FACING UP TO INTERNET GIANTS

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Mancur Olson claimed that concentrated interests win against diffuse interests even in advanced democracies. Multinational companies, for example, work well in unison to suit their interests. The rest of the public is not motivated or informed enough to resist them. In contrast, other scholars argued that diffuse interests may be able to fight back, but only when certain conditions prevail. One of the conditions for the success of diffuse interests is the intervention of national and international courts. Courts are able to fix problems affecting diffuse interests. Courts can also indirectly empower diffuse interests by initiating deliberation to inform the public. This paper investigates the jurisprudence of the European Court of Human Rights and the Court of Justice of the European Union. It argues that these international courts help consumers, a diffuse interest group, succeed in their struggle against internet companies, a concentrated interest group.

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I. INTRODUCTION

Hardly a year goes by without an enormous fine against internet giants like Google or Facebook.[1] These penalties are a constant reminder of the dangers associated with cyber-space—a marketplace of ideas where information is increasingly monopolized by a few powerful corporations.

A new citizen army is being marshalled to defend the public against the power of such corporations. It consists of a growing number of civil society activists whose main weapon is filing suits against companies that violate the rights of the internet-using public.[2] What chance do these few high-minded individuals and the nameless billions they represent have against the world's richest and most powerful conglomerates?

Apparently, it depends on who you are asking. For decades, the work of Mancur Olson has been enormously influential in the social sciences.[3] His argument is simple: concentrated interest groups have a greater ability to organize and to prevent free-riding, which is why in any conflict with diffuse interests, concentrated interest groups will have the upper hand.[4] To the extent that Olson is correct in his analysis, it seems that the general public cannot seriously expect to win against a handful of business tycoons that are fighting to increase their power and influence.

But there is a recent and bold challenge to Olson's view of the world. Gunnar Trumbull argued that, at least in advanced democracies, diffuse interests can actually influence policy and triumph against concentrated

1. *See, e.g.*, Nitasha Tiku, *The EU Hits Google With a Third Billion-Dollar Fine. So What?*, THE WIRED (Mar. 28, 2019), https://www.wired.com/story/eu-hits-google-third-billion-dollar-fine-so-what/ (stating that the European Union fined Google in 2019 for billions of dollars for the third time since 2017).

2. S*ee, e.g.*, NOYB (NONE OF YOUR BUSINESS), https://noyb.eu/ (last visited Feb. 22, 2024) (a European-based right to privacy activism group); ELEC. PRIV. INFO. CTR. (EPIC) https://epic.org/ (last visited Feb. 22, 2024) (an American-based right to privacy activism group).

3. *See* Ian McLean, *The Divided Legacy of Mancur Olson*, 30 BRIT. J. POL. SCI. 651, 651 (2000) (noting that academics acknowledged Mancur Olson's influential collective action theory in economics and political science).

4. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 2–3 (1965).

interests.[5] The reason for this more optimistic assessment is that policy is shaped not only by interest groups themselves but also by government officials that form coalitions with these interest groups.[6] The government can either form a coalition with major corporations or with civil society organizations representing the public.[7] If the second type of coalition occurs, diffuse interests can carry the day.[8]

The unique case of internet companies offers a good testing ground for Olson and Trumbull's competing accounts. Besides their sheer power, there seem to be two reasons why internet companies are specifically well positioned to form a coalition with the government at the expense of the public. First, the technology possessed by internet companies and the data they accumulate has many military, propaganda, and economic uses that are especially dear to governments.[9] Even governments in advanced democracies have much to gain from these companies, which also expect to get something in return. Second, because internet companies are truly cosmopolitan, they can easily move their centers of business to other countries, thereby evading unfavorable regulation and depriving the jurisdictions they leave behind of enormous tax revenues.[10] A threat of exit is a potent bargaining chip that can force countries to follow the interests of internet companies as they compete with other countries for their favor.[11]

But Trumbull showed that to sustain a coalition in a democratic country, more is needed than mutual interests.[12] There needs to be a supporting

5. GUNNAR TRUMBULL, STRENGTH IN NUMBERS: THE POLITICAL POWER OF WEAK INTERESTS 1–2, 99–123 (2012).

6. *Id.* at 124–25.

7. *Id.* at 22–26.

8. *Id.* at 28–29.

9. *See, e.g.*, Samuel Gibbs, *Google's AI Is Being Used by US Military Drone Programme*, THE GUARDIAN (Mar.7, 2018), https://www.theguardian.com/technology/2018/mar/07/google-ai-us-department-of-defense-military-drone-project-maven-tensorflow (explaining how the U.S. Department of Defense employs Google's artificial intelligence technologies for its drone projects); Hyunjin Seo & Husain Ebrahim, *Visual Propaganda on Facebook: A Comparative Analysis of Syrian Conflicts*, 9 MEDIA, WAR & CONFLICT 227, 228 (2016) (discussing how the official Facebook pages of the Syrian governmental actors posted propaganda to influence the public regarding the Syrian conflict in 2014).

10. *Global Technology Companies Threaten to Leave Pakistan over New Rules*, AP NEWS (Nov. 20, 2020), https://apnews.com/article/technology-pakistan-media-social-media-asia-2d9071247273bf0f1a9758aaaa1efe85 (stating that internet companies have threatened to pull out of Pakistan in response to regulations censoring digital content).

11. *See* Eyal Benvenisti, *The Margin of Appreciation, Subsidiarity and Global Challenges to Democracy*, 9 J. INT'L DISP. SETTLEMENT 240, 247 (2018) (arguing that states feel compelled to accept the demands of external foreign actors like multinational corporations that engage in "divide and rule").

12. *See* TRUMBULL, *supra* note 5, at 154 (describing the role of policy and how narrow interests need support from more legitimate interest groups to influence public support).

narrative that can legitimize this coalition in the eyes of the public.[13] Trumbull argued that narratives fall into two ideal types: "access" and "protection."[14] A narrative of access focuses on making certain utilities more widely available, while a narrative of protection addresses harm prevention.[15] Internet companies naturally favor the narrative of access, as they enable unprecedented access to information, networks, and opportunities. As such, the narrative that civil society can marshal against them has to be that of protection—protection for consumer privacy and against harmful misinformation.

Here international courts enter the picture. For them, "protection" is the more intuitive narrative. After all, protecting human rights is one of their key goals.[16] This explains why international courts are uniquely positioned to break the coalition between governments and concentrated interests and help sustain a new coalition between governments and diffuse interests.

Thus, international courts are the public's chief ally against the rulers of the internet. It is little wonder then that litigation is becoming such an important strategy for civil society in its attempt to protect the rights of the general public. This Article will investigate the ways in which international courts can change the power balance between concentrated and diffuse interests. By reviewing the intervention of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR) in internet regulation, more can be learned about the conditions that allow for diffuse interests' triumph celebrated by Trumbull.

Part I outlines the perennial struggle between diffuse interests and concentrated interests, along with relevant scholarship. Part II discusses the role of courts, both national and international, in shaping the results of this struggle. Part III describes the conflicting interests between the general public and internet companies. Part IV examines the ways that the CJEU and the ECHR have joined the fight in favor of diffuse interests regarding the regulation of the internet. Part V concludes.

II. DIFFUSE AND CONCENTRATED INTERESTS

All human societies are marked by the same eternal struggle: the

13. *See id.* at 29 ("The success of European agriculture in the early postwar period was in linking the idea of farmer supports to the broad public goal of food abundance.").

14. *See id*. at 126 (comparing the United Kingdom's legitimizing narrative of credit access as a core societal interest versus France's legitimizing narrative of protection from debt as a core societal interest).

15. *Id.* at 27–28.

16. *See* Emilie M. Hafner-Burton, *International Regimes for Human Rights*, 15 ANN. REV. POL. SCI. 265, 266 (2012) (describing the increase in international human rights tribunals and the historical development of a norm to enforce international human rights).

struggle between the few and the many.[17] Centuries before liberal democracies were even imagined, the world was divided between kings, dukes, and emperors.[18] Most of humankind was reduced to a condition of permanent serfdom, devoid of rights and of any form of formal political influence. The few ruled the many beyond any challenge.[19] While the threat of popular rebellion always served as a check on the few aristocrats in power, they held a clear advantage over the many under their rule.[20]

Then came the American Revolution that brought forth a new form of government: government by the people.[21] For the first time in history, it looked as if the many would be able to rule themselves rather than being ruled by a small political elite.[22] But instead of being content with this new condition, the framers of the American Revolution immediately foresaw a new danger—the tyranny of the majority.[23]

The tyranny of the majority occurs when a large segment of the population, united by an ideology, ethnicity, or race, uses its superior power to abuse the rights of minorities.[24] Accordingly, after democracies became widespread, the main danger scholars were addressing was the potential of the majority using its superior numbers to control democratic institutions and take advantage of smaller groups that cannot rally enough people on their side to win elections.[25] Yet focusing on this danger ignores an important fact: exactly because the majority is more numerous, it may be more difficult for it to organize and to fight for its own interests in unison.[26]

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17. *See* Miftahul Huda, *Assessing the Relation Between Majority and Minority Groups: A Critical Study on the Spirit of Domination in a Heterogeneous Society*, 4 AT-TURĀṠ 191, 192 (2017) (stating that the most common struggle in a heterogeneous society is that between the majority and the minority).

18. *See* Shai Dothan, *Democracy, Populism, and Concentrated Interests*, *56* LOY. L.A. L. REV. 459, 465–67 (2023) (explaining the history of power and authority in medieval times).

19. *See* Jerome Blum, *The Rise of Serfdom in Eastern Europe*, 62 AM. HIST. REV. 807, 809 (1957) (explaining that any rights peasants possessed were unfree and granted to them by the lord).

20. *See* Dothan, *supra* note 1818 at 465–67 (stating that during the Middle Ages, power was concentrated among the nobility).

21. *See generally* THOMAS GOEBEL, A GOVERNMENT BY THE PEOPLE: DIRECT DEMOCRACY IN AMERICA, 1890–1940 (2002) (explaining the path to a government by the people in the United States).

22. *See* Jackson Turner Main*, Government by the People: The American Revolution and the Democratization of the Legislators*, 23 WM. & MARY Q. 391, 391 (1966).

23. THE FEDERALIST NO. 10, at 54 (James Madison) (Lawrence Goldman, ed., 2008).

24. *See* JOHN STUART MILL, ON LIBERTY 8–9 (Batoche Books 2001) (1859) (stating that "the tyranny of the majority" is now generally included among the evils against which society is required to be on its guard).

25. *See* Ferdinand A. Hermens, *The "Tyranny of the Majority"*, 25 SOC. RSCH. 37, 37 (1958) (explaining how many scholars have discussed the phenomenon of the tyranny of the majority).

26. *See* Luke Mayville, *Fear of the Few: John Adams and the Power Elite*, 47 POLITY 5, 5 (2015) (explaining how John Adams recognized that rather than a tyranny of the majority, the wealthy minority would hold an overwhelming amount of power in politics).

The scholar who called attention to this oversight was Mancur Olson.[27] The basic idea behind his theory is simple: in a large diffuse group, the benefits of collective action are spread out among so many people that everyone has an incentive to free-ride, and no one is motivated to monitor such free-riding.[28] In contrast, in concentrated interest groups, cooperation yields benefits that are divided among fewer people, creating a stronger incentive to avoid free-riding.[29]

This implies that even in a democratic country, concentrated interest groups will possess greater political power than diffuse interest groups.[30] Small groups will constantly improve their ability to coordinate their actions to extract more resources, so-called "rents," from the country at the expense of diffuse interests.[31] Counter-intuitive yet convincingly argued, Olson's theory became the canonical view on how the conflict between the few and the many is likely to unfold.[32]

Other scholars have elaborated on the reasons why concentrated interests have an edge over diffuse interests.[33] A prominent reason articulated is that concentrated interests can more easily acquire information about the behavior of their representatives and spread it across their group.[34] This, in turn, makes it easier for concentrated interest groups to discipline politicians to do their bidding.[35]

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27. OLSON, *supra* note 4, at 33–34.

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

29. *See id.* at 33–34 ("[I]n some small groups each of the members . . . will find that his personal gain from having the collective good exceeds the total cost of providing some amount of that collective good . . . .").

30. *See id.* at 53 (arguing that smaller groups can make decisions more efficiently than can larger, more diffuse groups).

31. *See* MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES 74 (1982) (listing implications, such as disproportionate organizational power for collective action, reduced efficiency and aggregate income, and slower decision making).

32. *See* Todd Sandler, *Collective Action: Fifty Years Later*, 164 PUB. CHOICE 195, 195 (2015) (describing the influence of Mancur Olson's work on collective action in public choice literature).

33. *See, e.g.*, 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) (showcasing how rich individuals finance politicians' careers to ensure that their interests will be served above those of the general public); LAWRENCE LESSIG, REPUBLIC, LOST: THE CORRUPTION OF EQUALITY AND THE STEPS TO END IT 23 (2015) (arguing that democracy in America is flawed because political donors hold significantly more power than the general public and are able to manipulate politicians into granting them favors).

34. *See* Susanne Lohmann, *An Information Rationale for the Power of Special Interests*, 92 AMER. POL. SCI. REV. 809, 812 (1998) (exemplifying the prevalence of concentrated interests).

35. *See id.* (standing for the same proposition).

In a truly revolutionary book, Trumbull challenged this well-established view.[36] He called attention to the fact that the key problem of collective action is not so much providing people with appropriate incentives to avoid free-riding but rather sustaining a strong enough legitimating narrative to motivate people into action.[37] Most people do not like to perceive themselves as acting only from self-interest and against the rest of society.[38] Concentrated interests are at a disadvantage here because it is very easy for the media to expose their selfish and socially-harmful behavior.[39]

Trumbull's view is more sophisticated than Olson's with respect to the struggle between diffuse and concentrated interests in advanced democracies. To succeed in this struggle, interest groups have to forge coalitions that are sustained by a legitimating narrative.[40] Concentrated interests and diffuse interests can either form a coalition with each other, or one of these groups can form a strong enough legitimating narrative to form a coalition with state policy-makers.[41] Trumbull argued that if diffuse interests can come together and use their superior legitimacy to cement a coalition with the government, they may very well beat concentrated interests.[42]

Trumbull explained that the theory applies only in advanced industrialized societies.[43] The convergence of diffuse interests is conditioned on the presence of a free press and competition between political parties. Thus, countries where these pre-conditions are absent may be captured by concentrated interests.[44] Furthermore, concentrated interests may triumph when they face no competition from diffuse interests on specific issues that have limited significance to most of the public.[45]

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36. *See, e.g.*, TRUMBULL, *supra* note 5.

37. *Id.* at 26.

38. *See id.* at 2 (stating that there is a need to link one's own narrow interest to a related diffuse interest).

39. *See id*. at 18 ("A particular challenge for concentrated groups in achieving their narrow interests (those that impose a public cost) is that the small number of members they represent makes them easy to identify in the media.").

40. *See id.* at 26 (stating that diffuse groups organize around legitimating narratives that define the shared interest of their broader class).

41. *See id.* at 36 (demonstrating the different kinds of coalitions that can be formed to lead to a legitimating narrative).

42. *See id.* at 22–26 (arguing that one of the most important strategies has been to forge coalitions with other groups).

43. *Id.* at 124.

44. *See id.* at 26, 209 (listing the types of democratic mechanisms that require business interests to work with public interests).

45. *See id.* at 210 (arguing that diffuse interest groups may mobilize to defend against political incursions).

III. THE ROLE OF COURTS IN PROTECTING DIFFUSE INTERESTS

There are two conflicting ways to think about the role of courts in a democratic society. The first view contends that courts recognize violations of the rules of the game and rectify them by ordering the political bodies to take certain steps.[46] In contrast, the second view maintains that judges do not fix problems in the democratic process in a conclusive way.[47] Compliance is not always forthcoming after a judgment is issued but the resulting friction between the branches is beneficial nonetheless.[48] Both of these mechanisms can help to protect diffuse interests. The following sections address the two views in turn.

A. Courts as Fixing Democratic Failures

Courts are usually staffed with professional judges that are not directly elected by the public.[49] As such, courts face an inherent legitimacy problem when they try to overrule the policies of the elected branches of government.[50] Nevertheless, John Hart Ely presented a powerful answer to this legitimacy challenge against judicial intervention.[51] Ely argued that some people, foreigners for example, cannot vote at all on the policies that

46. *See* 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' statement that judges should act as umpires).

47. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 206 (1986) (revealing how judges sometimes use "passive devices" to sidestep having to decide a case in a way that would lead to political backlash against the court).

48. *See* EYAL BENVENISTI & GEORGE W. DOWNS, BETWEEN FRAGMENTATION AND DEMOCRACY 165–70 (2017) (implying that tension between government bodies helps spread information to the general public); Patrick A. Luff, *Captured Legislatures and Public-Interested Courts*, 2013 UTAH L. REV. 519, 533–36 (2012) (summarizing ways in which courts act as the one body of government insulated from concentrated interests and able to represent ordinary people); Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation*, 86 COLUM. L. REV. 223, 225 (1986) (making a case for the continuance of judicial review and judicial advocacy by claiming that through these techniques, courts can support diffuse interests over general interests); THE FEDERALIST NO. 51 (James Madison) (supporting the proposition that disputes between political bodies strengthen democracy).

49. *See* Luc B. Tremblay, *General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law*, 23 O.J.L.S. 525, 529 (2003) (defining judges as unelected and not representative of the public).

50. *See* Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1094 (2005) ("It is very troubling in a democracy to have so many important decisions made by unelected judges interpreting a document written more than 200 years ago[.]").

51. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST – A THEORY OF JUDICIAL REVIEW 139 (1980) (arguing that sometimes it is clear to the courts that legislatures have passed laws due to unconstitutional motivations and thus those laws should be invalidated).

affect their lives.[52] There are also people that belong to the so-called "discrete and insular minorities."[53] They are too small to ever form a majority, on the one hand, and yet on the other hand, cannot consolidate a coalition with other social groups because of prevailing prejudice.[54] For them, elections likewise cannot guarantee protection of their rights.[55] They must rely on courts to grant them what Ely called "virtual representation": a protection from discrimination by aligning their rights to those enjoyed by the majority.[56] Groups without political influence will therefore be protected because when the majority fights for its own rights, it essentially fights for the rights of these groups as well.[57]

For Ely, the prominent risk that courts guard against is undue influence of the majority and abuse of minority rights.[58] In other words, the fear is from diffuse interests overpowering concentrated interests. This means that courts should generally show less deference when the interests of minorities are at stake because judicial intervention can fix a prevailing problem in the democratic process.[59]

In response to Ely's theory, Bruce Ackerman called attention to Olson's argument that minorities may be better at preventing free-riding and therefore are in a superior position to fight for their rights than wider social groups.[60] However, this doesn't mean that the idea of virtual representation is wrong. Courts may focus on protecting the rights of those that are vulnerable to democratic failures–such as women or the poor–whether these groups are minorities or some form of diffuse interests.[61]

The theory has also been extended to international courts, with scholars calling for less deference to states in cases where a democratic failure is

52. *Id.* at 151 (citing Justice Blackmun who said that "aliens" are the perfect example of a group in need of judicial intervention because they often cannot vote).

53. *Id.*

54. *See id.* at 100, 151, 153 (explaining that groups like the Amish are discrete and insular minorities because they cannot possibly create a large enough coalition to influence politics).

55. *See id.* at 84 ("But even the technically represented can find themselves functionally powerless and thus in need of a sort of 'virtual representation' by those more powerful than they.").

56. *Id.* at 83.

57. *See id.* ("[B]y constitutionally tying the fate of outsiders to the fate of those possessing political power, the framers insured that their interests would be well looked after . . . .").

58. *See id.* at 86 (supporting judicial intervention when the existing process of representation doesn't protect minority interests).

59. *See* Edward M. Chen, *The Judiciary, Diversity, and Justice For All*, 10 ASIAN L. J. 127, 135 (2003) (claiming that courts are required to protect constitutional rights—particularly the rights of those who have been historically disenfranchised).

60. Bruce A. Ackerman, *Beyond "Carolene Products*,*"* 98 HARV. L. REV. 713, 724–26 (1985).

61. *Id.* at 742.

suspected.[62] There is even some evidence that courts are in fact taking this consideration into account when they decide how much deference, or margin of appreciation, to grant to states.[63]

B. Courts as Initiating Judicial Dialogue

Instead of viewing courts as intervening to provide a final solution to an existing problem, an alternative perspective views them as a part of a system of checks and balances. Under this view, courts do not have the last word on policy questions but rather are engaging in a dialogue with other branches that can eventually lead to better results than if that dialogue did not take place.[64]

From time immemorial, scholars have argued that the best way to protect a regime against tyranny—whether it is a tyranny of the majority or of a powerful elite—is to create a system of checks and balances that would prevent one group from possessing too much power.[65] While this solution is presented with the greatest eloquence in the Federalist Papers,[66] it has a far more ancient intellectual lineage. Already before, Aristotle suggested a "mixed regime" as a form of checks and balances.[67] Furthermore, the benefits of letting one group check the power of another group is noted by

62. Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 849 (1999) (arguing that if the rights of minorities are not protected by national courts, the ECtHR should not grant to their states a Margin of Appreciation); Shai Dothan, *In Defence of Expansive Interpretation in the European Court of Human Rights*, 3 CAMBRIDGE J. INT'L & COMP. L. 508, 520–21 (2014); SHAI DOTHAN, INTERNATIONAL JUDICIAL REVIEW: WHEN SHOULD INTERNATIONAL COURTS INTERVENE?, 28 (2020) [hereinafter DOTHAN, INTERNATIONAL].

63. *See* ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY 29 (2012) (finding that the ECtHR ruled in several cases only after considering "second-order reasons," which are reasons that state parties are better positioned to assess, such as standards of protection necessary for national security); Andreas von Staden, *The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review*, 10 INT'L J. CONST. L. 1023, 1042 (2012) (suggesting that the Margin of Appreciation granted to states depends on how much state authorities are respected); Oddný Mjöll Arnardóttir, *The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation Under Article 14 ECHR*, 14 HUM. RTS. L. REV. 647, 664–65 (2014) (demonstrating how the Margin of Appreciation granted to states depends on the social context).

64. *See* Luff, *supra* note 48 and accompanying text.

65. *See* Torsten Persson, Gérard Roland & Guido Tabellini, *Separation of Powers and Political Accountability*, 112 Q. J. OF ECON. 1163, 1165–66 (1997) (arguing that politicians' abilities to extract rents against the public are diminished by the existence of separation of powers).

66. THE FEDERALIST NO. 51 (James Madison).

67. *See* Carrie-Ann Biondi, *Aristotle on the Mixed Constitution and its Relevance for American Political Thought*, 24 SOC. PHIL. & POL'Y FOUND. 176, 183 (2007) (asserting that books four through six of Politics showcase Aristotle's defense of a mixed constitution).

even earlier sources, including Solon and Thucydides.[68] When Montesquieu developed his idea of the separation of powers, he also did not perceive each branch of government as working in isolation.[69] Rather, confrontation and friction between the branches was key to the success of the regime and the protection of the citizens' freedom.[70] National courts can play a crucial rule in facilitating this friction.

National courts make it difficult for the executive branch to pursue the policies it is interested in.[71] Public officials may be called upon to provide reasons for their actions, to be scrutinized under transparent procedures, and sometimes to give up on their initiatives altogether.[72] But officials may decide to disobey the orders of the judiciary, in which case their actions may be covered by the media and may also prompt further petitions to the court.[73] Scholars have argued that this process of friction between the court and the executive spreads information in society.[74] It makes many more people aware of their rights and the government's infringing actions. Because it is diffuse interests that usually suffer from a lack of information compared to concentrated interests, diffuse interests may be the indirect winners of judicial intervention.[75]

This theory was extended to international courts, with scholars contending that the European Court of Justice (ECJ—as it was then called) cannot sustain full compliance with some of its judgments.[76] Instead, a judgment often leads to a long process of contestation that results in the

68. *See* Ryan Balot, *The "Mixed Regime" in Aristotle's Politics*, *in* ARISTOTLE'S POLITICS: A CRITICAL GUIDE 103 (Thornton Lockwood & Thanassis Samaras eds., 2015) (mentioning that both Thucydides and Solon supported a blend of powers that served the interests of both the poor and the rich).

69. *See* M DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 191–92 (Thomas Nugent, LL.D. trans., J. V. Prichard ed., 1902) (discussing how in Rome, the Senate had some executive power in addition to legislative powers).

70. *See id.* (explaining that the people had the greatest share in the government in such a way that ensured the protection of their rights).

71. *See* Rafael La Porta et al., *Judicial Checks and Balances*, 112 J. POL. ECON. 445, 446 (2004) (outlining the effects of judicial intervention on the executive branch).

72. *See* Matthew C. Stephenson*, Court of Public Opinion: Government Accountability and Judicial Independence*, 20 J. L. ECON. & ORG. 379, 391 (2004) (explaining the government is often constrained to "respect judicial limitations on its policy choice[s]").

73. *See* ALLISON BRYSK & MICHAEL STOHL CONTRACTING HUM. RIGHTS: CRISIS, ACCOUNTABILITY, AND OPPORTUNITY 159–60 (2018) (detailing states' use of noncompliance and general criticism to resist international court decisions).

74. *E.g.*, Eyal Benvenisti, *Judicial Review and Democratic Failures: Minimizing Asymmetric Information through Adjudication*, 32 TEL AVIV U. L. REV. 277 (2010) (Hebrew).

75. *See supra* note 48 and accompanying text.

76. *See* James L. Gibson & Gregory A. Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 AM. J. POL. SCI. 459, 461 (1995) (reporting that the ECJ does not have a strong perception of legitimacy, which can lead to noncompliance).

mobilization of wide social groups both in favor of and against the policy set in the judgment.[77] This mobilization sustains public deliberation and the spreading of information to the general public.[78]

There are other mechanisms through which international courts improve public deliberation, such as the cultivation of a belief in the possibility of achieving justice through legal means and the framing of individual interests in terms of legally recognized rights.[79] But the key reason international courts facilitate public deliberation is that they interact with and sustain a large community of lawyers and other activists.[80] International courts serve as a hub for numerous legal professionals, including judges, legal staff, interns, government lawyers, and other opposition lawyers engaged in litigation. As a result, they provide valuable training opportunities and enrich public discourse.[81] Moreover, international courts create legal materials that are studied by academics who, in turn, improve the quality and quantity of legal information and make them more accessible to the public.[82]

International courts are beneficial for public deliberation not only because of the size of the engaged social networks they help to sustain but also because of the structure of these networks. International courts like the ECHR interact with a large number of non-governmental organization (NGO) activists that are different from each other in size, culture, and purpose.[83] These NGOs are independent, although they sometimes exchange information and help one another.[84] Most NGOs have a clearly defined and specific purpose that they actively seek to serve.[85] These characteristics are conducive to a healthy deliberation that helps to reveal the truth.[86] Indeed,

77. LISA J. CONANT, JUSTICE CONTAINED: LAW AND POLITICS IN THE EUROPEAN UNION 32–38 (2002).

78. Shai Dothan, *International Courts Improve Public Deliberation*, 39 MICH. J. INT'L L. 217, 230 (2018) (discussing how international court decisions can increase public deliberation and mobilize a wide variety of groups).

79. *Id*. at 219–24.

80. *Id.* at 224–28.

81. *Id.* at 236–38.

82. *Id.* at 238–39.

83. Zoe Pearson, *Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT'L L.J. 243, 244 (2006) (describing the wide involvement of NGOs in international courts).

84. Shai Dothan, *A Virtual Wall of Shame: The New Way of Imposing Reputational Sanctions on Defiant States,* 27 DUKE J. COMPAR. & INT'L. L. 141, 178–79 (2017).

85. Pearson, *supra* note 83.

86. Shai Dothan, *Social Networks and the Enforcement of International Law*, *in* EDWARD ELGAR RESEARCH HANDBOOK ON THE SOCIOLOGY OF INTERNATIONAL LAW 333, 342 (Moshe Hirsch & Andrew Lang eds., 2018).

empirical research indicates that the group of NGOs surrounding the ECHR focuses on the most severe human rights violations and the most legally important issues.[87] This suggests that the network formed around the ECHR is good at collectively processing relevant information.[88]

In sum, there are two perspectives on how courts can help diffuse interests. One argues that courts can fix democratic problems by providing equitable decisions in cases where the political process may fail.[89] Such a solution requires compliance with the court to be successful.[90] In contrast, the other view believes that if courts engage in a judicial dialogue with the political branches and serve as a check on government, success is not conditioned on compliance.[91] Noncompliance with the court may still inspire public deliberation that spreads information to wider social groups and gives diffuse interests a fighting chance.[92]

IV. THE CLASH OF INTERESTS BETWEEN THE PUBLIC AND INTERNET COMPANIES

Giant companies like Google, Amazon, Facebook, and Apple (the so-called GAFA) would never be so successful if they were not providing the public with useful services.[93] But in addition to the benefits they offer, these companies can also pose significant risks to the rights and interests of billions of people.[94] However, governments have strong incentives to collaborate with these companies, compromising their commitment to protect their citizens.[95] Activists who wish to sustain a coalition with governments in favor of the general public are fighting an uphill battle. Before delving into the role of international courts in helping these activists, this Part presents the set of interests involved.

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87. Dothan, *supra* note 84, at 153.

88. *Id.* at 159.

89. *See supra* Section II-A.

90. *See* Diana Kapiszewski & Matthew M. Taylor, *Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings,* 38 LAW & SOC. INQUIRY 803, 803 (2013) (stating that court rulings must be complied with to properly constrain public officials).

91. Dothan, *supra* note 78, at 227–28.

92. *Id.*

93. *See Brand Strategy: How GAFA Gains Their Ground*, VIVALDI (Jan. 29, 2018), https://vivaldigroup.com/leadership-lessons-gafa/ (describing how the GAFA companies remain successful).

94. *See* Maurice E. Stucke, *Here Are All the Reasons Why It's a Bad Idea to Let a Few Tech Companies Monopolize Our Data,* HARV. BUS. REV. (Mar. 27, 2018), https://hbr.org/2018/03/here-are-all-the-reasons-its-a-bad-idea-to-let-a-few-tech-companies-monopolize-our-data (describing the major consequences that occur because of GAFA's hold over society).

95. *See id.* (highlighting the ease of government capture by companies that have monopolies over people's data and how this can harm individuals).

A. How the Internet Can Harm Basic Rights

There are many ways in which data that appears on the internet can prove harmful to people. The victims of these transgressions are perhaps the most diffuse group of all—every person who uses the internet, which means almost everyone nowadays.[96] Here are some of the potential dangers of the internet:

1. *Reputational Damage* – It is incredibly easy to harm someone's reputation on the web by simply spreading false rumors. The people who initiate and spread the rumor can usually do so with impunity. And because there is no easy way to contradict this information or verify the truth, this defamation may seriously harm people's careers or personal lives. It may also lead to systematic harassment of victims.[97]

2. *Privacy* – People may want even true information about them to remain hidden from others or revealed only to a select group.[98] The internet, with its ability to instantly disseminate information all over the world, poses a formidable challenge to privacy.[99] This challenge is especially acute since information can remain perpetually at large in cyberspace.[100]

3. *Polarization* – Although the internet theoretically exposes people to information of all kinds, scholars have argued that the way conversations are held over the internet has a tendency to polarize people, leading to dangerous radicalism and the erosion of shared knowledge essential for a healthy society.[101] The wide-ranging social harms of the internet to public deliberation have the potential to adversely affect everyone, whether they decide to share information on the internet or not.[102]

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96. *See* Ani Petrosyan, *Number of internet and social media users worldwide as of October 2023*, STATISTA (Oct. 25, 2023), https://www.statista.com/statistics/617136/digital-population-worldwide/ (showing that there are 5.3 billion internet users worldwide as of October 2023).

97. Saul Levmore & Martha C. Nussbaum, *Introduction*, *in* THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REGULATION 1–3 (Saul Levmore & Martha C. Nussbaum eds., 2011); Michal Lavi, *Content Providers' Secondary Liability: A Social Network Perspective*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 855, 858 (2016).

98. *See* Lior Jacob Strahilevitz, *A Social Network Theory of Privacy*, 72 U. CHI. L. REV. 919, 919 (2005) (discussing that people often share information with a small group of people that they otherwise want to keep hidden from the general public and the related legal implications for privacy).

99. Levmore & Nussbaum, *supra* note 97, at 9–10.

100. *See* Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88, 88 (2012) (noting that all the posts and statuses people post online will remain in the cloud).

101. *See generally* CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 74 (2018) (arguing that these online forums serve as echo chambers that give people confidence in their beliefs; this confidence is what can cause people to become more radical in their ideas).

102. Eun-Ju Lee & Yoon Jae Jang, *What Do Others' Reactions to News on Internet Portal Sites Tell Us? Effects of Presentation Format and Readers' Need for Cognition on Reality Perception*, 37 COMM. RSCH. 825, 843 (2010) (finding that comment boards on the internet may influence how people think about public issues more than media coverage does).

4. *Fake News* – People rely on information they find on the internet to make many important choices, either as consumers, activists, or voters.[103] But the lack of thorough verification and the allure of lucrative advertising revenue enable the spread of false news.[104] This occurrence of deliberately misleading and untrue information on the web is a real problem.[105]

5. *Targeted Manipulation* – Cambridge Analytica's analysis of millions of voters' Facebook profiles to transmit individualized campaign advertisements gave humanity a glimpse of what online data could do.[106] With endless information about every web-user and sophisticated artificial intelligence, internet companies can exploit personal fears and dreams and exert significant influences over the population.[107]

6. *Automated Decision Making* – If important decisions like hiring or granting insurance are made based on an algorithm that is not transparent, individuals affected by unfavorable outcomes have no insight into or recourse to challenge these decisions.[108] This can lead to discrimination and violation of people's rights.[109]

People may give formal consent to sharing information on the internet, but this consent is often based on partial information or lack of a real choice.[110] There are no good alternatives to using some of the major services offered by companies like Google and Facebook,[111] which make people's

103. *See* SUNSTEIN, *supra* note 101, at 78–79 (stating that people frequently turn to online sources to learn about alternative positions).

104. *See* David O. Klein & Joshua R. Wueller, *Fake News: A Legal Perspective*, 20 J. INTERNET L. 1, 6 (2017) (explaining that fake news will be created in the hope that it is widely shared so fake news publications can accrue revenue from banner advertisements).

105. *See id.* at 5–6 (providing troubling examples of the potential outcomes of fake news being disseminated).

106. Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach*, THE GUARDIAN (Mar. 17, 2018), https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election (explaining how tens of millions of Facebook profiles may have been exploited to create more influential messages specifically targeting these individuals).

107. *Id.*

108. *See Complaint Filed: Help! My Recruiter Is an Algorithm!*, NOYB (Dec. 22, 2021), https://noyb.eu/en/complaint-filed-help-my-recruiter-algorithm (describing a complaint filed by the NGO noyb to the National Commission for Data Protection (CNPD) about Amazon recruiting through a non-transparent algorithm, which states that automated recruitment of this kind violated Article 22 of the General Data Protection Regulation (GDPR)).

109. *Id.*

110. *See* Thilla Rajaretnam, *The Right to Consent and Control Personal Information Processing in Cyberspace*, 1 INT'L J. CYBER-SEC. & DIGIT. FORENSICS 232, 234–35 (2012) (describing how e-commerce users have no choice about disclosing personal information when accessing websites that require agreement to their terms).

111. Justus Haucap & Ulrich Heimeshoff, *Google, Facebook, Amazon, eBay: Is the Internet Driving*

agreement to use these companies' services a weak excuse to hold them accountable for the consequences. Besides, people may be harassed on the internet even if they did not willingly share any data. The social harm of fake news or targeted manipulation is borne by anyone regardless of internet use.

For these reasons, there is a real need to resist internet policies that prioritize the profitability of a few companies at the expense of the broader society. Activists are organizing to answer this need and pressuring governments to regulate these companies.[112] But the activists likely face strong resistance from business interests that possess significant leverage on most governments, as the next sub-Part argues.

B. Why Do Governments Want to Curry Favor with Internet Companies?

The first answer to the question in the title is: money, a lot of it. High-tech companies are worth unfathomable sums. Google, for example, was nearing a net worth of 2 trillion USD at the beginning of 2022.[113] And these companies are sitting on a mountain of cash. Apple occasionally has more money than the government of the U.S.[114]

Countries are competing with one another for these companies' investments.[115] They are willing to grant generous concessions in corporate tax because foreign investment means extra income tax they could charge from the employees in these advanced industries.[116] In Israel, for example, employees in high-tech companies are responsible for 25% of the country's income tax.[117]

Competition or Market Monopolization?, 11 INT'L ECON. & ECON. POL'Y 49, 50 (2014) (stating that Facebook and Google dominate their respective markets in such a way that only small organizations can operate on the side).

112. *See* Mark Young et al., *Regulators and Activists Increase Scrutiny on Use of Cookies and Cookie Banner Design*, COVINGTON (Mar. 30, 2022), https://www.insideprivacy.com/data-privacy/regulators-and-activists-increase-scrutiny-on-use-of-cookies-and-cookie-banner-design/ (discussing how activists are scrutinizing the use of cookie banners and issuing complaints against companies for failing to adhere to guidelines).

113. *Alphabet Net Worth 2010-2022: GOOGL*, MACROTRENDS, https://www.macrotrends.net/stocks/charts/GOOGL/alphabet/net-worth (last updated Feb.16, 2024).

114. Bizclik Editor, *Apple Has More Money than U.S. Government*, BUSINESS CHIEF (May 19, 2020), https://businesschief.com/corporate-finance-2/apple-has-more-money-us-government.

115. *See* Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1575 (2000) (discussing how countries are trying to attract portfolio and direct investment, which has led to international tax competition).

116. *See id.* at 1588 (describing the prevalent phenomenon of "production tax havens," where countries tax local companies and their employed residents but grant tax concessions to foreign-owned production facilities).

117. Idan Ben Tovim, *Report: High-Tech Workers Are Responsible for About A Quarter of the Income Tax in Israel,* GEEKTIME (June 16, 2021), https://www.geektime.co.il/israeli-startup-high-tech-2021-report/.

The other thing internet companies have besides money is advanced technology. Governments rely on this technology for national security and other civilian applications, particularly in the post-Covid-19 era.[118] When the Pentagon needed cloud computing services, it looked to companies like Amazon, Microsoft, Google, Oracle, and IBM for solutions.[119] These are not the kind of friends any government can afford to upset without a very good reason.

C. Is a Government-Activist Coalition Possible?

Despite their considerable advantages, their concentrated power, and the diffuse harms they cause, technology companies are facing increasing resistance from many governments.[120] It makes one wonder if Olson was missing something and if Trumbull has a point: perhaps acting against the public interest of almost everybody eventually leads to a backlash.

A prominent example is the continuous criticism and calls for regulation of Facebook in the U.S.[121] The latest chapter in this saga is the testimony of whistleblower Frances Haugen in front of a Senate subcommittee regarding the harm of Facebook's Instagram to children's mental health according to the company's own research.[122] Senators are already suggesting legislation to hold social media platforms liable for such harms.[123]

Before that, in 2020, the CEOs of Amazon, Apple, Facebook, and Google had to answer difficult questions about their business competition in

118. *See* Mark Hallam*, COVID Exposes Digital Deficit in German Government*, DEUTSCHE WELLE (May 14, 2021), https://www.dw.com/en/covid-exposes-digital-deficit-in-german-government/a-57491014 (describing some of the problems Germany is facing with digitalizing its public services due to the needs arising from the Covid-19 pandemic).

119. Daisuke Wakabayashi & Kate Conger, *Google Wants to Work with Pentagon Again, Despite Employee Concerns*, N.Y. TIMES (Nov. 3, 2021), https://www.nytimes.com/2021/11/03/technology/google-pentagon-artificial-intelligence.html.

120. *See* Eric Cortellessa, *Congress Is Close to Cracking Down on Big Tech. But Powerful Obstacles Remain,* TIME (Apr. 20, 2022), https://time.com/6168761/congress-big-tech-monopoly-antitrust/ (examining a bipartisan bill proposed by Congress to curb the power of GAFA).

121. Edward Segal, *Criticism of Facebook Continues on Several Fronts, With More Bad Publicity Expected Monday,* FORBES (Oct. 24, 2021), https://www.forbes.com/sites/edwardsegal/2021/10/24/criticism-of-facebook-continues-on-several-fronts-with-more-bad-publicity-expected-monday/?sh=7705861742cd.

122. Salvador Rodriguez, *Senators Demand Facebook CEO Mark Zuckerberg Answer Questions After Whistleblower's Revelations at Hearing,* CNBC (Oct. 5, 2021), https://www.cnbc.com/2021/10/05/congress-demands-mark-zuckerberg-answer-questions-at-haugen-hearing.html.

123. Matthew Brown & Jessica Guynn, *Facebook Whistleblower Fires Up Congress: Is This Mark Zuckerberg's Moment of Reckoning?*, USA TODAY (Oct. 6, 2021), https://eu.usatoday.com/story/news/politics/2021/10/06/facebook-whistleblower-mark-zuckerberg-congress-legislation-reform/6017553001/.

a congressional antitrust hearing.[124] Prior to that, in 2018, Mark Zuckerberg was questioned in a Senate committee hearing in which he apologized and took personal responsibility for allowing foreign interference in elections through Facebook.[125] The hearing became a media sensation, and its excerpts were watched by millions.[126]

Some government interventions even go from criticizing the behavior of internet companies to changing their behavior. In Australia, the parliament threatened to pass legislation that would force Google and Facebook to pay for news content that they use on their platforms.[127] Facebook reacted by blocking the sharing of news in Australia, leading to a tense standoff.[128] After a week, the Australian government agreed to compromise by making significant concessions in the proposed legislation.[129] This incident demonstrated the superior bargaining power of Facebook, as it could threaten to suspend its services. But the incident also showed that governments can put up a fight and force even the strongest companies to negotiate a settlement.[130] Google also eventually agreed to start paying for the news that it uses instead of acting on its threat to stop its search services in Australia.[131]

Finally, before examining the work international courts are doing in Europe, it is necessary to take note of the initiatives of regulators. The current European Commissioner for Competition, Margrethe Vestager, has led the

124. Brian Fung, *Congress Grilled the CEOs of Amazon, Apple, Facebook and Google. Here Are the Big Takeaways,* CNN BUS. (July 30, 2020), https://edition.cnn.com/2020/07/29/tech/tech-antitrust-hearing-ceos/index.html.

125. *See Facebook, Social Media Privacy, and the Use and Abuse of Data: Hearing Before the Comm. on the Judiciary and the Comm. on Commerce, Science and Transportation*, 115th Cong. 109–10 ("We didn't take a broad enough view of our responsibility and that was a big mistake, and it was my mistake, and I am sorry.").

126. For example, see CNET, *Zuckerberg's Senate Hearing Highlights in 10 Minutes,* YOUTUBE (Apr. 11, 2018), available at https://www.youtube.com/watch?v=EgI_KAkSyCw, which has 4.8M views.

127. Amanda Meade, *Facebook Threatens to Block Australians from Sharing News in Battle Over Landmark Media Law*, THE GUARDIAN (Aug. 31, 2020), https://www.theguardian.com/media/2020/sep/01/facebook-instagram-threatens-block-australians-sharing-news-landmark-accc-media-law.

128. *Facebook Reverses Ban on News Pages in Australia*, BBC (Feb. 23, 2021), https://www.bbc.com/news/world-australia-56165015.

129. *See id.* (stating that Australian authorities will introduce an amendment that may not apply the code to Facebook if it can make a showing of a "significant contribution" to journalism).

130. *See* Todd Spangler, *How Facebook Won in the News-Blackout Standoff with Australia*, VARIETY (Feb. 23, 2021), https://variety.com/2021/digital/news/facebook-won-australia-news-blackout-standoff-1234913086/ (describing how the Australian government put pressure on Facebook through legislation).

131. Todd Spangler, *News Corp Says Google Will Make 'Significant Payments' for News Under Global Three-Year Deal*, VARIETY (Feb. 17, 2021), https://variety.com/2021/digital/news/news-corp-google-significant-payments-1234909335/.

European Commission in a veritable crusade against tech giants.[132] The Commission has fined Google and other companies repeatedly and required them to pay billions of dollars for breaking antitrust rules.[133] There are therefore many other institutions that seek to restrain the multinational companies that control the internet besides international courts, which are the focus of this Article.

V. THE JURISPRUDENCE OF INTERNATIONAL COURTS REGARDING INTERNET REGULATION

Trumbull has shown that the victory of diffuse interests over concentrated interests is possible, but it is certainly not guaranteed. Governments sometimes choose to serve the public interest and defend their citizens from internet titans. But their willingness to do so is limited considering the financial incentives involved. To form a strong bulwark against concentrated interests, diffuse interests need a legitimating narrative that can cement a coalition with the government.[134] Sustaining such a narrative may be a function that international courts are particularly fit to perform.

National courts have traditionally played a key role in applying public values to help resolve conflicts, transforming the discussion about interests into a discussion about principles and rights.[135] In recent years, international courts have also assumed a leading role in fulfilling the same task.[136] The principles articulated by international courts have framed the public debate on salient issues, both within and beyond their formal jurisdictions.[137]

One way for international courts to frame the debate about the rights of internet users is to define and require protection of these rights. The number

132. *See* Adi Robertson, *How the EU Is Fighting Tech Giants with Margrethe Vestager*, THE VERGE (Mar. 17, 2022), https://www.theverge.com/22981261/margrethe-vestager-decoder-antitrust-eu-apple-facebook-google-jedi-blue (delineating how Vestager has been the driving force behind increased tech regulation in the EU).

133. Ian Martin, *Google Loses Court Challenge Over EU $2.8 Billion Antitrust Fine*, FORBES (Nov. 10, 2021), https://www.forbes.com/sites/iainmartin/2021/11/10/google-loses-court-challenge-over-eu-28-billion-antitrust-fine/?sh=35aa1eef7904.

134. *See* TRUMBULL, *supra* note 5, at 26–29 (revealing that diffuse groups organize around legitimating narratives to defeat concentrated groups).

135. *See* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29–30 (1979) ("[T]he *function* of the judge . . . is not to resolve disputes, but to give the proper meaning to our public values."); Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 125 (1982) (stating that American courts "perform their distinctive social function . . . to give concrete meaning and application to the public values embodied in the Constitution").

136. *See* DOTHAN, INTERNATIONAL, *supra* note 62, at 70–72 (showing how the public values espoused by international courts are later reflected in decisions by courts in Australia, the United States, and Israel).

137. *See id.* (standing for the same proposition).

and sophistication of recognized legal rights connected to the internet is growing continuously, partly through resolutions of the United Nations General Assembly and Human Rights Council.[138] International courts have also joined the effort to define the rights that should be protected in cyberspace and impose on national governments the obligation to protect these rights against multinational companies.[139] When the CJEU and the ECHR recognize human rights, they create a legitimating narrative that supports the protection of these rights. Civil society can force governments to break their coalitions with internet companies and build an alternative coalition with the government supported by this legitimating narrative.

Another way international courts can help civil society form a coalition with governments is to change the conditions under which the public debate is conducted. If international courts change the legal competences of the actors involved, they may create fruitful conditions for diffuse interests to win. When international courts rise to protect the freedom of expression online, they enhance the flow of information to diffuse interest groups and improve their chances to succeed in politics.[140]

These two alternatives conform to the two roles of national courts discussed in Part II. Courts either fix a problem directly by defending a right that is not protected by the political process or improve the public discourse about rights in ways that are conducive to their protection. Among international courts, the CJEU and the ECHR are especially good examples of fulfilling these two roles. The unique effectiveness of these courts has been noticed by scholars decades ago.[141] They remain prolific and influential courts that can force states to change their practices by imposing reputational sanctions associated with disobeying their decisions.[142]

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138. *See* Dafna Dror-Shpoliansky & Yuval Shany, *It's the End of the (Offline) World as We Know It: From Human Rights to Digital Human Rights – A Proposed Typology*, 32 EUR. J. INT'L. L. 1249, 1251 (2021) (stating that the United Nations General Assembly and the Human Rights Council have been issued resolutions to protect and promote human rights online).

139. *See* Molly Land*, Toward an International Law of the Internet,* 54 HARV. INT'L L. J. 393, 394 (2013) (analyzing Article 19 of the International Covenant on Civil and Political Rights which begins to define the rights of citizens in connection to the internet).

140. Nicola Lucchi, *Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression*, 19 CARDOZO J. OF INT'L & COMP. L. 645, 669 (2011) (noting how the French *Conseil constitutionnel* has recognized the significance of online networks in order to participate in democratic life).

141. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 276 (1997) (claiming that the CJEU and the ECHR's adjudication have been increasingly as influential as that of national courts).

142. *See generally* SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS (2015) (explaining how reputational sanctions for noncompliance with both national and international courts can motivate states to change their behavior); Shai Dothan*, Judicial*

A. Protecting the Rights of Diffuse Interests

A famous example of the CJEU protecting human rights against internet companies is the case of *Google Spain v. AEPD*.[143] The case concerned Costeja González—a Spaniard who complained to the Spanish Data Protection Agency (AEPD) that a Google search of his name linked to a news article that mentioned him as involved in a real estate auction meant to recover social security debt.[144] Mr. González claimed that the proceedings leading to the auction had been taken care of years ago, and any reference to them was irrelevant.[145] The AEPD decided that there is nothing that can be done about the publication in the newspaper's website, but the agency can require Google to erase that data from its search results, thereby limiting the dissemination of the harmful information.[146]

Google brought the AEPD's decision before the Spanish National High Court.[147] The court noted that its decision depended on the interpretation of Directive 95/46/EC, popularly known as the Data Protection Directive.[148] This directive protected the rights of European citizens regarding the processing of personal data until the General Data Protection Regulation (GDPR) replaced it.[149] The National High Court accordingly referred the case to the CJEU for a preliminary ruling.[150]

In this case, the CJEU recognized the so-called "right to be forgotten."[151] The CJEU decided that the obligations of Google should be determined by weighing the individuals' fundamental rights to private and family life and personal data protection[152] against the legitimate interest of

Tactics in the European Court of Human Rights, 12 CHI. J. INT'L. L. 115 (2011) (describing the reputational sanctions associated with the jurisprudence of the ECHR and the court's strategic use of these reputational sanctions).

143. *See generally* Case C-131/12, Google Spain SL v. AEPD, ECLI:EU:C:2014:317 (13 May 2014) [hereinafter *Google Spain v. AEPD*] (holding that individuals can request search engines to remove links about their personal data).

144. *Id.* ¶14.

145. *Id.* ¶ 15.

146. *Id.* ¶¶ 14–17.

147. *Id.* ¶ 18.

148. *Id.* ¶ 19.

149. Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1, 86 [hereinafter General Data Protection Regulation].

150. *Google Spain v. AEPD, supra* note 143, ¶ 20.

151. *See id.* ¶¶ 20, 99 (addressing the 'right to be forgotten' question by recognizing that individuals have a right to request certain data about them to be removed from searches).

152. *See id.* ¶ 69 (stating that Articles 7 and 8 of the Charter of Fundamental Rights of the European Union protect these rights).

internet users to access that information.[153] Individuals can request the removal of their data from search results when their rights outweigh the economic interests of the internet operator and the interest of the public in accessing this information by searching individuals' names.[154]

The CJEU's judgment provides a protection for a right that may actually be used by a limited number of people with a strong interest in preventing search results from revealing embarrassing details about their past. To comply with this ruling, Google created a form that allowed EU citizens to request the removal of irrelevant, inadequate, or excessive information from its search results.[155] More than 12,000 people applied for erasing such search results on the very first day that this service was offered.[156]

More significantly, this judgment promotes a narrative of protection over a competing narrative of access. The court is willing to protect the fundamental rights of individuals even at the cost of impeding the public access to accurate information.[157] In doing so, the court positions itself on the side of diffuse interests—internet users and regular citizens whose rights are at risk in the internet age. By celebrating the narrative of protection over the narrative of access, the court can assist in breaking the coalition between governments and internet companies. This coalition is legitimated by the undeniable contribution that internet companies make towards access to information, which benefits all of society. The government now can instead form a coalition with civil society actors that are committed to a narrative of protection similar to the one underlying the court's judgment.[158]

Indeed, in the aftermath of *Google Spain v. AEPD*, the European Parliament and the Council were prompted to change the rules to confirm the right to be forgotten recognized in the judgment.[159] On April 27, 2016, the GDPR was passed, replacing Directive 95/46/EC.[160] Article 17 of the GDPR explicitly gives people the right to demand removal of personal data that is

153. *Id.* ¶ 81.

154. *Id.* ¶ 97.

155. *Google Sets Up 'Right to be Forgotten' Form After EU Ruling*, BBC (May 30, 2014), https://www.bbc.com/news/technology-27631001.

156. Rose Powell, *Google Receives 12,000 Requests to be 'Forgotten' on First Day*, SYDNEY MORNING HERALD (June 1, 2014), https://www.smh.com.au/technology/google-receives-12000-requests-to-be-forgotten-on-first-day-20140601-zru3g.html.

157. *See id.* (noting how the decision will require Google to decide between a person's right to be forgotten and a person's access to information).

158. *See* TRUMBULL, *supra* note 5, at 124–25 (stating that one common narrative can facilitate diffuse interest groups to coordinate their activities).

159. *See* General Data Protection Regulation, *supra* note 149, at 31, 43–44 (creating a new regulation that explicitly recognizes the right to be forgotten).

160. *Id.* at 86.

no longer necessary for the purpose for which it was collected.[161]

Another example of an international court ruling in favor of protecting human rights on the internet over unrestricted access to information is the ECHR case of *Delfi AS v. Estonia*.[162] Delfi, the largest internet news portal in Estonia,[163] published an article that led to a series of offensive and threatening comments.[164] The target of these threats requested the removal of the comments about six weeks after they were posted, and the news portal complied within the same day.[165] However, Delfi refused to pay the compensation demanded by the person whose reputation was damaged, leading to a lengthy civil dispute that was conducted along several instances of the Estonian judicial hierarchy.[166] Ultimately, the Estonian Supreme Court found the news portal was liable for damages because it did not remove the offensive comment on its own initiative.[167]

Delfi applied to the ECHR, arguing that holding it responsible for user-generated comments posted on its website violated its right to freedom of expression.[168] A Chamber of the ECHR found there was no violation of the Convention.[169] Delfi then requested a referral to a Grand Chamber, a procedure reserved for cases of special importance.[170] The Grand Chamber of the ECHR determined that in light of the egregious nature of the comments and the insufficient steps taken to promptly remove them, along with the moderate financial sanctions imposed on Delfi by the domestic court (about 320 EUR compensation for non-pecuniary damages),[171] there was no violation of the right to freedom of expression.[172]

Admittedly, this case is not a clear-cut example of concentrated interests facing diffuse interests. Although it is prominent in Estonia, Delfi is not a multinational tech-giant with limitless resources like Google or Facebook. Furthermore, despite promptly removing the offensive comments upon notice, Delfi was still found liable by the domestic court, which raises concerns about the need for continuous monitoring of all comments. This can have a chilling effect on the open public debate that relies on the sharing

161. *Id.* at 43–44.
162. Delfi AS v. Estonia, App. (No. 64569/09) Eur. Ct. H.R. (2015) [hereinafter Delfi AS v. Estonia].
163. *Id.* ¶¶ 11, 83.
164. *Id.* ¶¶ 17–18.
165. *Id.* ¶¶ 18–19.
166. *Id.* ¶ 20.
167. *Id.* ¶ 31.
168. *Id.* ¶ 3.
169. *Id.* ¶ 65.
170. *Id.* ¶¶ 4–5.
171. *Id.* ¶ 160.
172. *Id.* ¶ 162.

of different views.[173] This concern is echoed by Delfi in its argument,[174] as did a strongly worded dissent appended to the ECHR's judgment.[175] Moreover, civil society organizations that intervened in the ECHR case as third parties supported Delfi, stressing the values of access to information and freedom of expression.[176] This demonstrates that civil society is not always committed to a narrative of protection but also values access, a possibility that is acknowledged and documented by Trumbull.[177]

Nevertheless, the legitimating narrative fostered by *Delfi v. Estonia* sympathizes with internet users, thereby protecting diffuse interests. The ECHR decided to value the rights of individuals to preserve their reputation over the general interest of access to information. The court highlighted that Delfi is a large and commercial news portal, not a small forum where regular internet users exchange ideas.[178] The court's decision to impose onerous duties on an internet company to protect the rights of individuals can easily be applied to much bigger organizations. The narrative of access that internet companies champion to justify their coalition with the government was found inferior to the narrative of protection that defends regular citizens whose reputation is at risk. Civil society organizations can pick up the legitimating narrative of protection and use it to cement a coalition with the government that will support diffuse interests.

As a result of these proceedings, Delfi implemented measures to address the issue of offensive comments on its website.[179] It started to separate between registered comments and anonymous comments, with registered comments displayed first to its readers.[180] It also established a team of moderators to review and remove offensive comments on its website, including those that could lead to defamation.[181] Both Delfi and its largest competitor hired five employees who are tasked with erasing offensive comments.[182] Therefore, by imposing non-trivial costs on the companies that control the information on the internet, the ECHR has made it a safer online environment for all users.

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173. *See id.* ¶ 11 (joint concurring opinion of Judges Raimondi, Karakaş, De Gaetano, and Kjølbro) (explaining that a news portal can be held responsible for unlawful comments "if the portal knew, or ought to have known, that such comments would be or had been published on the portal").

174. *Id.* ¶ 73.

175. *See generally id.* (joint dissenting opinion of Judges Sajó and Tsotsoria).

176. *Id.* ¶¶ 94–109.

177. *See* TRUMBULL, *supra* note 5, at 26–29 (contrasting narratives of access and protection).

178. *See* Delfi AS v. Estonia, *supra* note 162, ¶¶ 115–17.

179. *Id.* ¶¶ 32, 83.

180. *Id.* ¶ 161.

181. *Id.* ¶ 32.

182. *Id.* ¶ 83.

B. Transforming the Public Debate to Assist Diffuse Interests

When international courts define and defend human rights, it is easy to see how they lay the foundation for a legitimating narrative protecting the same right. This sub-Part explores two significant changes brought about by international courts: the empowerment of new actors and the improvement of deliberation by protecting the freedom of expression. These changes could potentially help diffuse interests in their struggle against concentrated interests.

1. Spreading Legal Competences

The closest allies that international courts can rely on for strengthening their position vis-à-vis multinational companies are national courts. As Part II argues, national courts are key actors tasked with fixing democratic failures like the disempowerment of diffuse interests.[183] National and international courts complement each other. Scholars have observed that national courts usually have greater independence from pressures of national governments and more public support from domestic audiences compared to international courts.[184] In contrast, international courts have better ability to monitor the compliance of all states with international standards, and they can help national courts coordinate their legal interpretations with one another as well as provide them with greater legitimacy.[185]

This sub-Part demonstrates how the CJEU can better limit concentrated interests and allow diffuse interests a chance to win by empowering national courts. To avoid any misunderstanding, it is important to stress that national courts did not always see eye to eye with the CJEU and that national courts of last resort were anything but happy to have a European body review their decisions.[186] Still, pockets of cooperation between national courts and the CJEU made it possible for this court to increase its influence on public policy in Europe.[187]

The CJEU's efforts to strengthen national courts serve a crucial purpose

183. *See supra* Part II.

184. *See* BENVENISTI & DOWNS, *supra* note 48, at 153.

185. *See id.*

186. *See* KAREN J. ALTER, THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS 98 (2009).

187. *See* J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and its Interlocutors*, 26 COMP. POL. STUD. 510, 518–520 (1994) (examining the relationship between the CJEU and national courts); Eyal Benvenisti & George W. Downs, *The Premises, Assumptions, and Implications of Van Gend en Loos: Viewed from the Perspectives of Democracy and Legitimacy of International Institutions*, 25 EUR. J. INT'L L. 85, 92–93 (2014) (arguing that courts from the Netherlands and Belgium referred more cases than courts from other states to the CJEU, compared to the size of their national populations—this allowed the CJEU to grow stronger and protect the governments of these smaller states from pressures by the bigger European economies).

in the fight against concentrated interests. In addition to the traditional role of national courts in this fight, the CJEU's approach helps spread and localize the power centers that can protect diffuse interests. Opening national courts to litigation with consequences for European law gives diffuse interests much more opportunities to come together, to act, and to fight for their rights.[188] In recent years, more and more cases brought before the CJEU started with a preliminary reference from a national court, giving an opportunity for the entire domestic network of lawyers to be involved in the action.[189]

The first example of the CJEU's drive towards empowering national courts is the case of *Glawischnig-Piesczek v. Facebook.*[190] The case concerned an Austrian politician who was the subject of defamation.[191] A Facebook user shared on their personal user page an article about this politician and commented with defamatory language.[192] Facebook did not erase the comment when asked by the politician.[193]

The politician started legal proceedings against Facebook.[194] After several instances in the Austrian judicial system, the Austrian Supreme Court referred to the CJEU three questions for a preliminary ruling: (1) Does EU law prevent national courts from ordering a host provider like Facebook to remove information that is identical to content previously deemed illegal? (2) Does EU law prevent national courts from ordering a host provider to remove information that is equivalent to content previously declared illegal? (3) Can national courts impose such injunctions worldwide?[195]

The key interpretive issue for the CJEU was whether Article 15(1) of Directive 2000/31/EC,[196] which forbids states from imposing a general obligation of monitoring information on internet providers, prevents national

188. *See* Weiler, *supra* note 187, at 520 (explaining that the involvement of national courts opened up the possibility for many more Europeans to be active in fighting for their rights).

189. *See* Andreas Hofmann, *Is the Commission Levelling the Playing Field? Rights Enforcement in the European Union*, 40 J. EUR. INTEGRATION 737, 739–41 (2018) (discussing the European Commission's role in the CJEU's increasing number of cases); DOTHAN, INTERNATIONAL, *supra* note 62, at 76–77 (noting that the CJEU is increasingly responsible for cases).

190. Glawischnig-Piesczek v. Facebook Ireland Ltd, Case C-18/18, ECLI:EU:C:2019:821 (Oct. 3, 2019).

191. *Id.* ¶ 2.

192. *Id.* ¶ 12.

193. *Id.* ¶ 14.

194. *Id.*

195. *Id.* ¶¶ 20–21.

196. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), Council Directive 2000/31/EC, O.J. (L 178) 1, 13.

courts from issuing such orders.[197] The CJEU ruled that national courts are allowed to impose a monitoring obligation on a provider in a specific case in which a competent national court found this information illegal.[198]

The CJEU decided that to make sure that a host provider would prevent further damage to the reputation of victims, national courts are able to order the provider to remove or block access to information that is identical to information they previously declared illegal.[199] National courts are also able to order the removal of information that conveys the same message and includes the same elements, as long as it does not require the provider to conduct an independent assessment of that information.[200] Finally, national courts are able to make such orders effective all over the world within the confines of international law.[201]

With these three decisions, the CJEU essentially empowers national courts by greatly extending their ability to order Facebook and other internet providers to remove harmful information. This judgment not only recognizes the vulnerability of people's reputation on the internet, but also increases the legal competence of national courts to protect people's rights. The CJEU changed the rules of the game by strengthening its allies in the fight for the rights of internet users. This is a strategic decision that improves the position of diffuse interests.

Another judgment that indirectly increases the chances of the success of diffuse interests by changing the competences of legal actors is *Schrems v. Data Protection Commissioner*.[202] Schrems is an Austrian activist fighting for privacy rights on the internet.[203] As any user of Facebook residing in the European Union, he had to sign a contract with Facebook Ireland that allows it to transfer personal data of users to servers of Facebook located in the U.S.[204] Schrems filed a complaint to the Irish Data Protection Commissioner to prevent Facebook from transferring his data to the U.S. because of the country's surveillance activities, such as the ones exposed by Edward Snowden.[205]

The Irish Commissioner rejected the compliant, claiming that Decision

197. Glawischnig-Piesczek v. Facebook Ireland Ltd., Case C-18/18, ECLI:EU:C:2019:821, ¶ 31 (Oct. 3, 2019).

198. *Id.* ¶¶ 34–35.

199. *Id.* ¶¶ 37, 53.

200. *Id.* ¶¶ 45–46, 53.

201. *Id.* ¶¶ 50, 53.

202. Schrems v. Data Prot. Comm'r, Case C-362/14, ECLI:EU:C:2015:650 (Oct. 6, 2015)

203. *Austrian Activist Launches Consumers' Digital Rights Group*, AP NEWS (Nov. 28, 2017), https://apnews.com/article/18a537b8b234445fa4eab2633a4a516d.

204. Schrems v. Data Prot. Comm'r, Case C-362/14, ¶ 27.

205. *Id.* ¶ 28.

2000/520 of the Commission already resolved that the U.S. gives adequate data protection.[206] Schrems challenged the decision before the Irish High Court,[207] which referred the case to the CJEU for a preliminary ruling on whether the Commissioner is bound by a decision of the Commission or must instead conduct an independent investigation of the matter.[208]

The CJEU decided that when the Commission determines that a state provides adequate protection, this decision is binding on all EU states.[209] States cannot disobey it by trying to determine that the target state does not, in fact, provide proper protection.[210] However, individuals still have the right to file complaints with their national Commissioner, and the Commissioner retains the authority to oversee the transfer of personal data independently.[211]

The Commissioner was not authorized to declare the Commission's decision invalid—only the CJEU can do that,[212] but the Commissioner must examine that decision following the complaint.[213] If the Commissioner rejects the complaint, the individual can challenge this claim before a national court.[214] The national court must then make a preliminary reference to the CJEU to determine the validity of the Commission's decision if they find any ground for invalidity.[215] If, in contrast, the Commissioner were to find that the complaint is well-founded, then they shall bring the case before a national court, which, in turn, must refer the case to the CJEU if it has any doubt about the validity of the Commission's decision.[216]

This presents a *Catch-22*. If a national supervisory authority finds no grounds for the complaint, the complainant will bring the case to the national court that will send it to the CJEU. If the same supervisory authority agrees with the complaint, it has to send the case to the national court, which will refer the case to the CJEU. In any possible situation, cases will reach the national courts. They, as the true allies of the CJEU, will give the CJEU the opportunity to invalidate any decision of the Commission that violates the rights of individuals. Here again, by a seemingly technical decision about competences, the CJEU completely changes the strategic situation and gives itself the capacity to defend diffuse interests against concentrated interests.

206. *Id.* ¶ 29.
207. *Id.* ¶ 30.
208. *Id.* ¶ 36.
209. *Id.* ¶ 51.
210. *Id.* ¶¶ 51–52.
211. *Id.* ¶¶ 53–54, 57.
212. *Id.* ¶ 61.
213. *Id.* ¶¶ 62–63.
214. *Id.* ¶ 64.
215. *Id.*
216. *Id.* ¶ 65.

2. Promoting Deliberation

One of the main advantages of concentrated interests over diffuse interests is greater access to information.[217] In a concentrated interest group, the rewards for monitoring the behavior of politicians are divided among fewer people, giving its members a stronger incentive and a better ability to acquire information about their representatives.[218] Therefore, if international courts improve the flow of information in society, they also improve the chances of diffuse interests winning political debates.

There is a clear tension between this argument and the argument developed in sub-Part IVA. Sub-Part IVA argued that international courts can help diffuse interests against internet companies by defending privacy, thereby legitimizing a narrative of protection against the narrative of access to information. But this tension is not a contradiction. By setting nuanced and balanced rules, international courts can sometimes lend their authority to strengthening a narrative of protection and at other times do their best to ensure the free access to information that can improve the strategic position of diffuse interests when it comes to political debates against concentrated interests.

The ECHR judgment in the case of *Magyar Jeti ZRT v. Hungary*[219] demonstrates how this delicate balance can be reached. The case concerned a Hungarian news portal that published an article about drunk football fans who shouted racist profanities and threw beer bottles at Roma children.[220] The article contained a hyperlink to a YouTube video where a leader of the Roma minority, accompanied by one of the children, can be heard saying that the right-wing political party Jobbik is responsible for attacking the school.[221] Jobbik sued the news portal for defamation, arguing that the party's reputation was harmed by using a hyperlink to a YouTube video that described the football hooligans as members of their party.[222] The Hungarian courts found the news portal liable for defamation, and the news portal applied to the ECHR, claiming that this finding violates its freedom of expression.[223]

The ECHR acknowledged the importance of hyperlinks in providing

217. *See* Lohmann, *supra* note 34 and accompanying text.

218. *See id.* (highlighting informational advantages of concentrated interest groups).

219. Magyar Jeti ZRT v. Hungary, No. 11257/16 (Apr. 12, 2018), https://hudoc.echr.coe.int/fre?i=001-187930.

220. *Id.* ¶ 9.

221. *Id.* ¶¶ 6–9.

222. *Id.* ¶ 12.

223. *Id.* ¶ 3.

access to information on the internet.[224] It also highlighted the lack of control users have over the content of the websites they link to, which might be changed after the referral.[225] As such, the ECHR concluded that not every use of hyperlinks constitutes dissemination of information;[226] rather, a nuanced assessment is required in every case.[227] Factors such as the level of endorsement of the content referred to and knowledge about its defamatory nature should be considered.[228] In this particular case, the ECHR found that the news portal could not have known in advance that the accusations in the YouTube video would be unlawful because public criticism is permissible in relation to political parties.[229] Consequently, the court found that the Hungarian courts violated the right to freedom of expression by holding the news portal liable for defamation.[230]

Through this case, the ECHR is calling for a proper balance between the freedom of expression and the right of a political party to reputation. Such a balance is required to avoid a chilling effect on speech on the internet.[231] This sophisticated solution not only tries to protect all the associated rights of ordinary people. It also keeps all the discretion on how to resolve future cases in the hands of the ECHR, which gives the court the ability to continue to promote deliberation in ways that would defend diffuse interests.

VI. CONCLUSION

The battle between diffuse interests and concentrated interests is a recurring theme throughout human history. In a modern democratic society, scholars debate which group will prevail. Mancur Olson argued that concentrated interests, which can effectively work as a group and prevent free riding, may have the upper hand. On the other hand, Gunnar Trumbull suggested that diffuse interests, by sustaining a coalition with the government based on a legitimating narrative, can gain an advantage.

International courts play a crucial role in supporting diffuse interests, potentially giving them an edge over concentrated interests. To demonstrate

224. *See id.* ¶ 73 (noting that the "purpose of hyperlinks is, by directing to other pages and web resources, to allow Internet users to navigate to and from material in a network characterised by the availability of an immense amount of information").

225. *Id.* ¶ 75.

226. *Id.* ¶ 76.

227. *Id.*

228. *Id.* ¶¶ 76–77; *id.* ¶ 20 (Pinto de Albuquerque, J., concurring) (further elaborating these principles).

229. *Id.* ¶¶ 81–82.

230. *Id.* ¶¶ 84–85.

231. *Id.* ¶ 83.

how such an intervention would play out, this Article examines internet regulation and how it was shaped by judgments of the CJEU and the ECHR. Multinational companies are a good example of concentrated interests, while internet users represent diffuse interests.

The analysis of judgments reveals that the CJEU and the ECHR are instrumental in defining the rights of internet users. This could help diffuse interests by providing them with a strong legitimating narrative. Furthermore, by giving national courts the legal competence to intervene in favor of diffuse interests, these international courts indirectly support diffuse interests. Additionally, the international courts' efforts to uphold freedom of expression and access to information contribute to an informed public, benefiting diffuse interests in the process.