at least according to the process-driven approach I have just sketched, is to ensure that judicial decision-makers are exposed to the broadest cross-section of societal influence as possible, implementing any restrictions concerning who may and may not participate would in this respect be entirely counterproductive. In what follows, I reject this line of reasoning. My claim will be that although the rules pertaining to nonparty participation will of course be different on a process-driven approach than on a results-driven one, a number of restrictions will still have to be applied if the practice is to have a viable chance of improving the democratic legitimacy of the decision-making of courts.

The restrictions I have in mind are all aimed at addressing two problems that could reasonably be thought to impair the possibility of this coming about. The first is what I will call a "time-sensitivity problem," which issues from the fact that all officials, regardless of their station, have limited time to dedicate to any particular decision. Because this is so, any procedural element that stands to unduly compromise the court's efficiency could end up doing more harm than good. The second problem, which is a straightforward consequence of the first, is what I call a "political equality problem." Because courts have limited time to dedicate to any particular decision, a subsequent problem emerges concerning how to best (or most fairly) distribute that time among society's factions. Many have discussed the first problem in relation to nonparty participation;[54] few, if any, have explicitly touched on the second. The general argument I wish to submit in this section is that only when the practice of nonparty participation is guided by a set of rules whose aim is to resolve *both* of these problems does it have a

54. *See* Garcia, *supra* note 4, at 348–352; Harrington, *supra* note 19, at 677–682; COLLINS, *supra* note 1, at ch. 3; Andrea Kupfer Schneider, *Unfriendly Actions: The Amicus Brief Battle at the WTO*, 7 *WIDENER L. SYMP. J.* 87 (2001); Karen O'Conner & Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 *JUST. SYS. J.* 35 (1983).

realistic chance of mitigating the proceduralist's concern about the legitimacy of judicial review.

I begin by enlisting a concrete set of rules that is both comprehensive in scope and representative of the kind of guidelines one could find in any number of jurisdictions. Section 58.19(4) of the *Rules of the Court of Session* in Scotland provides that nonparties be granted leave to participate on the condition that: (1) the proceedings raise a matter of public interest; (2) the issue in the proceedings that the applicant wishes to address raises a matter of public interest; (3) the propositions to be advanced by the applicant are relevant to the proceedings and are likely to assist the court; and (4) the intervention will not unduly delay or otherwise prejudice the rights of the parties, including their potential liability for expenses.[55] My argument will be that while rules (1) and (2) are entirely appropriate to apply on a process-driven approach to nonparty participation, only limited aspects of rules (3) and (4) meet this standard.

A. The Public Interest Condition

The first two rules outlined by the Scottish list are the bedrock conditions for any process-driven conception of nonparty participation. Unless nonparties are constrained by something like a public interest condition on both the submissions they make and the proceedings in which they participate, the two problems mentioned above have a very real possibility of undermining the democratic nature of the practice as a whole. I will begin by discussing the rationale behind a submission-based restriction on nonparty participants, (2), and move from there to the proceeding-based restriction, (1).

1. Submission-Based Restrictions

To understand how rule (2) of the Scottish list can be said to improve the procedural legitimacy of the court, it is important to revisit the precise nature of the proceduralist's indictment. The proceduralist's concern over judicial review is not about the public's restricted access to courts *per se*, but about the absence of a particular kind of influence the public can be said to have over decisions made by judicial review bodies. This represents a slight but crucial distinction in the nature of the proceduralist's case. Whereas open access can often lead to an inequality in resource allotment among society's members, the proceduralist's charge is for this kind of inequality to be reduced. It is precisely here that a submission-based public interest restriction on nonparty participants becomes relevant.

Suppose we were to set up the rules pertaining to nonparty participation in a decidedly laissez-faire way, allowing anyone to participate for any reason. Surely one result would be that parties who enjoy a greater share of

55. *See* Act of Serudunt (*Rules of the Court of Session*) (Amendment No 5) (Public Interest Intervention in Judicial Review) (2000) SSI 2000/317 at 58.19(4).

https://doi.org/10.1017/S1352325218000149 Published online by Cambridge University Press

existing resources (e.g., wealth, influence, etc.) would acquire a disproportionate means to secure nonparty status, which in turn would give them at least a theoretically greater opportunity to influence the decisions of the court to their favor. Far from addressing the proceduralist's indictment then, such a state of affairs would generate precisely the opposite result: it would introduce a mechanism that could lead to a more entrenched decisional imbalance than what might exist if nonparties were restricted from participating altogether.

Erecting a rule requiring nonparties to outline the ways in which their participation is in the public interest would to a large extent mitigate this kind of concern. A rule to this effect would ensure that the perspectives presented to the court be designed in such a way that they address a genuine social interest, or touch on a genuine social concern, and this in turn would stratify the decisional influences those perspectives would have over society's members more generally. We can think of the rule as a kind of procedural lubricant for the emergence of a Rousseauvian-like general will,[56] whereby the arguments submitted by nonparties will begin to align with the interests of society at large rather than focusing narrowly on a range of private concerns. This will be so *even if the purported reasons behind a nonparty seeking leave to participate are entirely insincere*. Consider, for instance, an Oilfield Workers Union that wishes to intervene in a case featuring a challenge to an environmental regulation. One would think it obvious that the true motivation behind the Union's application would be to protect, or in some other way satisfy, the interests of its membership. But even if this were the case, a rule requiring the Union to design its submission on the basis of the public interest would force that body to pivot the focus of its submission away from what might be its true intent toward considerations of a more general nature—perhaps the adverse economic consequences of implementing the regulation in question or some other socially meaningful purpose. This in turn would diffuse those interests far more expansively, the upshot being that whether the considerations the Union refers to in its submission are in fact the ones that have given rise to it are from the point of view of the public interest condition entirely immaterial. What matters is that the submission introduces a legitimate public interest concern, which under the terms of the rule in question will have been satisfied.

What is more, a submission-based public interest restriction would also likely reduce the total number of nonparty participants featured in any given proceeding,[57] and this would quite directly address the time-sensitivity

56. *See* Gopal Sreenivasan, *What Is the General Will?*, 109 *Phil. Rev.* 545 (2000).

57. A speculative hypothesis: Could the inclusion of a public interest condition on interveners in the United Kingdom account for the significantly lower rate of nonparty participants in UK Supreme Court cases (33 percent) than in the United States (90 percent) where no such condition applies? *See* Collins, *supra* note 1, at 45, for the U.S. numbers, and Justice, *To Assist the Court: Third Party Interventions in the Public Interest* (2016), at 9, for the UK numbers.

problem as well. This is significant from a democratic perspective because, as many have explained, the relatively smooth and efficient operation of a society's justice system is vital to the overall quality of democracy within that society.[58] Consider how former Chief Justice of the United States Supreme Court, Warren Burger, put it:

> A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that people come to believe the law—in the larger sense—cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public streets.[59]

As Chief Justice Burger indicates in this passage, unless citizens can be assured that justice will be administered in a timely and efficient manner, confidence in the system as a whole will begin to wilt. And since democracy is more or less defined by the people's continued confidence in the institutions that govern them,[60] a crisis in one could quite literally translate to a crisis in the other. It is primarily for this reason that addressing the time-sensitivity problem is a requirement of any conception of nonparty participation whose aim is to improve the democratic legitimacy of the court. A submission-based public interest restriction would in this respect be entirely appropriate.

Now at this point, some might challenge me on my initial claim that solving the political equality problem is essential to viewing nonparty participation as a legitimating practice. Some might be of the opinion, for instance, that in a democracy the choice between protecting the citizen's right to free expression and the otherwise justifiable goal of promoting political equality

58. For a comprehensive account of many of the themes in this area, *see* SUSAN N. HERMAN, *THE RIGHT TO A SPEEDY AND PUBLIC TRIAL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* (2006); *see also* Timothy Sandefur, *In Defense of Substantive Due Process, or, The Promise of Lawful Rule*, 35 *HARV. J. L. & PUB. POL'Y* 284 (2012); Jayanth K. Krishnan & C. Raj Kumar, *Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective*, 42 *GEO. J. INT'L L.* 747 (2010).

59. Warren E. Burger, *What's Wrong With the Courts: The Chief Justice Speaks Out, U.S. NEWS & WORLD REP.*, Aug. 10, 1970, at 69 (address to American Bar Association meeting).

60. As Hannah Arendt reminds us, "it is the people's support that lends power to the institutions of a country." HANNAH ARENDT, *ON VIOLENCE* (1970), at 41. For a broad explanation of this general idea, *see* Sonja Zmerli, Kenneth Newton & Jose Ramon Montero, *Trust in People, Confidence in Political Institutions, and Satisfaction with Democracy, in CITIZENSHIP AND INVOLVEMENT IN EUROPEAN DEMOCRACIES: A COMPARATIVE ANALYSIS 35* (Jan W. van Deth, Jose Ramon Montero & Anders Westholm eds., 2007).

ought always to be resolved on the side of the former.[61] On this line of reasoning, any democratizing conception of nonparty participation worth the name would ensure that no limits be placed on the content of nonparty submissions, save perhaps that they not be "presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."[62] This is more or less the argument Ruben Garcia makes in his democratically inspired paper on *amicus curiae* in the United States,[63] and for the reasons just outlined I think it is the wrong way to understand democracy in the context of a practice like nonparty participation. But let me for the moment grant the point to my critic. Even if we concede that nonparty participation would in fact be more democratically legitimate under conditions where no submission-based restrictions were placed on nonparties, the objection would still not upset the wider argument I am trying to make in the paper. Recall that my argument acknowledges, and even takes for granted, that a full compromise solution to the proceduralist–outcome theorist debate over the legitimacy of judicial review is an unrealistic ambition to have. Because this is so, my interest in the paper is not to show how the proceduralist concern over judicial review can be mitigated by the practice of nonparty participation *in full* (I very much doubt that this is possible under any regulatory scheme), but only how such participation helps to mitigate it *to a degree*. In the background is always the other argument in the debate (the outcome theorist's) whose position is more or less based on the judiciary being independent and relatively withdrawn from the popular influences vying for leverage in other political venues. It seems to me that a public interest condition strikes the right kind of balance in this regard. Although allowing nonparty participation does give the general public a means to influence the decision-making of judges (addressing the proceduralist's concern), the public interest condition serves to diffuse that influence across all members of society, thereby ensuring that it will be far less likely to produce the kind of undesirable majoritarian results the outcome theorist fears will emerge in a political system absent judicial review processes.

2. Proceeding-Based Restrictions

A recent provision to the *Criminal Justice and Courts Act* in the UK (Section 87 (4-6)) introduces a new costs risk for potential interventions at both the

61. For a good discussion on this debate (albeit in the context of campaign finance reform), *see* J. Tobin Grant & Thomas J Rudolph, *Expression vs. Equality: The Politics of Campaign Finance Reform* (2004), especially ch. 2.

62. U.S. Fed. R. Civ. P. 11(b)(1).

63. Garcia contends that the four elements captured by *U.S. Federal Rule of Civil Procedure* 11(b)(1)–(4) would "provide a better threshold for the acceptance or rejection of amicus briefs" than what exists in that system at present. Garcia, *supra* note 4, at 349. As each of those elements goes to the legitimacy of information in the brief rather than the object of the brief's argument, however, I would challenge Garcia on the claim that his conception actually meets more general standards of democratic legitimacy.

Administrative Court and the Court of Appeal in England and Wales.[64] The rationale for the provision, as expressed by Lord Faulks QC (Minister in the House of Lords), is that by introducing these risks the courts will be able to "deter inappropriate interventions and also make interveners think about the scale of their intervention so as to reduce the costs for all parties, whether applicants or respondents, and to ensure that those interventions are relevant and genuinely assist the court."[65] According to Lord Faulks then, two distinct concerns have aroused the new cost regime in the United Kingdom: not only will imposing a risk of costs on potential interveners (1) free up the court's time (by deterring "inappropriate interventions"), it will also (2) maintain fairness with respect to the direct parties to the case.

Now concerning (1), we here witness a rule that, although intended to resolve the time-sensitivity problem directly, does a very poor job at resolving the resulting political equality problem. This is so because the risk of costs that would follow any decision to seek nonparty participation would likely deter those with less wealth from seeking leave to participate at all,[66] which would of course place those with more wealth in an even better position to monopolize the instrument fully. We can therefore dismiss out of hand a rule like this on a process-driven conception of nonparty participation. But the second concern elucidated by Lord Faulks does reveal something of importance.

Lord Faulks's claim is that, besides targeting "inappropriate interventions," imposing a potential cost risk on nonparties is necessary to ensure that the interests of the direct parties to the case are adequately respected. This is a familiar enough claim. To the extent that courts of law are in the business of dispute resolution, it may be thought that the content of a given proceeding ought to be determined exclusively by the submissions made by the disputants in question rather than those introduced by an outside party.

64. *UK Criminal Justice and Courts Act*, 2015 c 2. In particular, as JUSTICE outlines in its 2016 report on third-party interventions in the United Kingdom:

> There is now a statutory presumption that interveners should bear their own costs and a party to the judicial review cannot be required to pay an intervener's costs unless exceptional circumstances make this appropriate. [In addition, a] party may apply to the court to request that the intervener pay that party's costs arising from the intervention. The court must make such an order if one of the following conditions are met: (a) the intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent; (b) taken as a whole, the intervener's evidence and representations have not significantly assisted the court; (c) a significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues that are the subject of the state of the proceedings; or (d) the intervener has acted unreasonably. However, the courts retain their discretion not to award costs if it would be inappropriate to do so.

JUSTICE, *supra* note 57, at 51.

65. HL Deb 27 Oct 2014, Col 998.

66. *See* JUSTICE, *supra* note 57, at 27–30.

Any deviation from this standard would not only prove unfair to the direct parties to the case, but would undermine the central principle on which the adversarial system rests.

This has long been a common objection to allowing nonparty access to court proceedings, but it has not stood up to rebuttal well. Ideal theory might suggest that adversarial systems of law are exclusively in the business of dispute resolution, but in reality we know this to simply not be true. Philip Bryden puts the point succinctly when he writes that:

> [the objection] has much to recommend it if the entire object of the exercise is the resolution of disputes. On the whole it is not excessively disturbing to imagine that the outcome of a contest between two litigants should be determined, in part at least, by the skill of their advocates. If, however, we believe that the making of law in the course of the resolution of the dispute is a major part of the exercise, our attitude is likely to change considerably. The idea that the quality of our legal rules might depend on the relative abilities of counsel in a given lawsuit is one that gives rise to at least some measure of concern.[67]

Bryden's point is that because decisions rendered by courts often have implications extending well beyond the direct parties to the case, "the objection from fairness" (as I will call it) is thrown into serious doubt. Indeed, it would be quite unreasonable to argue that only direct parties (and more specifically their counsel) should have the right to influence the court in its decision-making if in actual fact that decision will have ramifications extending well beyond the direct parties themselves. Instead, and on the same logic giving rise to the objection from fairness itself, to the extent that the court's decision will have these auxiliary ramifications, the right to influence that decision should extend to any party who stands to be so affected. This is at bottom the point Bryden makes in his democratic paper on the practice of intervention in Canada, and I think it is a sound one.[68] But here I wish to pick up another thread of the argument—one that both is often overlooked in the literature and can help to clarify why

67. Bryden, *supra* note 4, at 514.

68. There is another variable in an overall assessment of fairness that bears noting here. It could reasonably be argued that an evaluation of fairness is not only about *who* stands to be affected by some decision, but about *how* they stand to be so affected. Consider, for instance, a litigant who faces the death penalty, or a decision that carries the potential for a very high financial reward. Can it be said that giving nonparties the opportunity to influence *those* kinds of decisions is fair, even if the general public stands to be affected by them in some way? I think that it can, and for the same reasons offered in the passage above. As I have explained the relationship, a proceeding-based restriction helps to ensure that nonparty participation is limited to cases where the public interest hangs in the balance. And where the public interest is implicated in a case that carries the potential for a severe penalty, it stands to reason that the ensuing interest will be quite significant in turn. This is so due to the biconditional nature of the relation between penalty and offense, where (if sentencing is fair) as one variable rises, so too will the other. In this respect, the balance I am alluding to in the body of the paper remains intact even when we factor in this other consideration.

rule (1) of the Scottish list is entirely appropriate to include in the overall standards to be applied to the practice of nonparty participation.

Although the objection from fairness is, as I have said, largely overstated, if the fact pattern exhibited in a given case were sufficiently narrow, I think the objection would get some traction. In particular, there is good reason to believe that the less likely it is that the facts pertaining to a given dispute will involve matters in the public interest, the more likely it is that the objection from fairness becomes persuasive. This insight draws on the same rationale that supports the objection from fairness more generally: given the significant burdens direct parties assume when they decide to use litigation as a way to resolve a dispute, it seems unfair to give external parties an opportunity to challenge them on the terms of that dispute when those external parties do not stand to be affected by the resolution in question. By the same token, however, if an issue or issues that touch on the public interest can genuinely be said to hang in the balance of whatever resolution the court reaches, the claim of the direct parties becomes in that respect far less compelling. For precisely the same reason that direct parties are justified in arguing for exclusive privilege when it is their interests alone at stake, nonparties who wish to participate on behalf of the public at large can argue for an application of the same standard when the resolution in question is likely to affect the public at large. In this way, and according to the logic of the objection from fairness itself, it is not only appropriate, but maybe even necessary, that a proceeding-based public interest restriction be placed on nonparties who wish to participate in a given dispute.

B. Condition of Joinder

The same general rationale will allow me to rather quickly explain why a condition of joinder on two or more nonparty briefs containing relevantly similar material is also an appropriate standard to apply to a process-driven conception of nonparty participation.[69] Such a condition would offer the court yet another apparatus to address the time-sensitivity problem it faces, but would do so without surrendering much on the side of political equality at all. The only challenge I see emerging on this point is that the condition would fail to honor, at least to the extent some might desire, the value individuals place on having the opportunity to express their *own* point of view concerning some issue.[70] But given that I have already suggested that a public interest restriction be placed on nonparty briefs, the

69. Much work has been done on the effectiveness of joint interventions as a means of persuading the court on some point of law, but very little has been said on the normative merits of the action. On the former issue, *see* Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 *J. L. & Pol.* 33, 56–69 (2004); *Stephen M. Shapiro, Amicus Briefs in the Supreme Court*, 10 *Litig.* 21, 24 (1984); JUSTICE, *supra* note 57, at 30–33.

70. For an elaboration of this argument, *see* Kay Lehman Schlozman, Sidney Verba & Henry E. Brady, *Participation's Not a Paradox: The View from American Activists*, 25 *Brit. J. Pol. Sci.* 1 (1995); Geoffrey Brennan & Loren Lomasky, *Democracy and Decision: The Pure Theory of Electoral Preference* (1993), at ch. 5.

reasoning behind this challenge loses much of its force in advance. Indeed, one upshot of circumscribing the practice of nonparty participation by the idea of "the public interest" is that the *who* of the argument should matter very little, the far more important consideration being *what* the argument addresses. A condition of joinder does nothing to upset this concern and much to support the efficient operation of the justice system.

C. Assistance Condition

So far I have argued that there are good substantive reasons in support of rules (1) and (2) of the Scottish list, namely of the judiciary imposing a public interest condition on both the content of nonparty submissions and on the type of proceeding in which they can feature, as well as a condition of joinder on two or more nonparty briefs containing relevantly similar material. What then are we to make of the final two rules of that list, which provide, respectively, that (3) propositions advanced by the applicant must be relevant to the proceedings and likely to assist the court; and that (4) interventions must not unduly delay or otherwise prejudice the rights of the parties, including their potential liability for expenses. For reasons that should now be clear, I believe that the gist of these rules is either inappropriate, redundant, or both. As we will see, however, one aspect of rule (4) escapes this negative assessment, indicating yet another condition that will appropriately be applied to nonparty participation on a process-driven conception.

Let me begin with rule (3). The rule contains two distinct precepts, and neither fit the kind of conception I have argued for in this paper. The condition that "propositions advanced by the applicant must be relevant to the proceedings" is already captured by the proceeding-based public interest restriction, and thus would be redundant to include as a separate provision; while the condition that such propositions "be likely to assist the court" is an explicit nod to a results-driven conception of nonparty participation, and thus quite out of place on the alternative conception I have defended. But since of all the rules that pertain to nonparty participation, this one is both the most ubiquitous *and* the most decisive,[71] I ought here to

71. A few salient examples include:

* The U.S. Context: Rule 37(1) of the *Rules of the Supreme Court of the United States* provides that "an amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored."
* The UK Context: Section 8.8.2 of the *Supreme Court Practice Directions for the United Kingdom* provides that "[l]eave is given to such bodies to intervene and make submissions . . . in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain" and, further, that, "an intervention is however of no assistance if it merely repeats a point which the appellant or respondent has already made."
* The Australian Context: The guiding precedent for being granted leave to intervene in Australia states that the applicant must be "willing to offer the court a submission on

pause for a moment to explain more thoroughly why it is rejected on a process-driven approach to the practice.

We have seen that the process-related value of nonparty participation is its capacity to mitigate what would otherwise be an exclusive and remote authority enjoyed by judges over decision-making. Because judicial decisions oftentimes carry broad and diffuse effects over society, in the same way that citizens enjoy an opportunity to influence governmental authority in other areas of political decision-making, they ought similarly to enjoy that opportunity when it comes to decision-making in the judicial context. Concerning the rule we are currently examining, then, the question is this: How does requiring that "propositions advanced by the applicant . . . be likely to assist the court" help to further this ideal? The answer is that it does not, and in fact, that it does much to undermine it. In particular, what an "assistance condition" promotes is the idea that at bottom a nonparty's participatory role is reducible to the perceived usefulness he can contribute toward the decision-making of the judge *from the perspective of the judge herself*, whose authority on the matter remains as absolute and remote as ever. This is precisely antithetical to the proceduralist's concern about the legitimacy of judicial review. For the proceduralist, legitimate participation is not a matter of how one can *assist* in some decision, but about her *influence* over that decision, and this signifies a thin but vital distinction in the overall dynamic between the two. Whereas the act of assisting in some decision is directed toward the *decision-making agent*, the act of influencing that decision is part of the *decision-making process*. Only the latter view of the function served by nonparty participation is appropriate when conceived for its legitimating potential, and it is belied by a condition that requires nonparties to be of some assistance to the court.

D. Expenses

Rule (4) requires a bit more attention. We have already discussed in some detail the objection from fairness, and clearly the aim of rule (4) is to address this objection in particular. The rule, which in its construction is almost identical to U.S. *Federal Rule of Civil Procedure* 24(b)(3),[72] states that "interventions ought not to unduly prejudice the rights of the litigants," and then goes on to make specific reference to the added expenses nonparties might cause with respect to the total amount litigants will

law or relevant fact which will assist the court in a way in which the court would not otherwise have been assisted." *Levy v. State of Victoria* (1997) 189 CLR 579 at 604.

* The Canadian Context: In Canada, "the salient question [for being granted leave to intervene] is whether the intervenor will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter." *Canada [AG] v. Pictou Landing First Nation* (2014) FCA 21 at para 9.

72. *U.S. Federal Rule of Civil Procedure* 24(b)(3) reads: "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."

https://doi.org/10.1017/S1352325218000149 Published online by Cambridge University Press

have to pay for bringing their dispute to court. I think enough has been said about how the public interest condition helps to internally regulate the objection from fairness that, as a general matter, the concern about "unduly prejudicing the rights of the litigants" can be put to one side. But more needs to be said on the expense issue in particular.

It is one thing to claim that it is unfair for a nonparty to upset the strategy of a litigant's case, but entirely another to suggest that it is unfair for the litigant to bear an increased financial burden due to their participation. In the former instance, and as we have seen, although litigants should have a right to design their own strategic approach for how the case will be argued, the basis for *exclusive* rights over that design extends only to situations in which the decision the court reaches will have an *exclusive* effect over them. The moment the public at large is implicated in that effect, then for the very same reasons we think it appropriate to attribute rights to litigants, we ought similarly to think it appropriate to attribute those rights to nonparties who wish to participate expressly for reasons in the public interest.

The same of course cannot be said about the increased financial burden litigants may suffer as a result of nonparty participation. Whereas nonparties are generally held responsible only for the costs pertaining to their own involvement in the case, direct parties will have to bear those costs *plus* the extra costs introduced by the nonparties (e.g., additional court costs, added time to prepare for the case, etc.). This indeed introduces a level of unfairness to the proceedings—one that, if democratic legitimacy is our concern, stands in need of a remedy.

One obvious way to address the problem would be to force nonparties to offset any increased financial burden they cause through a scheme of proportionate compensation. But while a scheme like this would be appropriate in several respects, it would be inappropriate in others, and would also carry with it some potentially damaging externalities. Most worryingly, it seems likely that implementing such a policy would bear the same adverse consequences discussed earlier in reference to the new UK cost regime, where those with greater financial resources and/or organizational acumen would enjoy a privilege over those with a lesser share of those resources. For the same reasons we earlier rejected the UK cost risk regime then, a policy based on proportionate compensation ought similarly to be rejected.

But there is an even more important reason to reject the proportionate compensation scheme, and it can help us to see much more clearly the kind of remedy that is appropriate. On the system of rules I have proposed, a prior level of inequality exists between nonparties and litigating parties that would make it unfair for the former to be completely on the hook for any added expenses introduced in respect of the latter. Indeed, whereas nonparties face certain public interest restrictions concerning the kind of submission they may introduce to the proceedings, litigating parties are

at liberty to design their submissions in any way they see fit. This in turn creates a dilemma: on the one hand, and for the reasons articulated above, it would be unfair to place the total burden of added expenses on the litigating parties, but on the other hand, and due to the submission-based restrictions they face, it would also be unfair to levy those expenses on the nonparties themselves. Who ought then to bear the burden of those increased costs? The answer lies in the reason the dilemma exists in the first place. The reason it is justifiable to impose self-inducted costs on the litigating parties but not on any nonparty participants is because the former can be treated *as if* their motivation for bringing a dispute to court is entirely personal,[73] whereas the latter, at least on the rules I have proposed, will be obligated to do so exclusively on the basis of the public interest. What this means is that, should the litigating party be victorious in their action, it is *they* who primarily stand to benefit, while nonparties do not stand to benefit in this way. Indeed, while a nonparty may derive some satisfaction as a result of submitting a successful nonparty brief (success here referring to the decision of the court falling into line with the content of the nonparty's submission), they will not be the *primary* beneficiary of that success. That beneficiary, rather, will be the public at large, and it is thus *they* who ought to bear the costs related to such participation.

As a practical matter, this could be accomplished relatively easily: a government agency could be established whose mandate would be to administer both direct funds to cover the costs of nonparty participation, as well as any compensatory funds owing to litigating parties who have suffered a financial loss as a result of that participation. This kind of agency would mirror a number of others already in existence,[74] and so is by no means unrealistic. What is more, by establishing such an agency, the unfairness that accrues from the problem of increased expenses would be dealt with both from the perspective of the direct parties to the case as well as from the perspective of the nonparty participants, and this in and of itself would do much to further the democratic nature of the practice as a whole.

E. Administrative Matters

The foregoing are the core rules I believe would be appropriate to apply on any conception of nonparty participation whose intent is to improve the procedural legitimacy of the court. By instituting these rules—and just as

73. This is of course not to say that all litigating parties will in fact be motivated on the basis of personal reasons—a number of litigants, especially in constitutional cases, will likely bring their dispute to court out of a sense of responsibility to the community—but only that the rules around standing ought not to prohibit litigants who are in fact motivated exclusively on this basis.

74. *See* Lara Friedlander, *Costs and the Public Interest Litigant*, 40 *McGILL L.J.* 55, 93–97 (1995); L. M. Fox, *Costs in Public Interest Litigation*, *10 ADVOC. Q.* 385, 393–396 (1989). For a general perspective on cost-related issues in relation to public interest litigation (in the United Kingdom, Australia, and Canada), *see* Chris Tollefson, *Costs in Public Interest Litigation Revisited*, 39 *ADVOC. Q.* 171 (2011).

importantly, by *not* instituting others—nonparty participation will receive the structural design required to generate the kind of democratizing influence many have suggested is possible. In addition to these core elements, however, there will also exist a number of supporting rules whose aim will be to govern the "nuts and bolts" of the institution—administrative details that may include, but are not limited to, word limits on nonparty briefs, page setup and fonts, bindings and cover color, etc. These and other administratively oriented details are important to apply for the same reasons I have explained the core rules are important: they help to deflect the time-sensitivity problem the court inherently faces by allowing increased public access to court proceedings. And yet whereas concerning the core rules I have taken a rather firm stand on the form they should take in practice, concerning the supporting administrative rules I believe the details should be left entirely to the discretion of the instituting jurisdiction itself. Since there is little normative significance in the difference between, say, a 2,000-word limit on nonparty briefs and a 5,000-word limit, these kinds of decisions are best left to those who understand the unique operating tendencies of the jurisdiction in question, and are thus in a much better position to prescribe the limits most suitable to it.

F. Judicial Discretion

I have just said that courts ought to have discretion over the administrative details pertaining to nonparty participation within their respective jurisdictions. This is about as far as that discretion should extend. It may be appropriate on a purely results-driven approach for judges to have full control over who may and who may not participate as nonparties—to wit, if the function served by nonparties is to assist the judge in executing her own adjudicative function, it seems fitting that she should have broad discretionary authority over who she believes will serve her in this regard—but it is anything but appropriate on a process-driven conception of the practice. Discretion over decision-making is precisely the kind of proceduralist-inspired worry that has given rise to our examination in the first place, and to suggest that judges ought to enjoy a significant amount of control over the way the rules concerning the practice are applied would in this sense be counterproductive. The first order of business, therefore, is to heed the advice of a number of others who have written on the topic and institute much clearer rules around the practice.[75] This will serve to weaken the level of interpretive control courts currently enjoy over nonparty participation, and consequently restore the kind of openness and transparency we rightfully demand of all our democratic institutions.

75. *See* JUSTICE, *supra* note 57, at 5, 79–80; JUSTICE/PUBLIC LAW PROJECT, *A MATTER OF PUBLIC INTEREST* (1996), at 32–33, 38–39; Response of the Senior Judiciary to the UK Ministry of Justice's Consultation Paper, *Judicial Review: Proposals for Further Reform* (November 2013), at 44; Willmott, White & Cooper, *supra* note 3, at 611–612; John Koch, *supra* note 53, at 166–167.

But this alone will not solve the discretionary problem in full. For even in cases where judicial rules have been subject to statutory fixture, there is a fear that the way those rules have been framed will remain so vague that the court will continue to enjoy a *de facto* discretion over them that for all intents and purposes begins to resemble the kind of interpretive control the regime had initially been set up to oppose. This seems especially apt in the current case given the inherent vagueness surrounding expressions like "in the public interest" and "relevantly similar," which can of course be interpreted in any number of ways.

And yet, even if we take for granted that the interpretive nature of adjudication will always grant judges a certain latitude over these matters, it seems to me that the concern as stated is largely overblown. As H. L. A. Hart reminds us: "[g]eneral terms would be useless as a medium of communication unless there were [a range of] familiar, generally unchallenged cases,"[76] meaning that, to be of any service at all, general terms have to pick out a number of instances—maybe even many of them—where the referent is relatively easy to determine. So while the language of "in the public interest" and "relevantly similar" seem naturally to invite a discretionary interpretation to their meaning, the paradigmatic instances of those ideas will help to fix them with greater clarity, thereby limiting the level of discretion required on a case-by-case basis.

More importantly, however, even when a judge can legitimately be said to encounter a "hard case," where it is not immediately clear whether the particular instance fits the general class, discretion will not be of a kind where she can just *ex nihilo* apply some totally new standard to the issue at hand, but rather she will be guided in her endeavor by the authorizing idea for that general class itself. In the case of the public interest condition, for instance, the discretion the judge will enjoy is limited by the standard in question—"Is x in the public interest?"—which means that a number of other reasons she might have for denying admittance would *prima facie* be excluded from consideration. She may not exclude parties because she feels they will not be of any assistance to the court, and she may not exclude them because she considers their arguments flawed in some way. Her reasons for exclusion must be guided by the fact that they have not adequately proven their worth from a public interest perspective alone, and this will serve to limit the discretion she enjoys over who may and may not participate in the proceeding.

This line of reasoning reveals something important about the kind of rules I have proposed so far. The discretionary problem just highlighted is one that any process-driven conception of nonparty participation must face. This is so because giving judges full discretion over who may and may not participate in a court proceeding allows the proceduralist's initial concern surrounding the illegitimacy of the judicial review process to

76. H. L. A. HART, *THE CONCEPT OF LAW* (3d ed. 2012), at 126.

once again rear its ugly head, only this time at the level of the court's decision to grant participatory leave. A felicitous upshot of instituting a public interest condition on nonparties then, even in addition to the role it plays in offering a mutual resolution to the time-sensitivity and political equality problems, is that it tends to narrow the discretion the court has over the institution generally. The same of course cannot be said for what I have called an "assistance condition" applied to nonparty participation. Whereas in the case of a public interest condition, the only discretionary problem of note would result from the vagueness of the idea *signified* by the condition, in the case of an assistance condition, it would result from the inherently discretionary nature of the condition *itself*. Indeed, while it is entirely possible (and maybe even to be expected) that a judge will return wildly divergent responses on the question of whether a nonparty is deemed to be of assistance to the court[77] (e.g., depending on the circumstances of the case, or even on the mood of the judge), she may not return such disparate responses concerning whether such participation touches on a matter in the public interest. Since the public interest condition provides judges with a fairly recognizable, not to mention objective, ideal to guide their deliberations, any discretion they enjoy will be limited to those fringe cases where it is unclear whether the particular instance fits the general class. On the assistance condition, the only operating ideal is a subjective one, and it is in that respect virtually unlimited.

With all of this in mind, one final rule that would be appropriate to apply on a process-driven conception of nonparty participation is the following: judges ought to be mandated to explain their reasons for denying any nonparty submission. This is seldom required of judges at present, and instituting a change in this respect would help to further assuage the discretionary problem even under the mitigated conditions I have discussed. No longer would parties have to speculate as to why their submission failed to pass muster with the court, but they would be given a clear explanation of that failure. This in turn would improve the legitimacy of the court in two important ways. First, it would begin to trace a line of precedent whereby judges could both assist one another in discerning how to navigate the hard cases they face, as well as correct each other at times when decisions made by a particular judge are lacking in rationale. Second, instituting this requirement on judges would once more place the democratic nature of nonparty participation on a solid footing. What the requirement

77. Consider, for instance, the substantive criteria enumerated by JUSTICE concerning permission to intervene. In its report, the organization notes that "[i]n most kinds of proceedings, there are no formal criteria by which the judge decides whether to grant permission to intervene. Instead, each application is considered on its own merits." I believe this state of affairs is caused by the fact that, "[i]n practice, the main criterion for whether to grant permission is whether the proposed intervention would provide the court with some information, expertise or perspective not already provided by the parties, and which would assist the court in performing its role." JUSTICE, *supra* note 57, at 50.

confirms is that the primary beneficiary of the practice is not the judge whose role it is to make decisions *for* the public, but the general public who stand to be affected *by* those decisions. Since this is the central motivation for erecting a process-driven conception of nonparty participation in the first place, it seems to me that a rule to this effect would do much to endorse that aim.

* * *

Let me quickly summarize the argument I have made in this section before offering some final remarks. In order to deal with the two problems that stand to subvert the goal of a process-driven conception of nonparty participation, the court ought to impose: (1) a public interest restriction on both (a) the content of the submissions made by nonparties, and (b) the proceeding in which nonparties wish to participate; (2) a condition of joinder on two or more relevantly similar nonparty submissions; and (3) a number of administrative restrictions on nonparty briefs. In addition to this, and to further militate against these problems, the practice itself ought to be arranged in such a way that: (4) a public administrative body be created with the mandate of issuing both direct funds to nonparties and compensatory funds to litigating parties who have suffered increased costs due to nonparty participation; and (5) judges be mandated to make their reasons for denying nonparty admittance public. It is my position that satisfying each of these conditions gives the practice of nonparty participation a much better chance of realizing its legitimating promise. Consequently, where the conditions are not already in effect—and, just as importantly, where other countervailing conditions (such as the requirement that nonparties to be "of some assistance to the court") *are* in effect—the suggestion that such a practice acts to legitimate the decision-making of courts loses much of its persuasiveness.

CONCLUSION

The argument I have defended in this paper takes for granted that the proceduralist indictment against judicial review is at least partially justifiable and that a complete theory of democratic legitimacy will therefore attempt to address it to the greatest possible degree. If our goal however is to retain a measure of the outcome theorist's position in our overall theory as well, we will to that extent be forced to carry out our attempts within a system that *includes* judicial review processes rather than one that does not. In this sense, our options for how to address the proceduralist's concerns are limited. One option that has prima facie plausibility, even under the theoretical constraints laid out early in the paper, is the practice of nonparty participation, where members of the general public may seek participatory involvement in a court proceeding despite the fact that they are not directly implicated by its dispute. In virtue of this practice, courts acquire a means to expose themselves to a cross-section of societal influences, which

in turn can be said to improve the legitimacy of the decisions they render from a procedural perspective. Importantly however, and here is where my argument began to deviate from others written in a similar vein, such legitimacy will not be transmitted spontaneously, as if the mere fact that courts allow nonparties to participate is all that is needed to address the proceduralist's concern. The crux of my argument has been that only when the practice is conceived in a particular way and is subjected to the appropriate conditions does it have a genuine chance of realizing its legitimating promise.

One issue I have tried to highlight throughout my examination is the tendency courts have to speak of nonparty participation in terms of the "assistance" it can offer them. I traced this tendency to what I called a results-driven approach to the practice, and suggested that it is an approach quite antipodal to the proceduralist's indictment against judicial review. If nonparties are considered valuable only to the extent that they assist the judge in performing her own task, then the value they bring to the proceeding is exhaustively instrumental—they are in effect tools to be used by the court rather than participants in its decision-making process. If, on the other hand, nonparties are valued for the legitimacy they bring to proceedings, then whether or not they can be said to assist the judge in arriving at a better, or more correct, legal judgment is largely immaterial. Their value, rather, is in the participatory role they serve in the decision-making process itself, most importantly by being granted an opportunity to influence that process toward some independently stated goal. This latter conception emerges from a process-related view of nonparty participation, and for obvious reasons it is the only approach that has a realistic chance of meeting the proceduralist's challenge.

But modifying our conceptual idea of the practice is of course not enough to legitimate it. Because the proceduralist's view of democratic legitimacy is primarily based on the twin values of fairness and equality, a genuine appreciation of that view would require taking two problems that serve to threaten these values into account when designing the rules by which the practice is administered. The first is a time-sensitivity problem, which issues from the fact that courts have limited time to dedicate to any particular decision; the second is a political equality problem, which results from the different ways courts might choose to distribute that limited time among society's members. I suggested that a number of restrictions be applied to the practice in order to militate against these problems, and highlighted two rules—ones that appear to dominate the practice currently—that go in the opposite direction. The first is an assistance condition, whereby nonparties are only welcome to participate if they are considered to be instrumentally useful to the court; and the second is a discretionary privilege, whereby judges enjoy almost total control over the parties that will and will not be granted leave to participate. I suggested that the way to deal with the first is to discard the rule altogether, erecting in its

place both submission- and proceeding-based public interest conditions, while the second can be tempered by requiring judges to provide a written explanation for any rejected nonparty request they issue as well as by ensuring that the rules around the practice are far more transparent than what exists in many jurisdictions at present. With these modifications in tow, I believe the practice of nonparty participation is capable of bringing the proceduralist and outcome-theorist positions on the legitimacy of judicial review closer together. Unless and until they are put into effect, however, the practice has very little chance of genuinely addressing the proceduralist's concerns.

https://doi.org/10.1017/S1352325218000149 Published online by Cambridge University Press