



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 56 | Number 2

Article 2

Spring 5-17-2023

Democracy, Populism, and Concentrated Interests

Shai Dothan

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>

Recommended Citation

Shai Dothan, *Democracy, Populism, and Concentrated Interests*, 56 Loy. L.A. L. Rev. 459 (2023).
Available at: <https://digitalcommons.lmu.edu/llr/vol56/iss2/2>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

DEMOCRACY, POPULISM, AND CONCENTRATED INTERESTS

*Shai Dothan**

Concentrated interest groups have a significant advantage over diffuse interest groups: they can effectively stop free riding among their members. Because of this advantage, concentrated interest groups work in unison and manage to capture the government in many democracies. Democratic mechanisms of separation of powers, an independent judiciary, and the rule of law are designed to prevent the capture of government by concentrated interests. Under certain conditions, these mechanisms make it possible for diffuse interests to have a fair share of the influence over the government. Populist ideologists doubt that claim, however. They are convinced that democracies are captured by a small elite that controls most of the political power. The declared aim of populists is to give political power back to the majority of society. Despite that declared aim, this Article argues that the actions taken by populists have exactly the opposite outcome. By downgrading democratic mechanisms that constrain the government, populists end up making it easier for concentrated interests to capture the government and take advantage of diffuse groups.

* Associate Professor of International and Public Law, Jean Monnet Chair in EU Law & Politics, University of Copenhagen Faculty of Law affiliated with iCourts—the Centre of Excellence for International Courts and Study Hub for International Economic Law and Development (SHIELD). PhD, LLM, LLB, Tel Aviv University Faculty of Law. I thank Lea Haddad and Alexa Schneider for superb research assistance. I thank Patrick Barry for comments and discussions on this Article. This research is funded by the Danish National Research Foundation Grant no. DNRF105 and conducted under the auspices of iCourts, the Danish National Research Foundation’s Centre of Excellence for International Courts.

TABLE OF CONTENTS

INTRODUCTION.....	461
I. THE POWER OF CONCENTRATED INTERESTS.....	465
A. The History of Concentrated Interests Before Democracy	466
B. Concentrated Interests in a Democracy	470
II. DEMOCRATIC MECHANISMS THAT PREVENT CAPTURE.....	473
A. Separation of Powers.....	473
B. Judicial Independence.....	476
C. Rule of Law Principles	481
III. THE POPULIST CHALLENGE	482
A. A Definition of Populism	483
B. Populists Claim That Democracies Are Controlled by an Elite	484
C. The Alternative Proposed by Populists	485
IV. POPULISM AND DEMOCRATIC BACKSLIDING	487
V. POPULISTS DO NOT SUPPORT DIFFUSE INTERESTS	491
A. Populism and Corruption.....	491
B. Who Is Excluded from “The People”	494
CONCLUSION.....	497

INTRODUCTION

At the beginning of Donald Trump's presidential inauguration speech, right after the perfunctory greetings and thank-yous, the following words appear:

Today's ceremony, however, has very special meaning because today we are not merely transferring power from one administration to another, or from one party to another, but we are transferring power from Washington, DC, and giving it back to you, the people.

For too long, a small group in our Nation's Capital has reaped the rewards of government while the people have borne the cost.¹

Trump's speech is a textbook example of an ideology known as populism.² This ideology is committed to the idea that democratic countries are ruled by a small self-serving elite, at the expense of the majority of the citizens.³ Populist politicians claim they can change this predicament and strengthen the position of the common, decent people against the corrupt elite.⁴

The idea that a small group of people can control all the major decisions in a democracy is not unique to populists. A similar idea is accepted by many social scientists. The most famous proponent of this view is Mancur Olson who argued that concentrated interest groups possess enormous political power because they can work together as a group.⁵ In a concentrated interest group, the rewards of political action are divided among only a few people, so everyone has an interest to serve the group and to prevent free-riding.⁶ The result is that small

1. President Donald Trump, Inaugural Address (Jan. 20, 2017), in 163 CONG. REC. S364 (daily ed. Jan. 20, 2017).

2. See *How to Talk Like a Populist*, VICE NEWS, https://video.vice.com/en_us/video/news-donald-trump-how-to-talk-like-a-populist/58ee7fc6147a49571d793c8c [<https://perma.cc/QD96-4P2F>] (highlighting President Donald Trump's inaugural speech as an example of how to speak like a populist).

3. Cas Mudde, *The Populist Zeitgeist*, 39 GOV'T & OPPOSITION 541, 543–44 (2004).

4. CAS MUDDÉ & CRISTÓBAL ROVIRA KALTWASSER, POPULISM: A VERY SHORT INTRODUCTION 10–11 (2017); *id.* at 546 (discussing how populists want to increase the power of the people in a society).

5. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 166–67 (1965) [hereinafter OLSON, LOGIC]; see also MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES 18 (2008) [hereinafter OLSON, RISE].

6. OLSON, LOGIC, *supra* note 5, at 2 (“[U]nless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their

and concentrated interest groups are able to continuously extract benefits from society and from the government, taking advantage of the political weakness of diffuse interest groups.⁷

For some scholars, this result seems almost inevitable. No matter what democratic mechanisms are set in place, they can never prevent an unscrupulous elite from taking over public money.⁸ But there are challengers to this view. Gunnar Trumbull, for example, conducted meticulous empirical research that shows diffuse interests, such as consumers, sometimes have the upper hand over concentrated interests in advanced democracies.⁹ The reason is that diffuse interests have greater legitimacy for their actions, allowing them to create viable coalitions with government.¹⁰

How can democracies guarantee that diffuse interests will win instead of concentrated interests? Populists say they have the winning formula. They claim that if they are in charge, concentrated elites will be driven away from the centers of power and ordinary people will start to influence politics.¹¹ Is that true?

Unfortunately, a wide scientific literature suggests that the changes populists advocate to the political functioning of democracy are likely to have exactly the opposite effect on the goal they claim they pursue.¹² While they claim they are fighting for the people, populists are committed to doing away with democratic mechanisms that

common interest, *rational, self-interested individuals will not act to achieve their common or group interests.*)”.

7. *Id.* at 3.

8. Andrew McFarland, *Interest Group Theory*, in *THE OXFORD HANDBOOK OF AMERICAN POLITICAL PARTIES AND INTEREST GROUPS* 37, 40–41 (L. Sandy Maisel et al. eds., 2010) (summarizing Mancur Olson’s stance on interest groups that undermined Robert A. Dahl’s pluralism theory; Dahl’s theory was essentially a theory of power, and it emphasized the importance of competitive elections in controlling social and political elites).

9. GUNNAR TRUMBULL, *STRENGTH IN NUMBERS: THE POLITICAL POWER OF WEAK INTERESTS* 1–2, 9–23 (2012).

10. *Id.* at 10.

11. See MUDDE & KALTWASSER, *supra* note 4, at 9–10 (describing the populist goal of giving the government back to the people); see also Mudde, *supra* note 3, at 546; Sergiu Gherghina & Sorina Soare, *Introduction: Populism – A Sophisticated Concept and Diverse Political Realities*, in *CONTEMPORARY POPULISM: A CONTROVERSIAL CONCEPT AND ITS DIVERSE FORMS* 1, 7 (Sergiu Gherghina et al. eds., 2013) (revealing how populism attempts to restore an equilibrium in power between those who are ruled and the minority in charge); Margaret Canovan, *Populism for Political Theorists?*, 9 J. POL. IDEOLOGIES 241, 241–42 (2004) (explaining how populists aim to give a voice to the ordinary people).

12. GIANFRANCO PASQUINO, *TWENTY-FIRST CENTURY POPULISM: THE SPECTRE OF WESTERN EUROPEAN DEMOCRACY* 28 (Daniele Albertazzi & Duncan McDonnell eds., 2008) (arguing that populism causes the democratic framework of a society to be unstable and that it has “eroded existing democracies from within and from without”).

actually protect diffuse interests and make it more difficult for concentrated interests to exercise unchecked power.¹³

Separation of powers and checks and balances between different branches of government require a complicated government. In a complex government there are vast numbers of expert civil servants and wide social groups that interact with them. The populists are right that these networks of powerful people can be corrupted.¹⁴ But what is the alternative? If a distrust in public administration and civil society activism translates to an agenda that supports the concentration of all political power in the hands of charismatic leaders and their henchmen, the cure is clearly worse than the disease.

Diffuse interests can win only if they have enough information and enough opportunities to take part in the public debate and to influence decision-making.¹⁵ When power is concentrated, all decisions become less transparent.¹⁶ All the junctures in which a motivated constituency can make a difference are closed. Therefore, the democratic backsliding that usually accompanies populist governments is harmful for diffuse interests.¹⁷ Populists speak in the name of the people, but

13. MUDDÉ & KALTWASSER, *supra* note 4, at 95–96; Federico Finchelstein & Nadia Urbinati, *On Populism and Democracy*, 1 *POPULISM* 15, 20 (2018) (describing how populism tries to change the workings and management of state institutions); Ingolfur Blühdorn & Felix Butzlaff, *Rethinking Populism: Peak Democracy, Liquid Identity and the Performance of Sovereignty*, 22 *EUR. J. SOC. THEORY* 191, 200 (2019) (detailing how populist movements are concerned with “the unsuitability of democratic processes to match conditions of high differentiation and complexity”); Cas Mudde & Cristóbal Rovira Kaltwasser, *Populism: Corrective and Threat to Democracy*, in *POPULISM IN EUROPE AND THE AMERICAS: THREAT OR CORRECTIVE FOR DEMOCRACY?* 205, 207 (Cas Mudde & Cristóbal Rovira Kaltwasser eds., 2012) (noting populists’ claim that the checks and balances in place in the government limit the power of the people).

14. Susan Rose-Ackerman, *Corruption and Government*, 15 *INT’L PEACEKEEPING* 328, 328 (2008) (maintaining that when there is “a state with very weak institutions, corruption may be a short-term way to hold the system together and prevent violent disintegration”).

15. *See* TRUMBULL, *supra* note 9, at 63 (describing how consumer advocates sought to put issues into the public debate by conducting and publishing exposés on product safety).

16. *See id.* at 22–23.

17. MUDDÉ & KALTWASSER, *supra* note 4, at 91 (“The stage of democratic erosion includes incremental changes to undermine the autonomy of those institutions that specialize in the protection of fundamental rights, such as diminishing judiciary independence, jettisoning the rule of law, and weakening minority rights.” (emphasis omitted)); Marc F. Plattner, *Populism, Pluralism, and Liberal Democracy*, 21 *J. DEMOCRACY* 81, 88 (2010) (arguing that populists are concerned with the will of the majority and are not interested in protections for individual rights); Cas Mudde & Cristóbal Rovira Kaltwasser, *Populism and (Liberal) Democracy: A Framework for Analysis*, in *POPULISM IN EUROPE AND THE AMERICAS: THREAT OR CORRECTIVE FOR DEMOCRACY?* 1, 17 (Cas Mudde & Cristóbal Rovira Kaltwasser eds., 2012) (revealing populists’ advocacy for majority rule and hostility “towards pluralism and the protection of minority rights”).

they create a government that is closed to the public, which can easily be captured by powerful concentrated interests.¹⁸

An independent judiciary is, by definition, a small elite that is able to issue counter-majoritarian decisions.¹⁹ Populists are right that this elite sometimes has an agenda, and it is often attentive to various foreign audiences instead of the public.²⁰ But without an independent judiciary, political promises are worthless. Concentrated interests would still be able to exert power over politicians directly through aggressive lobbying and financing. In contrast, all the hard-earned political victories of diffuse interests that were built through fragile coalitions of interests trying to shape long-term processes will evaporate without a court that is able to ensure statutes, regulations, and judicial precedents are respected.²¹

Finally, rule of law principles like ensuring that laws are all general, public, clear, and coherent²² also have a price. Laws will determine the fate of people in society, and an educated elite that knows the law well will have a major advantage over others. Populists are right that lawyers can serve their own interests and the interests of those that pay them.²³ But if democratic societies do away with the rule of law, the final arbitrator in every political question will be naked power, and concentrated interests are much better at exercising power than diffuse

18. MUDDE & KALTWASSER, *supra* note 4, at 91–92.

19. See Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 INT'L REV. L. & ECON. 349, 349 (1993) (emphasizing the importance of the different branches of government and checks and balances; additionally, explaining how the idea of an independent judiciary developed with Blackstone after the seventeenth century power struggle in England between the King and Parliament); Ivan C. Rand, *The Role of an Independent Judiciary in Preserving Freedom*, 9 U. TORONTO L.J. 1, 7 (1951) (arguing that the judiciary has the task of upholding the rule of law against executive authority, state authority, and pressures from popular opinion).

20. Edgardo Buscaglia, *An Analysis of Judicial Corruption and Its Causes: An Objective Governing-Based Approach*, 21 INT'L REV. L. & ECON. 233, 235 (2001) (defining judicial corruption and examining the various forms that it can take, especially in developing countries); LEA ELSÄSSER ET AL., GOVERNMENT OF THE PEOPLE, BY THE ÉLITE, FOR THE RICH: UNEQUAL RESPONSIVENESS IN AN UNLIKELY CASE 1 (2018) (stating that many empirical studies demonstrate that the American government favors the wealthy and that there is a large amount of private money in American presidential elections); Janine R. Wedel, *From Power Elites to Influence Elites: Re-setting Elite Studies for the 21st Century*, 34 THEORY, CULTURE & SOC'Y 153, 154 (2017) (making an argument about contemporary “influence elites” and how they operate to influence policy).

21. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 892 (1975) (arguing that the independent judiciary can uphold legislation that is protecting an interest group).

22. See LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969).

23. See Robert W. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History*, DAEDALUS, Winter 2019, at 177, 177 (explaining that the lawyers' services depend on the ability of their customers to pay).

interests. Diffuse interests prosper when the political atmosphere puts an emphasis on legitimacy, transparency, and cooperation.²⁴ Populist ideology is lethal for this atmosphere.²⁵

Part I describes the history of the struggle between diffuse and concentrated interests both in modern democracies and before democracy became a prevalent system of government. Part II explains why democratic mechanisms that are often criticized by populists are essential for diffuse interests to have a fighting chance against concentrated interests. Part III presents the populist argument against the form of government in many democracies. Part IV demonstrates that populist leaders often lead to democratic backsliding which erodes the basic protections democracy provides for diffuse interests. Part V counters the claims of populists that they represent diffuse interests even in the absence of democratic protections. The last Part concludes.

I. THE POWER OF CONCENTRATED INTERESTS

Damocles was a courtier in the court of King Dionysius II of Syracuse. He constantly tried to flatter the king by mentioning how everyone envies his riches and power. One day the King had enough and he decided to teach Damocles a lesson. He asked Damocles if he would like to switch places with him for a day. When Damocles eagerly agreed, the King ordered that he would be showered with all the luxuries that money can buy: delicious food and wine, jewelry, appealing servants, gold and silver everywhere. There was one catch, though: Damocles had to sit with a sword over his head held only by a single hair of a horse's tail. Unable to cope with the constant fear of death, Damocles begged the King to go back to his original powerless but safe existence.²⁶

24. See TRUMBULL, *supra* note 9, at 124–50 (discussing the power of policy narratives to affect the success of diffuse interests).

25. JORDAN KYLE & YASCHA MOUNK, *THE POPULIST HARM TO DEMOCRACY: AN EMPIRICAL ASSESSMENT* 34–36 (2018) (finding that populist rule is correlated with a decrease in the rule of law and additionally that populism is connected to a “7 per cent decline in freedom of the press, an 8 per cent fall in civil liberties and a 13 per cent drop in political rights”).

26. ‘*Sword Of Damocles*’ *Reference Sometimes Misused*, NPR (Aug. 19, 2011, 3:00 PM), <https://www.npr.org/2011/08/19/139799434/sword-of-damocles-reference-sometimes-misused> [<https://perma.cc/VXG2-CFW6>] (reporting a conversation with classics scholar Daniel Mendelsohn who recounted the story of Damocles).

The moral of the story is clear: people in positions of formal power often live in fear of the people they rule over.²⁷ To properly understand the diffusion of power in society, one must take into account not only formal structures of power, but also the reality of people's abilities to exert their will on others. Democracy may mean "one person, one vote," but it is naïve and misguided to think that in a democracy every citizen has the same political power.²⁸ It is just as misguided to believe that in a pre-democratic monarchy all political power is concentrated in the hands of the king.²⁹

Properly surveying the informal structures of power throughout history is a gargantuan task that exceeds the scope of this Article. But before turning to the contestation of diffuse and concentrated interests in a modern democracy, it is worthwhile to begin by briefly analyzing the structures of power before democracy started to spread across the globe.

A. *The History of Concentrated Interests Before Democracy*

The objective of this Article is to understand the struggle of diffuse and concentrated interests in established democracies. The blueprint for this regime type is a product of modern Western times.³⁰ There is therefore relatively little to lose by limiting the ambit of the inquiry to the historical conditions that directly facilitated the rise of the West. To understand modern democracies, it may be useful to consider the slow and incremental developments during medieval times

27. See Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT'L L. 221, 229 (2020) (recounting how authoritarians are fearful of revolution from below and of being replaced by other elites).

28. See, e.g., *Gray v. Sanders*, 372 U.S. 368, 388 (1963) (asserting that the one person, one vote principle is based on a strong democratic foundation); ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY 3 (1989) (stating that there is great inequality in people's social conditions which influences how much power they have in a democracy).

29. DARON ACEMOGLU & JAMES A. ROBINSON, ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY 25 (2012) (arguing that citizens have de facto and not de jure political power in non-democracies).

30. B. K. Nehru, *Western Democracy and the Third World*, 1 THIRD WORLD Q. 53, 54 (1979) (explaining that former colonies have accepted the Western version of democracy as the best type of government); David Stasavage, *Representation and Consent: Why They Arose in Europe and Not Elsewhere*, 19 ANN. REV. POL. SCI. 145, 146 (2016) (maintaining that medieval Western Europe developed the practices of representative government and the consent of the governed—two concepts that comprise the foundation of modern democracy).

that made modernity possible,³¹ but there is no need to go further in time or to extend the inquiry to other developed cultures.

During the Middle Ages, formal power was concentrated in the hands of the nobility. Vassals who tilled the land had to swear fidelity to their lords and fight for them on command. This does not mean that vassals were powerless. The lords committed to protect their vassals,³² but beyond the formal obligations they were also keenly aware that the vassals' loyalty was not unquestionable. When taxes are raised too much, rebellion is always a possibility, as the 1381 English Peasants' Revolt demonstrated.³³ Every medieval ruler must have considered the sword of Damocles whenever it was time to collect taxes.

At the pinnacle of the hierarchy of power in the Middle Ages stood the king or the queen that were viewed as God's representatives on earth.³⁴ But even royals were not immune from threats to the legitimacy of their rule. The 1215 Magna Carta was an unsuccessful attempt by a weak king to appease rebellious barons.³⁵ Later it became a symbol of the beginning of constitutional limitations on political power.³⁶

More than four hundred years later, when the legitimacy of the monarch was called again into question, a brilliant scholar, Thomas Hobbes, attempted to write a philosophical treatise that would justify the absolute rule of the king. In *Leviathan*, Hobbes argued that a strong

31. See generally ROBERT S. LOPEZ, *THE BIRTH OF EUROPE* (1967) (giving a detailed account of the many transformations this time period experienced, such as changes in living standards, changes in religion, development of the Byzantine civilization, and rapid changes in power).

32. Edward I. Steinhart, *Vassal and Fief in Three Lacustrine Kingdoms*, 7 *CAHIERS D'ÉTUDES AFRICAINES* 606, 606–09 (1967) (analyzing the intuition of vassalage and stating that this is when two legally free men enter into an agreement in which they take on obligations and rights towards each other: the lord takes on the obligation of protecting and maintaining his vassal).

33. W. M. Ormrod, *The Peasants' Revolt and the Government of England*, 29 *J. BRITISH STUD.* 1, 1 (1990) (describing how the exorbitant amount of taxes of the 1370s contributed to the Peasants' Revolt in the summer of 1381).

34. Carla Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777–1793*, 30 *REPRESENTATIONS* 109, 111 (1990) (“The power to determine what was truly God’s knowledge, and who could enjoy the ‘privilege’ of its ‘enjoyment’ (literally, ‘jouissance’), belonged not to the author but to God’s first representative on earth, the king, and by extension his administration.”).

35. J. R. Maddicott, *Magna Carta and the Local Community*, 102 *PAST & PRESENT* 25, 28 (1984) (retelling the tale of the Magna Carta and how it did nothing to satisfy local demands).

36. H. D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 *COLUM. L. REV.* 1, 30 (1917) (noting that the Magna Carta was intended as a limit on the executive and judicial powers and not on the legislature).

ruler with an exclusive right to use force is necessary to prevent a terrible state of war of all against all.³⁷ Without a king to protect them, people would be forever subject to the fear of death.³⁸ For that reason, people have consented to give up their natural rights in return for the protection of a central government.³⁹

The impact of *Leviathan* was so great that all future debates had to engage with it. Toward the end of the seventeenth century, the central thesis of the book was attacked from opposite directions. Robert Filmer in *Patriarcha* challenged the very idea of a social contract.⁴⁰ In his view, the world always had rulers and the people they governed.⁴¹ One can say that concentrated interests ruled over diffuse interests by divine right. On the other side of the debate, John Locke wrote *Two Treatises of Government*, a book that follows the idea of a social contract but paints a far less gruesome picture of the state of nature than Hobbes does.⁴² Locke would not grant the government any power that is not necessary for the protection of the public good.⁴³ In other words, a significant amount of power should remain in the hands of diffuse interests.

Two Treatises of Government inspired both the American Revolution and the French Revolution a century after it was written.⁴⁴ During these revolutions, the debate between the defenders of concentrated interests and the supporters of diffuse interests continued to have talented advocates. Edmund Burke wrote *Reflections on the Revolution in France* to oppose revolution and praise the tradition that kept concentrated interests at the helm.⁴⁵ In opposition to that, Thomas

37. See generally THOMAS HOBBS, *LEVIATHAN: OR, THE MATTER, FORME, & POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVILL* (A. R. Waller ed., Cambridge Univ. Press 1904) (1651).

38. *Id.*

39. *Id.*

40. See ROBERT FILMER, *PATRIARCHA AND OTHER POLITICAL WORKS OF SIR ROBERT FILMER* 69–71 (C.H. Wilson & R.B. McCallum eds., Basil Blackwell 1949) (1680) (rejection of Grotius's argument that people may correct kings).

41. See Peter Laslett, *Introduction* to FILMER, *supra* note 40, at 12 (describing Filmer's belief that all men were born unfree).

42. See, e.g., JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 158–59 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

43. See *id.* at 158–59.

44. L. Edward Allemand, *Two European Influences on the American Revolution: Puritanism and John Locke*, 25 *DEPAUL L. REV.* 805, 806 (1976) (explaining Locke's influence on the American Revolution); see also SYLVIA NEELY, *A CONCISE HISTORY OF THE FRENCH REVOLUTION* 17 (2008) (discussing Locke's influence on Voltaire and the French Revolution).

45. See EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 32 (Frank M. Turner ed., Yale Univ. Press 2003) (1790).

Paine argued in *The Rights of Man* that every individual should have equal access to political power.⁴⁶

The American Revolution demonstrated that democracy is possible, but it took a long time until this regime type spread to all the corners of the earth.⁴⁷ Furthermore, even in established democracies, it used to be the case that only a fraction of the adult population could vote.⁴⁸ Initially, most democracies did not enfranchise women⁴⁹ and many times the right to vote was conditioned on owning property.⁵⁰ Slavery existed in the United States until it was abolished in 1865,⁵¹ subjugating an entire class of people without any form of civil and political rights.

As the right to vote slowly expanded in democracies, disenfranchised people also evolved new methods of exerting power on government.⁵² Just like it is wrong to assume that diffuse interests would always win today, when universal franchise is enjoyed in almost all democracies with some notable exceptions,⁵³ it is wrong to assume

46. See THOMAS PAINE, *THE RIGHTS OF MAN* 94 (1951) (ebook).

47. Kevin Narizny, *Anglo-American Primacy and the Global Spread of Democracy: An International Genealogy*, 64 *WORLD POL.* 341, 341 (2012) (outlining the spread of democracy from the eighteenth century to modern day).

48. See DAVID STASAVAGE, *THE DECLINE AND RISE OF DEMOCRACY: A GLOBAL HISTORY FROM ANTIQUITY TO TODAY* 29 (2020) (illustrating that the idea of a political system where all adults can vote is a development of the twentieth century).

49. Dawn Langan Teele, *Women & the Vote*, 149 *DAEDALUS* 25, 25 (2020) (showing that for most of history, only men could vote).

50. *Id.* (highlighting that for the most part voters had to be male, “landed” elite).

51. Rhonda V. Magee, *Slavery as Immigration?*, 44 *U.S.F. L. REV.* 273, 285 n.41 (2009).

52. Sidney Tarrow, *Modular Collective Action and the Rise of the Social Movement: Why the French Revolution Was Not Enough*, 21 *POLS. & SOC’Y* 69, 82 (1993) (exemplifying how over time, disenfranchised peoples learned to utilize petitions, mass demonstrations, and far-reaching organization tactics to exert power over government).

53. See Rosanna M. Taormina, *Defying One-Person, One-Vote: Prisoners and the “Usual Residence” Principle*, 152 *U. PA. L. REV.* 431, 459 (2003); Greg Robins, *The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand*, 4 *N.Z. J. PUB. INT’L L.* 165, 182 (2006) (recounting the disenfranchisement of prisoners incarcerated for two years or longer in New Zealand); Megan A. Winder, *Disproportionate Disenfranchisement of Aboriginal Prisoners: A Conflict of Law That Australia Should Address*, 19 *PAC. RIM L. & POL’Y J.* 387, 387 (2010) (showcasing the disproportionate affect that Australia’s prisoner disenfranchisement laws has on Indigenous citizens); Shai Dothan, *Comparative Views on the Right to Vote in Intel Law: The Case of Prisoners’ Disenfranchisement*, in *COMPARATIVE INTERNATIONAL LAW* 379, 382–83 (Anthea Roberts et al. eds., Oxford Univ. Press 2018) (providing an overview of the rights of prisoners to vote in European states and showing that many states place some restrictions on prisoners); Robin L. Nunn, Comment, *Lock Them Up and Throw Away the Vote*, 5 *CHI. J. INT’L L.* 763, 768–70 (2005) (outlining the impact the felon disenfranchisement laws have in the United States, particularly for minority voters); Harry J. Enten, *Felon Voting Rights Have a Bigger Impact on Elections than Voter ID Laws*, *THE GUARDIAN* (July 31, 2013), <https://www.theguardian.com/commentis>

that concentrated interests are in full control when they have the legal, formal right to govern the masses. The real power balance between diffuse and concentrated interests in pre-democratic regimes is a historical enigma, one that this Article can refer to but will not attempt to resolve.

B. Concentrated Interests in a Democracy

The regime type dealt with in this Article is that of an advanced democracy. When almost all the adult people affected by public policies can vote, it looks like diffuse interest groups should have an advantage because they contain far more voters than concentrated interest groups.⁵⁴ Some scholars have even identified a new problem: the tyranny of the majority.⁵⁵ If minorities are not able to win elections, some would view them as a disadvantaged group deserving of special protection.⁵⁶

Mancur Olson challenged this view.⁵⁷ He argued that democracy is not just about winning elections based on the relative size of social groups.⁵⁸ The key to power in a democracy is the ability to control the government.⁵⁹ Those who can make the government do their bidding can extract many advantages, so-called “rents,” that benefit them at the expense of others.⁶⁰ Generous subsidies, tariffs and trade barriers,

free/2013/jul/31/felon-voting-rights-impact-on-elections [https://perma.cc/2PSX-4DJ7] (describing how most disenfranchised felons in the United States are Democrats whose votes could have a significant impact on the outcomes of elections).

54. See DONALD L. BEAHM, CONCEPTIONS OF AND CORRECTIONS TO MAJORITARIAN TYRANNY 2 (2002) (reviewing how the majority has garnered power to tyrannize the minority).

55. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 8 (1980) (describing the problem of the tyranny of majority).

56. Meghan Benton, *The Tyranny of the Enfranchised Majority? The Accountability of States to Their Non-Citizen Population*, 16 RES PUBLICA 397, 397 (2010) (indicating that the tyranny of the majority has created a need for the protection of the minority).

57. See, e.g., OLSON, LOGIC, *supra* note 5.

58. See *id.* at 53.

59. See Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1126–27 (1994) (delineating how the wealthy have captured politicians through financing in order to extract benefits from them that are ultimately against the interests of the general public); LAWRENCE LESSIG, REPUBLIC, LOST: THE CORRUPTION OF EQUALITY AND THE STEPS TO END IT 23 (2015) (explaining that the core problem with America’s democracy is that large donors to political campaigns hold all the political power to nominate individuals to office and successful politicians are thus forced to reciprocate by granting them favors).

60. Wertheimer & Manes, *supra* note 59, at 1127.

exclusive rights enjoyed by professional guilds: all these are ways in which democracy favors parts of society.⁶¹

Olson claimed that concentrated interest groups are better able to control the government because they can sustain collective action in a way that diffuse groups cannot.⁶² In a concentrated interest group, the spoils of the benefits granted are divided among a small group, which makes every individual less likely to free ride on the others and more motivated to prevent free riding by others than in a diffuse group.⁶³

A simple example can demonstrate this theory. Imagine that out of almost 330 million Americans there are three hundred who control the sugar market. Let's assume that all the economic benefits involved in controlling the sugar market sum up to three billion dollars a year. Actually, this is approximately the sum American consumers pay every year because of subsidized loans to the sugar market and prevention of competition by import tariffs and selling quotas imposed on local sugar processors. This means that the average American, representing diffuse interests, pays ten dollars extra for their sugar every year.⁶⁴ No one would change their vote in any type of elections for ten dollars. No one would go on demonstrations, or fund political candidates, or lobby for a certain party for ten dollars a year. In contrast, three hundred people, a concentrated interest group, sharing three billion dollars are getting ten million dollars each on average. For this amount of money, people will go to great lengths to serve their group and help the common cause. Moreover, for this amount of money, people will definitely punish members of their group that try to free ride on their efforts.⁶⁵

Even if people are willing to go on a political crusade for small sums, they will only do that if they know someone is taking their money. The greatest weakness of diffuse groups is their ignorance about the various complicated ways in which their interests are taken

61. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 764 (1964) (demonstrating how certain private interest groups utilize governmental power to usurp public interests).

62. See OLSON, LOGIC, *supra* note 5, at 2–3.

63. See *id.* at 46; OLSON, RISE, *supra* note 5, at 20–24.

64. See Guy Rolnik, *Meet the Sugar Barons Who Used Both Sides of American Politics to Get Billions in Subsidies*, PROMARKET (Sept. 19, 2016), <https://www.promarket.org/2016/09/19/sugar-industry-buys-academia-politicians/> [<https://perma.cc/KRP2-N7NR>].

65. See Friedrich Schneider & Werner W. Pommerehne, *Free Riding and Collective Action: An Experiment in Public Microeconomics*, 96 Q.J. ECON. 689, 693–702 (1981) (providing a similar explanation through an experiment conducted on students at the University of Zurich).

advantage of.⁶⁶ For concentrated interests, it is much easier to acquire information about the decisions of politicians and to spread it within the group.⁶⁷ Getting informed is expensive and diffuse interest groups often do not have an incentive to obtain and process the data that is a prerequisite to political action.⁶⁸ Despite these serious arguments highlighting the difficulties faced by diffuse interests, there are scholars who believe diffuse interests are not doomed to lose every political battle to concentrated interests.⁶⁹ Gunnar Trumbull argued that diffuse interests often win against concentrated interests in advanced democracies.⁷⁰

In advanced democracies, no big policy decision can be made without a coalition that involves at least two out of three major actors: the government, the corporate world, and civil society.⁷¹ Such a coalition has to rest on a legitimating narrative that would justify it toward the public.⁷² The key advantage of diffuse interests over concentrated interests according to Trumbull is their ability to build a convincing legitimating narrative.⁷³ When civil society makes a coalition with the government to serve diffuse interests, its behavior looks noble and altruistic.⁷⁴ In contrast, when corporations try to build a coalition with the government to serve concentrated interests, their actions look self-serving and are easily exposed to criticism.⁷⁵

Trumbull does not argue that diffuse interests will always win against concentrated interest, only that diffuse interests stand a chance to win if the proper conditions are in place.⁷⁶ Not much is written about what are these proper conditions, however, besides mentioning that they exist in advanced democracies.⁷⁷ But centuries of political theory

66. See OLSON, RISE, *supra* note 5, at 26 (emphasizing the rational ignorance of the diffuse public when it comes to public affairs).

67. See Susanne Lohmann, *An Information Rationale for the Power of Special Interests*, 92 AMER. POL. SCI. REV. 809, 811–12 (1998).

68. See OLSON, RISE, *supra* note 5, at 28.

69. See TRUMBULL, *supra* note 9, at 1.

70. *See id.*

71. *See id.* at 124.

72. *Id.* at 26.

73. *See id.* at 28–29.

74. *See id.* at 2.

75. *See id.*

76. *See id.* at 31.

77. *See id.*

have been dedicated exactly to this question: how to prevent the government from being captured by concentrated interests.⁷⁸ The next part discusses some of the mechanisms unveiled by this literature.

II. DEMOCRATIC MECHANISMS THAT PREVENT CAPTURE

Democracy is much more than holding elections every couple of years. It is a complicated system of government premised on the idea that the only way to maintain the maximum level of freedom for all citizens is to accept a series of compromises.⁷⁹ These compromises must be regulated in a way that makes them hard or impossible to diverge from based on the momentary political will of the public.⁸⁰ This part discusses the mechanisms that are considered by political theorists as essential for democracy to flourish: separation of powers, an independent judiciary, and the rule of law. It then explains why these mechanisms are essential for protecting diffuse interests.

A. Separation of Powers

Early philosophers were already concerned by the possibility of the corruption of government.⁸¹ Plato wrote a famous typology of governments that divided them to three kinds: (1) government by the one, (2) government by the few, and (3) government by the many.⁸² Later,

78. See generally Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221 (2012) (clarifying how concentrated interests groups capture the government and discussing ways that this can be stopped); WILLIAM J. NOVAK, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., Cambridge Univ. Press 2014); see D. Daniel Sokol, *Limiting Anticompetitive Government Interventions That Benefit Special Interests*, 17 GEO. MASON L. REV. 119 (2009) (exploring how concentrated interest groups redistribute public goods in ways that are beneficial to themselves and offering a solution to this problem).

79. See Amy Gutmann & Dennis Thompson, *Valuing Compromise for the Common Good*, DAEDALUS, Spring 2013, at 185, 187 (for a description of the importance of compromise to democracies).

80. See Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707, 710 (2006) (noting that constitutions bind governments and "restrict the actions available to future politicians").

81. Lisa Hill, *Conceptions of Political Corruption in Ancient Athens and Rome*, 34 HIST. POL. THOUGHT 565–66 (2013) (mentioning that many early thinkers, such as Plato, Aristotle, Polybius, Thucydides, Marcus, Epictetus, and Seneca, analyzed the possibility of government corruption).

82. Plato, *Republic*, in READINGS IN ANCIENT GREEK PHILOSOPHY: FROM THALES TO ARISTOTLE 234 (S. Marc Cohen et al. eds., 5th ed. 2016) (c. 375 B.C.E) (examining the different forms of government: an aristocracy, timocracy, oligarchy, democracy, and tyranny); ARISTOTLE, POLITICS bk. III, pt. IV, at 61 (Benjamin Jowett trans., Indo-European Publ'g 2009) (c. 250 B.C.E.) (stating that there is rule by one (kingship), by a few (aristocracy), or by many (polity) and the bad forms of those three types are: tyranny, oligarchy, and democracy). Plato explains that the aristocracy is the best after the ideal of a Philosopher King, but that it can degenerate into timocracy.

both Aristotle and Polybius explained that any one of these alternatives would be unstable. Rule by the one would soon be corrupted, leading to a revolution that will give power to a rebellious elite.⁸³ This elite would, in turn, also become corrupt and lead to a popular revolution that will give all power back to the people.⁸⁴ The people would not be able to govern and an anarchic situation would ensue. A charismatic leader would take advantage of the chaotic condition and form a tyranny of one ruler. The cycle would then begin again.⁸⁵

Aristotle and Polybius both recommended a solution to this predicament: a mixed government.⁸⁶ A mixed government includes elements of rule by one, by a few, and by many that together form a much more stable regime than any single alternative.⁸⁷ The Roman republic was considered by Polybius as an example of a mixed regime.⁸⁸ The combination of power centers representing single rule in the form of consuls, the rule of the elite in the senate, and the rule of the general public in public assemblies gave the Roman republic strength and stability.⁸⁹

Plato, *supra*, at 234. A timocracy is corrupt and may favor war over peace. *Id.* An oligarchy is the rule of only the rich. *Id.* Plato then describes a democracy which provides many freedoms but gives equality to people who are not equal. *Id.* Finally, a democracy can descend into a tyranny. *Id.*

83. 3 POLYBIUS, THE HISTORIES bk. VI (Frank W. Walbank & Christian Habicht eds., W.R. Paton trans., Harv. Univ. Press 2011) (recounting the degradation of each form of government into the next); ARISTOTLE, NICOMACHEAN ETHICS 130 (Terence Irwin trans., Hackett Publ'g Co. 2d ed. 1999) (350 B.C.E.) (discussing the deviation from kingship to tyranny which is when the ruler starts to pursue his own good above that of the people; Aristotle describes the transition from aristocracy to oligarchy where the rulers distribute wealth to themselves). Polybius explains how kingship is the beginning with hereditary succession. POLYBIUS, *supra*. This then descends into tyranny when the king starts to live lavishly. *Id.* This leads to an overthrow by the subjects. *Id.* What is instituted then is an aristocracy, but this will ultimately meet its end in the same way the tyranny ended. *Id.* The people then finally resort to a democracy; but yet again, when the people forget about the value of freedom they will begin to crave power. *Id.* This will lead right back to a monarchy. *Id.*

84. ARISTOTLE, *supra* note 82, at 130–31.

85. See POLYBIUS, *supra* note 83, at 317 (explaining how it is easy for this cycle to perpetuate endlessly).

86. Carrie-Ann Biondi, *Aristotle on the Mixed Constitution*, SOC. PHIL. & POL'Y, July 2007, at 176, 183 (claiming that Aristotle defends the mixed constitution in books IV to VI of the *Politics*); F. W. Walbank, *Polybius on the Roman Constitution*, 37 CLASSICAL Q. 73, 75 (1943) (Polybius is interested in the mixed constitution because of its stability and ability to defend against *anacyclosis*).

87. See Walbank, *supra* note 86, at 75.

88. POLYBIUS, *supra* note 83, at 329 (emphasizing how the Roman state contains all three forms of government).

89. *Id.* at 329–37 (describing how power is distributed in the Roman state).

Despite the ancient roots of the idea that dividing the power of government is essential to avoid its degeneration,⁹⁰ the figure most associated with the idea of separation of powers is the eighteenth century philosopher Montesquieu.⁹¹ In his famous book *The Spirit of Law*, Montesquieu argued that the British system of government ensures the maximum amount of freedom to its citizens.⁹² The secret to protecting the citizens' freedom is separating the power of government between different branches: the legislator, the executive, and the judiciary.⁹³

Montesquieu did not argue that every branch of government needs to be isolated from intervention of the others.⁹⁴ On the contrary, the branches of government need to compete and balance each other.⁹⁵ For example, the executive should have the right to block legislation under some conditions⁹⁶ while the legislator should be able to monitor the execution of statutes.⁹⁷ The protection of freedom comes from the ability of different branches to check and balance each other. Democracy as a system of checks and balances received competent advocates in the writers of the *Federalist Papers*.⁹⁸ *Federalist No. 47* refers to Montesquieu and presents a compelling argument for a system of checks and balances.⁹⁹

The idea that a democratic government must facilitate the competition of powers is designed to prevent any part of the government from becoming tyrannical and abusing the rights of the public.¹⁰⁰ Using more modern terminology, it is possible to describe the same idea

90. See ARISTOTLE, POLITICS bk. IV, at 133–41 (B. Jowett trans., Clarendon Univ. Press 1885) (c. 350 B.C.E.).

91. See Robert G. Hazo, *Montesquieu and the Separation of Powers*, 54 A.B.A. J. 665, 667 (1968).

92. See *Memoir of Montesquieu*, in 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS xix, xxii (J.V. Prichard ed., Thomas Nugent trans., George Bell and Sons rev. ed. 1878) (1748).

93. 1 MONTESQUIEU, *supra* note 92, at 162–63.

94. *Id.* at 191–92.

95. See *id.*; John A. Fairlie, *The Separation of Powers*, 21 MICH. L. REV. 393, 399 (1923) (elaborating on the importance that each branch of the government maintains some control over the others); Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 593 (1986) (highlighting how the system of separation of powers was designed to ensure that each branch of government could oversee the other).

96. See 1 MONTESQUIEU, *supra* note 92, at 169.

97. *Id.*

98. T.G. Rogers, *Securing Liberty: The Federalist Papers*, in REVOLUTIONARY MOMENTS: READING REVOLUTIONARY TEXTS 61, 62–63 (Rachel Hammersley ed., 2015) (reviewing the ways in which the authors of the *Federalist Papers* supported Montesquieu's concept of checks and balances).

99. THE FEDERALIST NO. 47 (JAMES MADISON).

100. See ALLISON CLARK ELLIS, IMPACT OF POLITICAL SOCIALIZATION ON THE SUPPORT FOR DEMOCRATIC PRINCIPLES: EMERGING RESEARCH AND OPPORTUNITIES (Allison Clark Ellis ed.,

in a slightly different way as designed to prevent capture by concentrated interests and allow diffuse interests to enjoy some political power. Without any conflict between the different parts of government, any government official can use public resources for their own interests or to serve the interests of a concentrated interest group that managed to capture them.¹⁰¹ In contrast, friction between the different parts of government spreads information to the public and allows for greater public participation, thus empowering diffuse interests.¹⁰²

B. *Judicial Independence*

An independent judiciary is widely accepted as an essential building block in a functioning democracy.¹⁰³ Scholars tend to view the role of courts in two different ways. Some view national courts as a political institution that clashes with the executive and the legislative branches to form the checks and balances described in the previous section.¹⁰⁴ For others, courts are the ultimate umpire that enforces the rules on all the participants in the political game and is able to say the last word on every issue based on established legal principles.¹⁰⁵ This section addresses both views.

The judiciary has a special role within the system of checks and balances. Courts do not only clash with the other branches on policy issues that the judges want to promote, they also supervise the friction

2021) (describing how democratic backsliding can occur when one branch of government weakens the separation of powers between each branch and erodes the mechanisms meant to keep them in line).

101. See Torsten Persson et al., *Separation of Powers and Political Accountability*, 112 Q.J. ECON. 1163, 1165–66 (1997) (summarizing how separation of powers can stop politicians from extracting rents against the public).

102. See EYAL BENVENISTI & GEORGE W. DOWNS, *BETWEEN FRAGMENTATION AND DEMOCRACY* 165–70 (2017) (discussing how controversy between different branches of government spreads information to the public that they would otherwise not be able to access); Patrick A. Luff, *Captured Legislatures and Public-Interested Courts*, 2013 UTAH L. REV. 519, 533–36 (elucidating how the judicial branch can act as a public-interested governmental body that withstands the pressure of concentrated interests); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 225 (1986) (arguing that judicial review and activist interpretation should be allowed because they are used to ensure that concentrated interests do not dominate the political process); THE FEDERALIST NO. 51 (JAMES MADISON) (asserting that contestation amongst political actors can lead to a more democratic government).

103. Justice Starcher, *An Independent Judiciary*, W. VA. LAW. 8, 8 (2003).

104. Frank M. Johnson Jr., *The Role of the Judiciary with Respect to the Other Branches of Government*, 11 GA. L. REV. 455, 464 (1977).

105. Michael P. Allen, *A Limited Defense of (at Least Some of) the Umpire Analogy*, 32 Seattle U. L. REV. 525, 525 (2009) (quoting Chief Justice John Roberts discussing the judge's role as an umpire).

between other branches of government as a body tasked with resolving disputes.¹⁰⁶ Courts need conflict to survive. When conflicting political actors have matching powers, this means that the court is able to choose to favor either side of the dispute with equal risk of backlash, which expands the discretion of the judiciary.¹⁰⁷ For that reason, scholars have claimed that courts would usually support the weaker political body in the hope of strengthening its position and putting it up to par with other bodies.¹⁰⁸

As mentioned above, friction between political bodies spreads information to the public, which allows diffuse interest groups to get informed and to take part in politics.¹⁰⁹ Sometimes, the friction created by judicial intervention is directly between the court and the political branches.¹¹⁰ The executive or legislative branches that are facing an activist court find themselves needing to justify their policies in a transparent manner, thereby exposing themselves to public criticism and scrutiny.¹¹¹ The information that is released to the public in this process helps diffuse interests strengthen themselves against concentrated interests.¹¹²

Courts are not immune to the consequences of this constant friction. They are exposed to the possibility of backlash that can harm them in a variety of ways.¹¹³ Courts are subject to the possibility of

106. See Trevor L. Brown & Charles R. Wise, *Constitutional Courts and Legislative-Executive Relations: The Case of Ukraine*, 119 POL. SCI. Q. 143, 153 (2004) (indicating that some countries provide constitutional courts with the ability to resolve disputes between the legislature and executive branch).

107. See BENVENISTI & DOWNS, *supra* note 102, at 94 (discussing how growing competition between developed and developing nations can lead to greater discretion for international tribunals); Eyal Benvenisti & George W. Downs, *Distributive Politics and International Institutions: The Case of Drugs*, 36 CASE W. RES. J. INT'L L. 21, 41 (2004) (suggesting that courts are more willing to utilize discretion when there is relatively little power disparity among the parties involved).

108. BENVENISTI & DOWNS, *supra* note 102, at 99; Eyal Benvenisti, *Judicially Sponsored Checks and Balances*, 31 Mishpatim [HEBREW U. L. REV.] 797, 817–18 (2001) (explaining that the Israeli Supreme Court strengthens the relatively weak Israeli parliament to facilitate constant friction between it and the government; this friction helps the court to maintain its own power as a mediator between the two other branches of government).

109. See BENVENISTI & DOWNS, *supra* note 102 and accompanying text.

110. Rafael La Porta et al., *Judicial Checks and Balances*, 112 J. POL. ECON. 445, 446 (2004) (providing an overview of the ways judicial intervention can have a direct effect on the legislative and executive branches).

111. See Eyal Benvenisti, *Judicial Review and Democratic Failures: Minimizing Asymmetric Information Through Adjudication*, 32 TEL AVIV U. L. REV. 277 (2010).

112. See BENVENISTI & DOWNS, *supra* note 102 and accompanying text.

113. Adam S. Chilton & Mila Versteeg, *Courts' Limited Ability to Protect Constitutional Rights*, 85 U. CHI. L. REV. 293, 302 (2018) (noting the various forms of backlash that a court might face, including court packing, changes in judicial appointments, etc.).

noncompliance with their judgments and criticism of their decisions.¹¹⁴ Political bodies can often change the law to overrule judicial interventions and they can harm the court as an institution by lowering its budget or tampering with judicial selection.¹¹⁵ Therefore, even if judges as individuals enjoy a large degree of independence, the judiciary is vulnerable to hostile reactions by the political branches.¹¹⁶

Alexander Bickel famously suggested that courts should exercise so-called “passive virtues” to preempt political backlash.¹¹⁷ His argument was that by avoiding the most difficult issues courts can continue to maintain a good compliance record.¹¹⁸ Others have suggested variations on this idea, for example the technique of limiting judicial activism in issues that are the most salient on the nation’s agenda.¹¹⁹

The problem with constantly avoiding conflicts with the political branches is that this technique would not allow the court to increase its political power over the long run.¹²⁰ In order to establish the court’s reputation as able to command the government, the court must put this ability to the test.¹²¹ Only by requiring the political branches to do

114. ALISON BRYSK & MICHAEL STOHL, *CONTRACTING HUMAN RIGHTS: CRISIS, ACCOUNTABILITY, AND OPPORTUNITY* 159–60 (2018) (outlining the ways in which states show resistance and backlash to international courts, particularly pointing to noncompliance and general criticism).

115. See SHAI DOTHAN, *REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS* 69–70 (2015).

116. John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 355 (1999) (highlighting a right for political branches to interfere with the judiciary but not to interfere with individual judges); John Ferejohn, *Judicializing Politics, Politicizing Law*, L. & CONTEMP. PROBS., Summer 2002 at 41, 59 (mentioning the sharp reactions or reversals that political branches can have to judicial decisions); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 567 (1992) (highlighting times in which Congress has acted decisively against judicial decisions); John Ferejohn & Pasquale Pasquino, *The Countermajoritarian Opportunity*, 13 U. PA. J. CONST. L. 353, 381 (2010) (discussing decisions that led to strong government reactions and forced political compromise).

117. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 200–04 (1962) (explicating the use of passive devices to avoid otherwise unavoidable judgments that might be unwise given the political circumstances).

118. See *id.* at 169–98, 200–04 (1986) (revealing the techniques courts use to avoid issuing rulings on certain topics).

119. See Frederick Schauer, *Foreword: The Court’s Agenda – And the Nation’s*, 120 HARV. L. REV. 5, 11–12 (2006) (contending that the Court operates mainly in areas that have low public salience and avoids contentious political issues for the most part).

120. See Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 67 (2016) (concluding that the decision to avoid contentious issues can come at the expense of the court’s ability to accrue power).

121. See ELY, *supra* note 55, at 48 (acknowledging that “one of the surest ways to acquire power is to assert it”); Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 79 (contending that the Court must intervene against gross abuses as the public has come to expect this).

things that they do not want to do and successfully making them comply can the court build its reputation for the future.¹²² Only in this way can the court guarantee that when the need arises to force the government to do something, it will have the capacity to do so.¹²³

The proper strategy that the court must adopt to succeed is walking on the brink of noncompliance: challenging the political bodies to comply with uncomfortable judgments while giving them sufficient incentive to comply.¹²⁴ Scholars have indicated that the tool courts use in order to avoid backlash even when they demand a serious effort from the government is to track the preferences of most of the public.¹²⁵ Even if the court is not trusted because of its expert ability to apply the law correctly, it can still enjoy legitimacy because it tracks what most of the public wants. The proliferation of public opinion surveys gives the court a new capacity to determine the wishes of the public with growing accuracy.¹²⁶

If courts are indeed committed to following the current wishes of the majority of the public, this could mean that courts are likely to decide in ways that concur with the views of diffuse interest groups. But when one takes into account the possibility of political shifts within the public, the role played by courts changes. Some scholars

122. David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 733 (2009) (explaining how widespread compliance with an unpopular ruling strengthens the belief that people must comply with Supreme Court decisions and will cause the Court to accumulate greater power over time).

123. See DOTHAN, *supra* note 115, at 9–11 (specifying that parties are more likely to comply with the judgments of high-reputation courts because failing to comply will lead to harsher reputational sanctions for them). Thus, courts work hard to increase their reputation so that they can ensure compliance on contentious decisions. *Id.* To build their reputation, courts need to secure compliance with demanding judgments and with judgments whose reasoning exposes judicial discretion. *Id.*

124. See *id.* at 103–04 (revealing how courts can use their reasoning to increase reputational sanctions on parties that do not comply and consequently increase the chances of compliance).

125. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 478, 483–84 (2005) (asserting that *Lawrence v. Texas* was an easy case for the Court as it was conforming to the commonly held beliefs of the people). Additionally, Klarman explains that while before *Brown v. Board of Education* and *Lawrence v. Texas* the public was divided on the issues of racial equality and gay rights in general, it was simple to predict where the public beliefs were heading. *Id.* The Court acted according to that prediction. *Id.*

126. Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153, 156 (2013) (maintaining public opinion polls are treated as an “authoritative indicator” of how the public perceived the Court’s legitimacy); Or Bassok, *The Supreme Court at the Bar of Public Opinion Polls*, 23 CONSTELLATIONS 573, 576–77 (2016) (explaining the development of the idea that judicial legitimacy can be understood through public opinion polls); Or Bassok, *Beyond the Horizons of the Harvard Forewards*, 70 CLEV. ST. L. REV. 1, 41 (2021) (arguing that the increase in judicial supremacy is because of the creation of public opinion polls as they enable us to accurately determine how the public views the Court).

have suggested that if a political hegemon is about to lose power to competing groups, it would deliberately transfer power to the judiciary so that future judicial decisions would protect its interests against the attempts of succeeding political hegemons.¹²⁷ This means that courts could represent the values held by groups that previously spanned most of the public even if they are not so today.

Furthermore, courts may represent in their judgments values that were held by powerful concentrated interest groups in the past.¹²⁸ Scholars have noted that part of the reason an independent judiciary is secured in many democracies is the wish of interest groups to guarantee that the political deals they struck with the incumbent government would continue to be respected when this incumbent is replaced by the opposition.¹²⁹ There is therefore no way to be sure that courts as political bodies would side with diffuse interests, either according to their current or past political interest.

This does not stop proponents of the second view of judging from tasking the court with protecting those that are disadvantaged by the democratic system.¹³⁰ Originally, the initiator of this view, John Hart Ely, supported judicial intervention in political decisions to protect

127. See Michael Mandel, *Democracy and the New Constitutionalism in Israel*, 33 *ISR. L. REV.* 259, 274–82 (1999) (contending that Israel is a case of “new constitutionalism”—where the relationship between courts and the representative bodies is changed in order to preserve a certain status quo in the society); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 44 (2004) (describing how political elites can maintain their power in the face of political pressure through the constitutionalization of rights or judicial empowerment based on certain interests); Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 *L. & SOC. INQUIRY* 91, 91–92 (2000) (contending that there are many instances in which an elite seeks to empower the judiciary with the aim of preserving their hegemony when social changes put it in danger).

128. Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 *DUKE L.J.* 1667, 1679 (2009) (explaining that there is a better opportunity for interest groups to affect a court’s judgments when that judge is only presiding over a small number of cases).

129. Landes & Posner, *supra* note 21, at 879 (contending that an independent judiciary can further the aims of interest groups because the judiciary will uphold laws consistent with what the legislature intended at the time of passing the law, as such, changes in political parties after the passing of a law will not affect the interests originally represented by the passage of the law); J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 *J. LEGAL STUD.* 721, 738–41 (1994) (analyzing why the courts in Japan are not as independent as the courts in the United States). Ramseyer argues following Landes’s and Posner’s theory that the difference in judicial independence in these systems is due to the consistent dominance of one electoral party in Japan compared to the “erratic electoral performance” in American politics that makes preserving deals with interest groups through an independent judiciary useful. *Id.*

130. Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 10 *ASIAN L.J.* 127, 134–35 (2003) (stating that the role of the judiciary is to protect constitutional rights, and especially those of disadvantaged minorities).

discrete and insular minorities.¹³¹ But other scholars quickly noted that exactly the same reasoning can be applied to justify courts in intervening to protect diffuse interest groups to the extent that they lack political power.¹³²

There are good normative reasons for encouraging courts to protect diffuse interests groups.¹³³ Whether courts are going to rise to this challenge or not is a factual question without a clear answer. In contrast, the role that courts play as part of a mechanism of checks and balances is not committed to a normative theory about what courts ought to do.¹³⁴ Instead, the theory of this role makes a general claim that by creating political friction and disseminating information, courts strengthen diffuse interests in their competition with concentrated interests.

C. Rule of Law Principles

The two previous sections deal with institutional design mechanisms that can help diffuse interests to succeed in politics. Another method to protect diffuse interests is through a commitment to norms as opposed to institutions.¹³⁵ Because diffuse interest groups may have different particular interests in different times and in different societies, these protective norms must be procedural, not substantive, in nature.

Lon Fuller engaged in a famous thought experiment in which he imagined a series of such procedural rules that would protect any society from becoming harmful to its citizens.¹³⁶ The returning theme in

131. See ELY, *supra* note 55, at 86 (utilizing the *Carolene Products* footnote to argue that in some situations judicial intervention may be needed to protect minority interests).

132. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 742 (1985).

133. Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059, 1064–78 (1974) (explaining that it is only natural that the Supreme Court ought to protect minorities because it is in the enlightened self-interest of everyone).

134. See N.W. Barber, *Prelude to the Separation of Powers*, 60 CAMBRIDGE L.J. 59, 65–66 (2001) (arguing that political theory underlying the idea of separation of powers is efficiency and not liberty; this underlying theory of efficiency does not mean wealth-maximizing or have any utilitarian moral philosophy goal).

135. See BJÖRN ARP, INTERNATIONAL NORMS AND STANDARDS FOR THE PROTECTION OF NATIONAL MINORITIES: BILATERAL AND MULTILATERAL TEXTS WITH COMMENTARY 3–4 (2008) (discussing how we can perceive international treaties as particular international norms and that there is now such an expansive network of bilateral instruments that it is easy to access the legal sources providing minority protections).

136. See FULLER, *supra* note 22, at 39.

all these rules is the idea that laws should be general, known, and consistent.¹³⁷ When laws apply generally to all the population, people cannot be discriminated against to suit the interest of a particular social group.¹³⁸ To the extent that diffuse interest groups are at a political disadvantage, their rights are guaranteed by being continuously tied to the rights enjoyed by the ruling concentrated interest groups.¹³⁹

To the basic principles described by Fuller, other principles can be added that have been proven through countless experiments in public administration to secure fairness in government. Such principles have been elaborated on by the field of “Global Administrative Law.” They include: transparency, participation, reasoned decision-making, legality, and effective review mechanisms.¹⁴⁰ All these principles can provide diffuse interest groups with the information and the institutional opportunities they need to fight for their rights.

III. THE POPULIST CHALLENGE

Lord Acton famously said that “[p]ower tends to corrupt[;] absolute power corrupts absolutely.”¹⁴¹ The word “tends” in the beginning of the sentence is important and should not be omitted. In a system with proper checks and balances, corruption is a possibility, not a certainty. Democracies engage in a series of demanding compromises to limit the risk of corruption,¹⁴² corruption that can often take the shape of a government controlled by a concentrated interest group.¹⁴³

The problem is that populists do not believe in compromises.¹⁴⁴ Their worldview is Manichean. It describes politics as an inevitable

137. *Id.* at 42 (stating that the law should be coherent, clear, and known, and additionally, that officials ought to be guided by the law).

138. *See* ELY, *supra* note 55, at 82–87 (analyzing the idea of virtual representation as a protection for the interests of the politically powerless and stating that this basic idea greatly affected the U.S. Constitution).

139. *See id.* (contending that people with no electoral power are virtually represented if their rights are tied to those of more powerful political parties).

140. Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS., Summer/Autumn 2005, at 15, 17.

141. Franz L. Neumann, *Approaches to the Study of Political Power*, 65 POL. SCI. Q. 161, 163 (1950).

142. *See* Yan Sun & Michael Johnston, *Does Democracy Check Corruption? Insights from China and India*, 42 COMPAR. POL. 1, 1 (2009) (listing ways in which democracy restrains corruption through checks and balances and democratic mechanisms).

143. *Id.* at 4.

144. *See* Christian F. Rostbøll, *Second-Order Political Thinking: Compromise Versus Populism*, 69 POL. STUD. 559, 559 (2021) (reviewing the literature which mentions that populism conflicts with the politics of compromise).

struggle between the sons of light and the sons of darkness.¹⁴⁵ Populists would claim that behind the façade of liberal values, their adversaries are controlled by a corrupt elite.¹⁴⁶ They provide the only alternative, as this part explains.

A. A Definition of Populism

Before moving forward, it is necessary to start with a clear definition of populism. The literature mentions three main ways to think about populism: (1) an ideology that views society as divided between two rivaling groups, the pure people and the corrupt elite, and argues that political decisions should be based on the general will of the people;¹⁴⁷ (2) a political strategy of exercising direct power on a large and unorganized number of followers by a charismatic leader;¹⁴⁸ (3) a form of discourse involving an anti-elitist rhetoric embracing the sovereignty of the people.¹⁴⁹

This Article is only concerned with the first definition—populism as an ideology. Under this definition, populists believe that the greatest risk to democratic countries is from capturing the government by a small elite.¹⁵⁰ This elite doesn't care about the wellbeing of most of the people.¹⁵¹ It serves the narrow interests of its members.¹⁵² Furthermore, the elite is often acting as a marionette of foreign forces that go against the national interest of the country in which they intervene.¹⁵³

145. Mudde, *supra* note 3, at 544.

146. See Cas Mudde, *Europe's Populist Surge: A Long Time in the Making*, 95 FOREIGN AFFS. 25, 25–26 (2016) (showing how populists weaponize the rhetoric of a corrupt elite).

147. Mudde, *supra* note 3, at 543.

148. Kurt Weyland, *Populism: A Political-Strategic Approach*, in THE OXFORD HANDBOOK OF POPULISM 48, 50 (Cristóbal Rovira Kaltwasser et al. eds., 2017).

149. Paris Aslandis, *Is Populism an Ideology? A Refutation and a New Perspective*, 64 POL. STUDIES 87, 96 (2015).

150. See Bart Bonikowski & Noam Gidron, *The Populist Style in American Politics: Presidential Campaign Discourse, 1952–1996*, 94 SOC. FORCES 1593, 1596 (2016) (detailing the anti-elite, antiestablishment rhetoric of populists).

151. See Kenneth M. Roberts, *Populism, Political Mobilizations, and Crises of Political Representation*, in THE PROMISE AND PERILS OF POPULISM 140, 142 (Carlos de la Torre ed., 2015) (reiterating populists' claim that the elite "neglect, devalue, and exploit the common people").

152. See JAN-WERNER MÜLLER, WHAT IS POPULISM? 18 (2016) (stating that the elite only work for their own interests).

153. See Johannes Plagemann & Sandra Destradi, *The Foreign Policy of Populists*, 15 HORIZONS: J. INT'L RELATIONS & SUSTAINABLE DEV. 110, 115 (2020) (showcasing how the AK Party referred to Türkiye's foreign policy prior to Erdoğan's ascent to power as policy run by a "Westernized elite" that did not work in the interests of the Turkish people).

The greatest adversary of the elite are the common people, known as the “heartland.”¹⁵⁴ These people are reluctant to engage in politics.¹⁵⁵ They do not want to take part in dirty political power games and are only marshalled to support populist leaders out of concern for their nation.¹⁵⁶

The conflict between the elite and the people is the defining core of the populist ideology.¹⁵⁷ Over this core, populists can adopt a variety of views and opinions. For example, populist leaders can be either socialists or capitalists because there is nothing about the populist ideology itself that mandates a particular view about socioeconomic issues.¹⁵⁸ This is why populism is known as a thin-centered ideology.¹⁵⁹

B. Populists Claim That Democracies Are Controlled by an Elite

The populist view that democracies are controlled by a corrupt elite has much in common with the idea that democratic regimes facilitate the capture of government by concentrated interest groups. The elite is a small social group that exerts great influence on the government by working together to serve the group’s interest.¹⁶⁰ The source of power of the elite, like that of a concentrated interest group, is the fact that its adversaries are not resisting it effectively.¹⁶¹ The common people are a classical diffuse interest group. They are uninformed about politics and do not work together to support their own social group.¹⁶² Members either take care of themselves and their families or try to serve the interest of the nation as a whole.

Populists describe various kinds of elites. The elite can be composed of billionaires whose main source of power is their economic means.¹⁶³ The elite can also be a form of “deep state”—a clandestine

154. Mudde, *supra* note 3, at 545 (citing PAUL TAGGART, POPULISM 95 (2000)).

155. *Id.* at 547.

156. *Id.* at 547–48.

157. David Fontana, *Unbundling Populism*, 65 UCLA L. REV. 1482, 1486 (2018).

158. See MÜLLER, *supra* note 152, at 7 (delineating how populists include people as far across the spectrum as capitalist Donald Trump and socialist Bernie Sanders).

159. Mudde, *supra* note 3, at 544.

160. See MÜLLER, *supra* note 152.

161. See Craig Calhoun, *Populist Politics, Communications Media and Large Scale Societal Integration*, 6 SOCIO. THEORY 219, 219 (1988), for the observation that populists view low voter turnout as a reason for believing that elites will always remain in power.

162. See Michael Bailey, *Quiet Influence: The Representation of Diffuse Interests on Trade Policy*, 26 LEGIS. STUD. Q. 45, 47 (2001) (recognizing that diffuse interests do not expend the resources to acquire political knowledge or organize for a cause).

163. See Colin Crouch, *Post-Democracy and Populism*, 90 POL. Q. 124, 131–32 (2019) (discussing examples of leftist populist agenda attacking wealthy elites).

network of civil servants that controls decision-making in the country regardless of election results.¹⁶⁴ Some bureaucratic elites are said to draw their power from networks of diplomats or directly from international organizations like the European Union.¹⁶⁵

Elites can control the media, as well as cultural and academic institutions, and civil society organizations.¹⁶⁶ These types of elites often rely, according to populists, on foreign money and on collaboration with global networks that help them to strengthen their hold on the rest of society. The Jewish-Hungarian philanthropist George Soros who founded and contributed billions of dollars to the Open Society Foundation is often portrayed by populist leaders as the mastermind behind such a global network.¹⁶⁷ Populists depict him as a dark force that sends its tentacles to meddle in national politics all over the world.¹⁶⁸

C. *The Alternative Proposed by Populists*

Populists are not just criticizing governments that are based on rules and pragmatic compromises: they offer an alternative. For populists, the ultimate goal of politics is to rule by the general will of the people.¹⁶⁹ The general will (in French: *volonté générale*) is a concept associated with the philosophy of Jean-Jacques Rousseau.¹⁷⁰ It refers to the will of the people as a whole as distinguished from the sum of

164. See B. Guy Peters & Jon Pierre, *Populism and Public Administration: Confronting the Administrative State*, 51 ADMIN. & SOC'Y 1521, 1526 (2019) (discussing how President Trump's populist agenda was to undercut the "deep state").

165. See Marion Reiser & Jörg Hebenstreit, *Populism Versus Technocracy? Populist Responses to the Technocratic Nature of the EU*, 8 POL. & GOVERNANCE 568, 569 (2020) (conducting a comparative analysis of populist parties and their attitudes towards technocracy found in the EU).

166. Janine A. Clark & Bassel F. Salloukh, *Elite Strategies, Civil Society, and Sectarian Identities in Postwar Lebanon*, 45 INT'L J. MIDDLE E. STUD. 732, 741 (2013) (discussing the importance of sectarian elites controlling the media and how these elites can then impact NGOs).

167. Mike Rudin, *Why Is Billionaire George Soros a Bogyman for the Hard Right?*, BBC NEWS (Sept. 7, 2019), <https://www.bbc.com/news/stories-49584157> [<https://perma.cc/MU2M-6L47>] (detailing how George Soros came to be considered the mastermind of a global conspiracy by the hard right).

168. See Melik Kaylan, *Why Populists Hate George Soros and How It Started*, FORBES (Mar. 1, 2018, 3:18 PM), <https://www.forbes.com/sites/melikkaylan/2018/03/01/why-populists-hate-george-soros-and-how-it-started/> [<https://perma.cc/Z48Q-B4V8>] (articulating how populists view Soros as having a wicked impact on the entire globe).

169. Mudde, *supra* note 3, at 543.

170. Christopher Bertram, *Rousseau's Legacy in Two Conceptions of the General Will: Democratic and Transcendent*, 74 REV. POL. 403, 403 (2012) (maintaining that the idea of a general will is central to Rousseau's work).

all individual wishes and interests.¹⁷¹ The general will should reflect the common good of the entire political community.¹⁷² Populist leaders claim to represent the general will in their actions.¹⁷³

The general will of the people is similar in some respects to the wishes of diffuse interests. The general will cares for the well-being of all of society.¹⁷⁴ In this respect, it is supposed to protect the rights of the widest possible social group within the state.¹⁷⁵ The general will is also committed to the idea that there is one correct view on all political questions.¹⁷⁶ This view is not reached through the political log-rolling techniques that are used by concentrated interest groups to increase their power disproportionality to their size. The general will is reached through selfless observation of what is the common good.¹⁷⁷ Diffuse groups are also not composed of active and aggressive political actors.¹⁷⁸ They act or at least *claim* to act based on what is good for the community.¹⁷⁹

Paul Taggart said that populism requires extraordinary people to lead ordinary people.¹⁸⁰ Populist leaders rely on personal charisma to secure the support and the loyalty of people that are otherwise not interested in politics.¹⁸¹ If the populist promise is fulfilled, their leaders could represent the interests of wide diffuse groups unencumbered by political deals with concentrated interest groups.¹⁸²

171. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT OR, PRINCIPALS OF POLITICAL RIGHT* 125–28 (Henry J. Tozer trans., Charles Scribner's Sons 1895) (1762) (describing the general will).

172. *Id.* at 119.

173. See MUDDÉ & KALTWASSER, *supra* note 4, at 16–19 (arguing that the general will is the third core concept that populist ideology employs).

174. Richard Dagger, *Understanding the General Will*, 34 W. POL. Q. 359, 361–62 (1981) (stating that Rousseau's conception of the general will implies that a law that is in accordance with the general will benefits everyone's well-being).

175. ROUSSEAU, *supra* note 171, at 126 (asserting that the general will produces quality of rights and the notion of justice).

176. Dagger, *supra* note 174, at 361 (explaining that the goal of the general will is to form a guiding principle for the development of policy).

177. *Id.* at 360 (highlighting how the general will rejects selfish interests and is instead impartial in its consideration of everyone's interests).

178. See OLSON, LOGIC, *supra* note 5, at 127–28 (maintaining that larger, diffuse groups are more inactive).

179. See TRUMBULL, *supra* note 9, at 8 (expressing how it is assumed that diffuse groups work towards policies intended to be for the benefit of society and not for material, selfish interests).

180. MUDDÉ & KALTWASSER, *supra* note 4, at 62 (citing PAUL TAGGART, *POPULISM* (2000)).

181. *Id.* at 42 (emphasizing the importance of having a charismatic leader for a populist movement).

182. Paul Blokker, *Populism as a Constitutional Project*, 17 INT'L J. CONST. L. 535, 539 (2019) (describing how populists reject the rule of law as a tool for elite interests and instead seek to

IV. POPULISM AND DEMOCRATIC BACKSLIDING

Democratic backsliding occurs when the defense mechanisms of democracy—separation of powers, an independent judiciary, and the rule of law—are eroded.¹⁸³ Without these defense mechanisms, democracy itself is fragile. The current government may decide to do away with basic human liberties and even to stop conducting free and fair elections, turning a democracy into an autocratic regime.¹⁸⁴

Why is populism associated with democratic backsliding? Populists claim to rule by popular support; why would they destroy the system of democratic elections that put them into power? The answer is that a functioning democracy is built on a series of pragmatic compromises creating checks and balances.¹⁸⁵ Compromises are always anathema to the populist creed.¹⁸⁶ The populist ideology is committed to absolute truths and an inevitable struggle against those who deny them.¹⁸⁷ This ideology cannot recognize that the deliberation among contentious factions in society is not only legitimate but also healthy and beneficial.

Specifically, populist leaders claim to represent the general will of the people.¹⁸⁸ When the legitimacy of the regime derives from direct application of the general will, anything that limits it is presented as illegitimate.¹⁸⁹ Hence, all the constraints on government mentioned above are viewed as a problem by populist leaders.¹⁹⁰ To this, one must add the fact that populist leaders usually base their support on personal charisma of particular leaders.¹⁹¹ Once again, anything that

implement a new governmental order that prioritizes the common good over the interests of a particular group). As such, populist ideology denounces elite rule and even the seemingly neutral rationality of law and alternatively seeks to strengthen popular sovereignty. *Id.*

183. See Tom Ginsburg, *Democratic Backsliding and the Rule of Law*, 44 OHIO N.U. L. REV. 351, 355–57 (2018) (outlining the incremental measures taken that lead to democratic backsliding).

184. See *id.* at 357.

185. See Sun & Johnston, *supra* note 142, at 1 and accompanying text.

186. Mudde, *supra* note 3, at 544 (explaining why populists are unable to compromise).

187. See *id.*

188. See *id.* at 543.

189. See Niels Boel et al., *Populism and the Claim to a Moral Monopoly: An Interview with Jan-Werner Müller*, POLITIK 71, 71–72 (2017) (revealing populists' claim that anything limiting their power is illegitimate).

190. Paul Blokker, *Populist Constitutionalism*, in ROUTLEDGE HANDBOOK OF GLOBAL POPULISM 113, 114 (Carlos de la Torre ed., 2019).

191. Jane Mansbridge & Steven Macedo, *Populism and Democratic Theory*, 15 ANN. REV. L. & SOC. SCI. 59, 65 (2019) (noting that many populist movements rely on a charismatic leader).

hinders these leaders from executing their understanding of the general will is viewed with hostility by populists.¹⁹²

There are many examples of populist governments trying to harm the independence of the judiciary: In Hungary, the ruling populist party Fidesz created a new constitution that lowered the retirement age for judges from 70 to 62, forcing hundreds of judges into early retirement.¹⁹³ This measure was softened only after the Court of Justice of the European Union (CJEU) ruled that it violated European Union law.¹⁹⁴

In Poland, a disciplinary chamber was created by the populist Law and Justice party (PiS) that can punish judges for their opinions, thereby jeopardizing judicial independence.¹⁹⁵ The CJEU ordered Poland to suspend the chamber and when it didn't do so, the court imposed on Poland in October 2021 an unprecedented one-million-euro fine for every day of noncompliance.¹⁹⁶ Only in May 2022, in an attempt to release a much larger sum of thirty-six billion euros in Covid-19 recovery funds, the Polish Parliament made some changes to the disciplinary mechanisms. Many critics view this move as make-believe more than genuine compliance.¹⁹⁷

If democratic backsliding continues over a certain point, a democratic country can stop being defined as a democracy. This is the case with Türkiye, where populist President Recep Tayyip Erdoğan acted to outlaw the third largest political party and led a policy of arresting numerous journalists.¹⁹⁸ The country still allows democratic elections,

192. See Blokker, *supra* note 190, at 185.

193. See Johnny Luk, Opinion, *Could Hungary Break the EU?*, AL JAZEERA (July 15, 2021), <https://www.aljazeera.com/opinions/2021/7/15/could-hungary-break-the-eu> [<https://perma.cc/KM E6-Y6HE>] (recounting Orbán's decision to drop the age of retirement on the first day of 2012).

194. See Case C-286/12, Eur. Comm'n v. Hungary, ECLI:EU:C:2012:687, ¶ 82 (Nov. 6, 2012), (declaring that the scheme to require judges to retire at the age of 62 violates Articles 2 and 6(1) of Council Directive 2000/78/EC and that Hungary must pay costs); *Wrong Direction on Rights: Assessing the Impact of Hungary's Constitution and Laws*, HUM. RTS. WATCH (May 16, 2013), <https://www.hrw.org/report/2013/05/16/wrong-direction-rights/assessing-impact-hungarys-new-constitution-and-laws> [<https://perma.cc/U5SL-MBGF>].

195. Allyson Duncan & John Macy, *The Collapse of Judicial Independence in Poland: A Cautionary Tale*, 104 JUDICATURE 41, 41 (2020).

196. Zosia Wanat, *Poland Hit with Record €1M Daily Fine in EU Rule-of-Law Dispute*, POLITICO (Oct. 27, 2021, 3:16 PM), <https://www.politico.eu/article/poland-record-1-million-euro-daily-fine-eu-rule-of-law-dispute/> [<https://perma.cc/MN8Q-HMTV>].

197. Wojciech Kość, *Poland's Parliament Partially Rolls Back Judicial Changes to Get EU Cash*, POLITICO (May 26, 2022, 11:12 PM), <https://www.politico.eu/article/poland-parliament-partially-rolls-back-judicial-changes-rule-of-law-eu-recovery-funds/> [<https://perma.cc/44R5-XCLX>].

198. *Turkey Detains 16 Kurdish Journalists Over Alleged 'Terrorist' Links*, EURONEWS (June 16, 2022), <https://www.euronews.com/2022/06/16/turkey-detains-16-kurdish-journalists-over-alleged-terrorist-links> [<https://perma.cc/33AW-8SRT>].

but its rule of law status makes it better defined as an autocracy that allows multiparty elections than as a democracy.¹⁹⁹

Despite the anecdotal evidence finding a strong connection between populism and democratic backsliding, not all populists are committed to doing away with democracy.²⁰⁰ Bernie Sanders will probably be defined as a populist because of his railings against a plutocratic elite.²⁰¹ But he is not politically averse to democracy, and there is no particular reason to think that he would destroy democratic safeguards if he reached a position of power.²⁰²

For that reason, some scholars started to warn about one particularly ominous type of populism that poses a much greater threat to democracy than other varieties of populism.²⁰³ This dangerous ideology is known as “authoritarian populism.”²⁰⁴ Its adherents prioritize the collective security of the state over the liberal autonomy of individuals.²⁰⁵ Authoritarian populists promise the public security from a variety of threats and conformity to their traditions.²⁰⁶ They advocate for obedience to the nation’s leader to reach these goals.²⁰⁷

199. See Bertil Emrah Oder, *Turkey’s Democratic Erosion: On Backsliding and the Constitution*, 88 SOC. RSCH.: AN INT’L Q. 473, 474 (2021) (defining Türkiye’s current regime as an electoral autocracy).

200. Daniele Albertazzi & Sean Mueller, *Populism and Liberal Democracy: Populists in Government in Austria, Italy, Poland and Switzerland*, 48 GOV’T & OPPOSITION 343, 345 (2013) (explaining how populists in Europe present platforms proclaiming to fix democracy and not to challenge it).

201. Simon Julian Staufer, *Donald Trump, Bernie Sanders and the Question of Populism*, 26 J. POL. IDEOLOGIES 220, 231–33 (2021) (arguing that Bernie Sanders’s platform contains some of the elements of a populist ideology as he portrays himself as a champion of “the people” against a morally illegitimate body).

202. *Id.* at 233 (stating that democratic politics can still thrive in Bernie Sanders’s vision for society).

203. Faruk Hadžić, *The Global Context of Authoritarian Populism as Democratic Pylon to Fascism, and a Tutorial from the Balkans*, 10 J. SCI. PAPERS “SOC. DEV. & SEC.” 67, 73 (2020) (arguing that authoritarian populism’s strategy of basing their regime on “democratic electoral legitimacy” is a serious threat to democracy; this form of legitimacy prohibits the right of the people to criticize the government).

204. *Id.* at 70 (describing that authoritarian populism has been a fast-growing ideology since the 1980s).

205. See, e.g., Bojan Bugarić, *The Two Faces of Populism: Between Authoritarian and Democratic Populism*, 20 GERMAN L.J. 390, 393 (2019) (articulating how authoritarian populists in Hungary and Poland threatened the civil rights and freedom of the people).

206. *Id.* at 391 (stating that authoritarian populist platforms claim that they will protect the people who are not being represented “by the liberal elites”).

207. PIPPA NORRIS & RONALD INGLEHART, *CULTURAL BACKLASH: TRUMP, BREXIT, AND AUTHORITARIAN POPULISM* 74 (2019) (arguing that these authoritarian values place a strong emphasis on obedience to the leader).

It is easy to see why authoritarian populists are prone to lead to democratic backsliding. They are committed to the idea that their nation and their way of life is under attack.²⁰⁸ To fight off this attack, they are willing to let go of democratic checks and balances and concentrate all the power in the hands of the executive.²⁰⁹ Authoritarian populists are more likely to lead to democratic backsliding than other forms of populism that do not downgrade liberal values.²¹⁰

Nevertheless, empirical evidence suggests that populism is in fact a significant cause of democratic backsliding whether the populist leadership is from the right or from the left.²¹¹ Populists from the right may be more authoritarian because they support what is known as “nativism”—the notion that the country belongs to its traditional inhabitants and not to immigrants or ethnic minorities.²¹² But populists from the right and from the left both tend to limit civil liberties and political rights in the countries that they rule.²¹³

When countries are ruled by populists, they tend to reduce the constraints on the executive.²¹⁴ This is a direct logical result of the distrust of populists of political compromises and their preference for following the general will of the people. This tendency is also supported by ample historical evidence.²¹⁵

208. See, e.g., *id.* at 340 (explaining that radical alt-right groups may claim that their very identity, that is the “white identity,” is being attacked).

209. KYLE & MOUNK, *supra* note 25, at 18–19 (presenting evidence that many populists consolidated power in the executive).

210. Larry Diamond, Stan. Univ., Speech for the FSI Conference on Global Populism: *When Does Populism Become a Threat to Democracy* (Nov. 3, 2017) (describing how authoritarian populism is bad for democracy because it chips away at democratic institutions in ways that non-authoritarian populists do not).

211. See KYLE & MOUNK, *supra* note 25, at 16–22 (explaining their findings that 24 percent of populist leaders cause democratic backsliding as they limit civil liberties, diminish the checks and balances on the executive branch, and allow rampant corruption).

212. See, e.g., NORRIS & INGLEHART, *supra* note 207, at 187 (describing President Trump’s nativist rhetoric against foreigners).

213. See KYLE & MOUNK, *supra* note 25, at 18 (presenting evidence that five of thirteen populist leaders attacked the civil and political freedom of their people; and noting that this decline in civil and political rights is measured by the Freedom House.).

214. *Id.* at 18–19.

215. Christian Houle & Paul D. Kenny, *The Political and Economic Consequences of Populist Rule in Latin America*, 53 GOV’T & OPPOSITION 256, 257–58 (2016) (using data from nineteen Latin American countries from 1982 to 2012 to show that populists removed legal constraints on executives’ powers); Tamás Hoffmann & Fruzsina Gárdos-Orosz, *Populism and Law in Hungary—Introduction to the Special Issue*, 47 REV. OF CENTR. & E. EUR. L. 1, 7 (2022) (explaining how “fundamental elements of democratic control” were removed in Hungary to ensure that the executive could maintain power).

The evidence shows that the mechanisms that are designed to safeguard democracy are destroyed by populists. These are exactly the mechanisms that protect diffuse interests. Doing away with them puts diffuse interests in grave danger.

V. POPULISTS DO NOT SUPPORT DIFFUSE INTERESTS

Part IV argued that populist regimes are prone to democratic backsliding. Part II argued that democratic safeguards—the very ones that are eroded by populist leaders—are necessary to defend diffuse interest groups. Does this mean that populist regimes are necessarily favoring concentrated interests over diffuse interests? Supporters of populism may not be so easily convinced by this line of argument. They would suggest that by representing the general will of the people, populists are following a different route towards the protection of diffuse interest groups.²¹⁶ They would even claim this route is more successful than the one provided by democratic checks and balances.²¹⁷

This part challenges such populist claims on two accounts. First, populist leadership usually does not really represent the general will. It presents itself as the protector of the people and uses the public sentiment against corruption to get into power, but it quickly becomes corrupt itself. Second, the general will is supposed to be an embodiment of the wishes of the great majority of the population. But often it is not. Wide social groups that one can easily define as diffuse interest groups are excluded from the notion of “the people” whose will the populist leadership claims to execute.

A. *Populism and Corruption*

For anyone who sets out to prove populist politicians are more corrupt than other politicians, a major empirical challenge awaits. It is not only true that populists claim that they fight against corrupt elites, there is also hard evidence that populists do indeed get to power in countries that already have high corruption levels.²¹⁸ The evidence

216. See Mudde, *supra* note 3, at 543 (maintaining that populism desires for politics to express the general will of the people).

217. INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, POPULIST GOVERNMENT AND DEMOCRACY: AN IMPACT ASSESSMENT USING THE GLOBAL STATE OF DEMOCRACY INDICES 5 (2020) (noting how populists claim that checks and balances can actually enable the “elite conspiracy”).

218. KIRK A. HAWKINS ET AL., MEASURING POPULIST DISCOURSE: THE GLOBAL POPULISM DATABASE 10 (2019) (presenting evidence of the high correlation between corruption and populism).

shows that corruption is almost a precondition for populist politicians to get elected.²¹⁹ But if that is the case, is any correlation between corruption and populism the result of populist leaders corrupting their country? Or is the causal connection reversed, namely, corruption is what pushes a country to the hands of populist leaders?

Despite the difficulty of proving statistically the impact of populism on corruption, scholars who observed populist leaders have argued that these leaders increase the levels of corruption in their countries instead of diminishing it.²²⁰ Many populist leaders lambasted against corruption and, when elected, proceeded to weaken the courts and use their freedom from judicial oversight to increase corruption significantly. Key examples include Donald Trump in the United States, Rodrigo Duterte in the Philippines, and Jair Bolsonaro in Brazil.²²¹ The general claim that populists escalate corruption is backed by a large variety of sources.²²²

As far as the quantitative evidence goes, it gives significant support to the notion that the populist leaders are corrupt. About 40 percent of populist leaders who went into office between 1990 and 2014 were indicted for corruption charges.²²³ When you consider this number, remember that populists are often dedicated to destroying the independent judiciary, which means that many other populist leaders probably escape corruption charges by corrupting the judges.²²⁴ There is also some evidence from global rankings of corruption that show a deterioration in the ranks of countries that are ruled by populists.²²⁵

219. *See id.*

220. *See, e.g.*, Samuel Issacharoff, *The Corruption of Popular Sovereignty*, 18 INT'L J. CONST. L. 1109, 1112 (2021) (stating that populism leads to corruption); *see also* Jonathan Mendilow, *Introduction to Populism and Corruption*, in POPULISM AND CORRUPTION: THE OTHER SIDE OF THE COIN 1, 16 (Jonathan Mendilow & Éric Phélippeau eds., 2021) (articulating how populism can lead to a legitimization of corruption); Margarita López Maya, *Populism, 21st-Century Socialism and Corruption in Venezuela*, 149 THESIS ELEVEN 67, 67–70 (2018) (presenting the example of Venezuela's populist leader, Hugo Chávez, who implemented corrupt policies).

221. *See* Lica Porcile & Norman Eisen, *The Populist Paradox*, BROOKINGS: ORDER FROM CHAOS (Oct. 28, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/10/28/the-populist-paradox/> [<https://perma.cc/796Z-7LK6>] (stating that these three political leaders are examples of populist leaders who engage in corrupt practices despite anti-corruption safeguards).

222. *See, e.g.*, NIKLAS KOSSOW, TRANSPARENCY INT'L, POPULISM AND CORRUPTION 6–9 (2019), <https://knowledgehub.transparency.org/assets/uploads/helpdesk/populism-and-corruption-2019-final.pdf> [<https://perma.cc/3K4S-E8JJ>] (detailing several examples where corruption increased under populist regimes).

223. *See* KYLE & MOUNK, *supra* note 25, at 19.

224. *See id.* (arguing that 40 percent is likely a conservative estimate).

225. *Id.* at 20.

When called upon to explain the link between populism and corruption, some scholars note that because populists are committed to a politics of us-versus-them, they are able to legitimize clientelism.²²⁶ If your opponents are all crooks, say the populists, then helping out the righteous people on your side is the right thing to do.²²⁷ Delegitimizing the opposition is therefore the best excuse to serving concentrated interests that support you.²²⁸

Other scholars note that populists are not unique in giving back to the interest groups that supported them, but because populists are eroding any institution that can guarantee legality, fairness, and economic stability, their political bribes are much more extreme.²²⁹ They pander to the short-term interests of their constituencies instead of creating a stable and viable distribution of wealth and benefits.²³⁰ Concentrated interests clearly have an advantage over diffuse interests in exerting power when institutions are dysfunctional because they do not need to work in transparent ways that secure public legitimacy.²³¹ They use cronyism and intensive lobbying that relies on their greater ability to work effectively in clandestine ways.²³²

Based on this evidence, the claim that populists are good for diffuse interests despite eroding the institutions that protect them should be rejected. Populist leaders may claim that they represent the general will, but instead of genuinely representing the will of the people, they are overwhelmingly corrupt.²³³ Corruption implies that populists are not following the values they claim to fight for because they are easily captured by concentrated interests that can help the populists bolster their rule.

226. MÜLLER, *supra* note 152, at 29 (noting that populists justify mass clientelism as the people who are truly “the people” have a right to be supported by the state).

227. *See* Mendilow, *supra* note 220, at 16 (explaining that corruption aimed to further the greater good of the party may be accepted when the party is perceived to conflict with the corrupt elite).

228. *See id.*

229. *See* Issacharoff, *supra* note 220, at 1122 (describing how populists do not focus on establishing a strong economic foundation but instead prioritize short-term benefits).

230. *Id.* at 1122–23.

231. *See* TRUMBULL, *supra* note 9, at 2 (emphasizing how concentrated interest groups must obscure their intervention in politics to avoid a legitimacy loss with the public); *see also* OLSON, LOGIC, *supra* note 5, at 2–3 (stating that small interest groups are more effective in obtaining their goals than larger ones).

232. *See* Issacharoff, *supra* note 220, at 1112 (showing how populism leads to cronyism, corruption, and clientelism); OLSON, RISE, *supra* note 5, at 44 (articulating how rent-seeking occurs when a narrow portion of a society is represented).

233. *See* Issacharoff, *supra* note 220, at 1112.

B. *Who Is Excluded from “The People”*

Because of corruption, populists usually renege on their promise to help “the people.”²³⁴ But what if a populist leader is uncommonly honest and keeps this promise to the letter? Would that mean that his policies will benefit diffuse interests? Not necessarily.

To understand why, it is important to clarify what populists mean when they speak about “the people.” Clearly, the people are not every member of society, because they are distinguished from the corrupt elite. But there are many groups that are definitely not elites by any stretch of the imagination that are still excluded from the way populists conceive the people.²³⁵

Racial, religious, and ethnic minorities are often economically destitute and politically weak, but they are excluded from the definition of “the people.”²³⁶ In fact, they are often presented as antagonistic to the people and nourished by the corrupt elite, deliberately to weaken the people and undermine the general will.²³⁷ These minorities are often diffuse groups.²³⁸ They can number millions of people, a significant portion of the population.²³⁹ In some countries, the combination

234. *See id.*

235. *See* MUDDE, *supra* note 4, at 9–14 (describing how “the people” is a construction with a lot of flexibility and gives the example of xenophobic populists in Europe who describe “the people” as excluding immigrants and minorities).

236. Ashutosh Varshney, *Populism and Nationalism: An Overview of Similarities and Differences*, 56 *STUD. COMPAR. INT’L DEV.* 131, 132 (2021) (stating how populism that is associated with right-wing politics often reflects the interests of a racial, ethnic, or religious majority as opposed to that of the minorities).

237. *See id.* at 136 (describing how populists may claim that elites are protecting a minority that can be considered to have external origins so as to discredit both).

238. *See* Ackerman, *supra* note 132, at 729 (describing different kinds of disadvantaged minorities as diffuse, insular, or discrete).

239. *See United Nations Guide for Minorities*, U.N. Hum. Rts. Off. of the High Comm’r, <https://www.ohchr.org/en/minorities/united-nations-guide-minorities> [https://perma.cc/V9A5-D4KK].

of all disadvantaged minorities can even outnumber the rest of the population.²⁴⁰ As diffuse groups, these large segments of society are unable to work in unison and exert political power.²⁴¹ Populists openly and proudly work against them.²⁴²

Foreigners, the unemployed, and prisoners are all sizable groups that lack in political power and coordination, constituting clear examples of diffuse interests.²⁴³ They are usually also excluded from the way populists view the people.²⁴⁴ The true people that constitute the healthy part of society, the so-called “heartland,” do not include these groups and are usually fundamentally averse to them.²⁴⁵

The way populists view the poor, another diffuse interest group, varies from country to country.²⁴⁶ In some countries, the poor are presented as honorable people preyed upon by the corrupt elite.²⁴⁷ In Argentina, for example, the poor supporters of populist leader Juan Perón were called *descamisados* (shirtless), initially as an insult, but the name was reclaimed as a badge of honor by Perón and his wife Eva.²⁴⁸ For the Peróns, the poor may have been at the very core of the heartland, but this sentiment is certainly not shared by all populists. In some countries, such as the United States, right-wing populists may present

240. See, e.g., Mark Memmott, *Minorities Are Now Majority of US Births, Census Says*, NPR (May 17, 2012, 7:55 AM), <https://www.npr.org/sections/thetwo-way/2012/05/17/152896230/minorities-are-now-majority-of-u-s-births-census-says> [<https://perma.cc/7PTY-UT7H>].

241. See Sam Fulwood III, *Why Young, Minority, and Low-Income Citizens Don't Vote*, CTR. AM. PROGRESS (Nov. 6, 2014), <https://www.americanprogress.org/article/why-young-minority-and-low-income-citizens-dont-vote/> [<https://perma.cc/55LV-65DR>] (explaining that disadvantaged groups find it difficult to be informed on politics and to organize together).

242. See Opinion, *Polish Death Camps*, WASH. POST (Jan. 31, 2018, 7:01 PM), https://www.washingtonpost.com/opinions/global-opinions/polish-death-camps/2018/01/31/13c4cdc6-05e4-11e8-8777-2a059f168dd2_story.html [<https://perma.cc/BFJ6-77H8>] (highlighting populist leader Jaroslaw Kaczynski's open xenophobia and crusade against Muslim people in Poland).

243. See Ackerman, *supra* note 132, at 729–30 (providing support for this statement).

244. See Christian Joppke, *Immigration in the Populist Crucible: Comparing Brexit and Trump*, 8 COMPAR. MIGRATION STUD. 1, 10 (2020) (reporting on Donald Trump's negative rhetoric towards Mexican and Muslim immigrants); Hans-Georg Betz, *Exclusionary Populism in Austria, Italy, and Switzerland*, 56 INT'L J. 393, 397–400 (2001) (showcasing three different countries' populist movements and how they all exclude disadvantaged groups and foreigners from representation); Mudde, *supra* note 3, at 557 (explaining how populists like Berlusconi and Haider reject “progressives, criminals, and aliens”).

245. See Mudde, *supra* note 3, at 545 (citing PAUL TAGGART, POPULISM 95 (2004)).

246. See *infra* notes 247–248.

247. See Carlos de la Torre, *Populism in Latin America*, in THE OXFORD HANDBOOK OF POPULISM 195, 197 (Cristóbal Rovira Kaltwasser et al. eds., 2017) (showcasing how Juan and Eva Peron, populist leaders in Buenos Aires, supported the poor).

248. See Gustavo Castagnola, *The Fashion of Politics. Argentina from the 1940s to the 2000s*, 15 AUSTRIAN J. HIST. STUD. 7, 7–9 (2004) (detailing the *descamisado* movement in Argentina).

the poor as people who made bad choices and do not contribute to society.²⁴⁹ When the poor are excluded from the heartland by populist leaders, these leaders are once again hostile to a diffuse interest group.

The way populists view women is also a complicated matter. Left-wing populists often put an emphasis on progressive policies, which could support the liberation of women.²⁵⁰ Women may also be presented as the most genuine and authentic embodiment of the spirit of the people.²⁵¹ But right-wing populists are committed to protecting the traditional way of life, which usually puts women in an inferior position compared to men.²⁵² Numbering about half of the population and sharing a wide variety of other identities, women are the ideal example of a diffuse interest group.²⁵³ Their subjugation by right-wing populists positions populist leaders against what is probably the widest diffuse group in society.

Populists cannot claim to represent all diffuse interests against concentrated interests when they are openly opposed to so many diffuse interest groups or detrimental to their rights. The heartland in whose name populists speak may indeed be a diffuse group as it is fundamentally non-elitist in nature.²⁵⁴ But groups within the heartland that enjoy a mythical image and have come to symbolize the healthiest parts of the heartland may actually be highly organized groups with powerful lobbies that constitute concentrated interest groups. Farmers

249. See Maureen Dowd, Opinion, *Liberties; Trump Shrugged*, N.Y. TIMES (Nov. 28, 1999), <https://www.nytimes.com/1999/11/28/opinion/liberties-trump-shrugged.html> [https://perma.cc/H4R-4GZ8] (quoting Donald Trump describing poor people as morons); Bess Levin, *Mitch McConnell Blames the Poor for Trump's Trillion-Dollar Deficit*, VANITY FAIR (Oct. 16, 2018), <https://www.vanityfair.com/news/2018/10/mitch-mcconnell-blames-the-poor-for-trumps-trillion-dollar-deficit> [https://perma.cc/6FT4-Z94S] (providing evidence of McConnell's negative rhetoric towards the poor).

250. See Anna Gwiazda, *Right-Wing Populism and Feminist Politics: The Case of Law and Justice in Poland*, 42(5) INT'L POL. SCI. REV. 580, 580–81 (2020) (acknowledging that left-wing populists are generally more open to feminism).

251. See Stéphanie Rousseau, *Populism from Above, Populism from Below: Gender Politics Under Alberto Fujimori and Evo Morales*, in GENDER AND POPULISM IN LATIN AMERICA: PASSIONATE POLITICS 140, 154 (Karen Kampwirth ed., 2010) (quoting populist leader of Bolivia, Evo Morales, describing women in a speech as the ultimate symbol of honesty and otherwise praising them).

252. See Cas Mudde & Cristobal Rovira Kaltwasser, *Vox Populi or Vox Masculini? Populism and Gender in Northern Europe and South America*, 49 PATTERNS PREJUDICE 16, 25–26 (2015) (summarizing their findings that, in South America, left-wing populists support women's rights more forcefully than other non-populist parties, whereas in Northern Europe, right-wing populists support women's rights at a lower rate than other non-populist parties).

253. See Ackerman, *supra* note 132, at 742 (defining women as a diffuse group).

254. Mudde, *supra* note 3, at 546–47 (defining the “heartland” and describing how “elites” are rejected by populists).

are an example of such a group in many societies.²⁵⁵ The military and other security services are other examples.²⁵⁶

To conclude, populists do not support many of the primary examples of diffuse interest groups because they exclude them from their definition of “the people.” Additionally, when populists claim to represent “the people,” they sometimes put special emphasis on narrow parts of it that are better defined as concentrated interest groups not only because of their relatively small size, but mainly because of their superior level of organization for collective action.

A final reason to reject the claim that populists support diffuse interests is that populists are often dedicated to destroying civil society institutions and non-governmental organizations (NGOs).²⁵⁷ Diffuse groups rely on these organizations for any successful collective action. Without NGOs, diffuse groups cannot exercise political power and they will be overrun by concentrated interests who work well in unison and have no need for such organizations.

CONCLUSION

This Article is not meant as a diatribe against populism. While most lawyers would view many populist regimes as detrimental to democratic values, populist ideologies also have advantages. Populism can expand public participation in politics, both through increas-

255. See Anke Bosma & Esther Peeren, *#Proudofthefarmer: Authenticity, Populism and Rural Masculinity in the 2019 Dutch Farmers' Protests*, in *POLITICS AND POLICIES OF RURAL AUTHENTICITY* 2, 3 (Pavel Pospěch et al. eds., 2021) (explaining how populists and farmers aligned during the Dutch Farmer Protests); Priyanka Shankar et al., *Exposed: How Big Farm Lobbies Undermine EU's Green Agriculture Plan*, *DEUTSCHE WELLE* (Oct. 19, 2021), <https://www.dw.com/en/exposed-how-big-farm-lobbies-undermine-eus-green-agriculture-plan/a-59546910> [<https://perma.cc/Z5SC-QREY>] (showcasing the power that farm lobbies have).

256. See Moisés Naím, *How to Be a Populist*, *THE ATLANTIC* (Apr. 21, 2017), <https://www.theatlantic.com/international/archive/2017/04/trump-populism-le-pen/523491/> [<https://perma.cc/KE8D-BXEB>] (listing “glorify the military” as one step towards becoming a populist and providing examples of populist leaders like Trump, Orbán, and Putin doing so); Adam Scharpf, *Dangerous Alliances: Populists and the Military*, *GIGA FOCUS LATIN AMERICA* (2020), <https://www.giga-hamburg.de/en/publications/giga-focus/dangerous-alliances-populists-and-the-military> [<https://perma.cc/S63N-3ACX>]; Ben Freeman, *Army of Ukraine Lobbyists Behind Unprecedented Washington Blitz*, *RESPONSIBLE STATECRAFT* (Feb. 11, 2022), <https://responsiblesatecraft.org/2022/02/11/ukrainian-lobbyists-mounted-unprecedented-campaign-on-us-lawmakers-in-2021/> [<https://perma.cc/8WTY-PS8B>] (reporting that more than \$117 million was spent lobbying by the U.S. defense sector in 2021).

257. See Philip Alston, *The Populist Challenge to Human Rights*, 9 *J. HUM. RTS. PRAC.* 1, 5–6 (2017) (outlining how the space for civil society and NGOs in many countries is either nonexistent or precariously close to disappearing as a result of populists).

ing the use of participatory institutions like plebiscites and by increasing voter turnout in elections.²⁵⁸ Populist discourse can make more people feel they are represented and encourage them to be more engaged in politics.²⁵⁹ Finally, populism is often a reaction to real corruption, and although it rarely cures countries from corruption, it can lead to a reshuffling of political power when it is most needed.²⁶⁰

Instead of attempting to weigh the costs and benefits of populism, the Article has a much more specific aim. It aims to show that although populists claim to represent diffuse interests and fight against concentrated interests, the opposite is usually the case.

Populist leaders erode democratic safeguards such as separation of powers, judicial independence, and the rule of law that are all useful in protecting diffuse interests. Without these mechanisms, concentrated interests can easily gain more power at the expense of diffuse interests.

Supporters of populism may object to this conclusion by saying that populists are representing the general will of the people and through this serve diffuse interest groups and empower them. This claim is refuted by showing that populist regimes are usually corrupt and hence serve the concentrated interests that conspire with the government instead of the people. Furthermore, populists do not consider every part of society as deserving to be included in “the people.” Many diffuse interest groups are excluded by populists from the heartland that is considered to be the healthy core of society. Populists are therefore inimical to diffuse groups instead of supporting them.

All this leads to the conclusion that populist leaders often use false propaganda. They are not helping diffuse interests as they claim. They are facilitating the rise to power of concentrated interests and engender the downfall of diffuse interests.

258. See HAWKINS ET AL., *supra* note 218, at 12, for an analysis of how populism can lead to greater political participation.

259. See Bram Spruyt et al., *Who Supports Populism and What Attracts People to It?*, 69 POL. RES. Q. 335, 336 (2016) (outlining how populism can give people hope that they can influence the political system).

260. See HAWKINS ET AL., *supra* note 218, at 10 (proving that corruption may be a precondition to populism’s success).