THE REGULATION OF FOREIGN FUNDING OF
NONPROFITS IN A DEMOCRACY

Nick Robinson*

Governments around the world have increasingly restricted nonprofits’ access to foreign funding. These restrictions are often justified as needed to protect a country from undue foreign influence. Yet, they have also been used by governments to control or stigmatize critics and have created significant new constraints on global activism on pressing issues from fighting climate change to promoting human rights.

To better understand this shift, this article analyzes restrictions on foreign funding to nonprofits in the world’s three largest democracies or democratic blocs: the European Union, India, and the United States. It finds these democracies have taken markedly different approaches in their regulation of cross-border funding of nonprofits, which it labels in turn: “rights-based regulatory liberalism”, “government controlled nonprofit nationalism”, and “ambiguous regulatory heavy-handedness.”

Drawing on these comparative experiences, the article explores justifications for restricting cross-border funding to nonprofits as well as justifications for more open regulation. Significantly, perhaps the strongest argument both for and against limitations on foreign funding is promoting a country’s democratic self-governance. It argues that this apparent contradiction is the result not only of competing considerations about what improves self-governance, but also competing understandings of the proper relationship between government and civil society in a democracy.

To help provide a roadmap forward for policymakers, the article lays out a typology of factors by which governments have historically regulated the foreign funding of nonprofits. It ends by arguing for a democracy centered approach that rests on four key principles for limiting and shaping any such regulation. While there are genuine reasons to regulate cross-border funding of nonprofits, the specter of foreign influence often leads both lawmakers and judges to underappreciate the dangers of such regulation to democratic self-governance. The potential benefits of the approach outlined in this article have implications not just for the regulation of the cross-border funding of nonprofits, but also the broader regulation of foreign influence in a democracy.

* Senior Legal Advisor at the International Center for Not-for-Profit Law. I would like to thank Chinmayi Arun, Jack Balkin, Jane Chong, Rohit De, Rob Faris, Ben Freeman Tarunabh Khaitan, Paul Linden- Retek, Adam Lioz, Emma Llanos, Derek Mitchell, Doug Rutzen, Jason Pielemeier, Robert Post, Aziz Rana, and Yvonne Tew for their comments on and conversations about this article. All errors and opinions are my own.
INTRODUCTION

Over the last two decades, governments around the world have increasingly imposed new restrictions on foreign funding to nonprofits.¹ This is part of a larger shift in these organizations’ changing global fortunes. After the end of the Cold War, many commentators celebrated the rise of nonprofits, or non-governmental organizations (NGOs), as “one of the most

¹ See, e.g., Patricia Bromley et al., Contentions over World Culture: The Rise of Legal Restrictions on Foreign Funding to NGOs, 1994-2015, 99(1) SOCIAL FORCES 281 (2020) (Documenting how over 60 countries enacted measures to restrict foreign funding to nonprofits between 1994 and 2015).
spectacular developments of the twentieth century” with some acrimony that they now even acted as a type of far-reaching “global conscience.” Major global NGOs, as well as many national and local nonprofits, came to prominence advocating for issues such as protecting human rights, combatting corruption, or fighting for environmental protection. More recently though the world has witnessed governments undertake the “biggest crackdown [on nonprofits] in a generation” and the “viral-like spread of new laws” restricting their operations. Frequently these laws have limited NGOs access to foreign funding, significantly curtailing the ability of civil society to effectively operate and advocate across borders.

Much of this shift in the treatment of nonprofits tracks changing geopolitical winds. The shifting of power away from the West, the lingering repercussions of the global war on terror, and a well-documented decline in democracy worldwide, has helped to undermine acceptance of international norms around an open regulatory space for nonprofits and activists. After

---

5 THOMAS CAROTHERS & SASKIA BRECHENMACHER, CLOSING SPACE: DEMOCRACY AND HUMAN RIGHTS SUPPORT UNDER FIRE 1 (2014), https://carnegieendowment.org/files/closing_space.pdf; See also Lloyd Hitoshi Mayer, Globalization Without a Safety Net: The Challenge of Protecting Cross-Border Funding of NGOs, 102 MINN. L. REV. 1205 (2018) (describing the rise of these foreign funding restrictions in at least fifty countries and detailing both their different mechanisms and impact. Id. at 1211-1221).
6 Id.; Sherwood, supra note 4.
7 Id. (documenting three causes for the rise in nonprofit restrictions: (1) shifting power away from the West; (2) recognized power of civil society by authoritarian governments; and (3) anti-terrorism measures); LARRY DIAMOND, ILL WINDS: SAVING DEMOCRACY FROM RUSSIAN RAGE, CHINESE AMBITION, AND AMERICAN COMPLACENCY 1-14 (2019) (describing a global “crisis” for democracy brought about in part by the rise or reassertion of China and Russia).
8 CAROTHERS & BRECHENMACHER, supra note 5 at 29-30 (detailing how new domestic and international restrictions on citizens’ rights pushed by the United States in the global war on terror created copycat actions by other governments).
9 See, e.g., V-DEM INSTITUTE, DEMOCRACY REPORT 2023 6 (2023) https://www.v-dem.net/documents/29/V-dem_democracyreport2023_lowres.pdf (finding that the level of democracy experienced by the average global citizen in 2022 had dropped to 1986 levels).
10 Bromley et al, supra note 1 (describing restrictions on nonprofits as a backlash against liberal international order).
the Color Revolutions and Arab Spring, countries like Russia, China, and Egypt raced to put in place new restrictions, including on foreign funding of nonprofits, in an attempt to control democracy movements that had spurred protests and toppled governments. These new regulations allowed governments to surveil, harass, stigmatize, and even shutdown nonprofits that receive foreign funding, and often tie up these groups in a maze of rules and reporting requirements.

Yet this trend towards limiting nonprofits’ access to cross-border funding has been propelled not just by authoritarian governments, but also many democracies. Proponents of these regulations in democracies often argue they are a needed line of defense against the dangerous meddling of foreign powers, including authoritarian governments in countries like China and Russia. Meanwhile, opponents claim these laws are unnecessary, will inevitably be used to target voices that are unpopular with the government, and are just another sign of democratic erosion.

Even a cursory examination of these restrictions on foreign funding in democracies show that their motivations differ considerably, as do their impact. In 2016, Israel enacted a nonprofit transparency law for foreign government funding of nonprofits that was criticized as being designed to target European Union funding of Palestinian rights groups. Meanwhile, in the European Union, Hungary adopted a NGO transparency law in 2017 that seemed intended to stigmatize human rights and anti-corruption nonprofits that received money from European and U.S. funders (it was repealed after a year).
Judgment by the Court of Justice of the European Union (CJEU)).

Australia and Taiwan enacted laws in 2018 and 2019 respectively designed to combat Chinese political influence, but that could also apply to foreign funding of nonprofits, albeit in more narrow circumstances. In 2010, India significantly revised its Foreign Contributions Regulation Act (FCRA), and strengthened it further in 2020. The Indian government has used the FCRA to investigate and shut down prominent human rights and environmental nonprofits that are critical of government policy that received foreign funding, including from U.S. foundations. Amidst concerns about Chinese influence and the lobbying of lawmakers by hostile foreign governments, the United Kingdom enacted a new foreign influence registry in 2023 that can capture nonprofits that receive foreign funding in a more narrow set of covered political activities. The European Union and Canada are also actively considering foreign influence laws that could similarly impact NGOs that receive foreign funding.

---


20 See AMNESTY INTERNATIONAL, URGENT ACTION: NGOs IN INDIA AT RISK OF GOVERNMENT SHUTDOWN (Nov. 15, 2018), https://www.amnesty.org/download/Documents/ASA2093882018ENGLISH.pdf (describing nonprofits facing targeting by the government under the FCRA. For example, the Act has been used to target the national affiliates of Amnesty International and Greenpeace, as well as prominent rights organizations like Lawyers Collective.)


22 See Nicholas Vinocur, EU ‘foreign agents’ law spooks NGOs, POLITICO (March 13,
The United States has played a particularly prominent role in this larger global story by, largely inadvertently, providing justification for many of these foreign funding restrictions in other countries. The U.S. is well known for having a vibrant civil society and in practice has historically allowed for generally open cross-border funding of NGOs. However, the U.S. also has the distinction of enacting what might be the world’s first law restricting foreign funding of nonprofits: the Foreign Agents Registration Act (FARA). FARA is a 1938 transparency and labeling law enacted by Congress in the runup to World War II to combat Nazi propaganda. Both authoritarian countries, like Russia, and democracies, like Australia, have repeatedly pointed to FARA as justification and inspiration for their own laws targeting foreign influence. In a particularly telling example, in 2020, President Daniel Ortega’s government in Nicaragua enacted a law that was verbatim copied in significant part from FARA, which the government then used to crack down on human rights nonprofits that received foreign funding by threatening to require these groups to register as “foreign agents”. In 2023, Georgia’s Parliament passed a foreign influence bill that lawmakers claimed was modeled on FARA. In response, thousands of pro-democracy
protesters braved water cannons to take to the streets of Tbilisi to eventually force their Parliament to withdraw the bill as they feared it would be used to attack civil society and draw the country closer to Russia.28

Despite its recent global fame, for much of its history FARA led an obscure life. After the Justice Department used the Act to shut down fascist publication outlets during World War II, enforcement fell into relative hibernation by the second half of the 1950s.29 FARA though once again took center stage amidst the federal government’s efforts to combat foreign influence after attempts by Russia to sway the 2016 U.S. Presidential election.30 As a result, the Justice Department brought high-profile FARA enforcement actions against alleged lobbyists for foreign governments, including top officials and confidents of President Trump, as well as against Chinese and Russian government owned broadcasters.31

When the government has more vigorously enforced FARA it has frequently captured nonprofits, underscoring concerns about not only the Act’s overbreadth, but its potential for politicization. Perhaps the most famous FARA prosecution was during the height of the McCarthy era in the early 1950s when the Justice Department used FARA to prosecute officers of an anti-war nonprofit that included the civil rights icon W.E.B. Du Bois.32

More recently, in 2018, Congressional Republicans launched an investigation into whether four prominent U.S. environmental groups violated FARA,33 in 2020 the Justice Department forced the National Wildlife Federation to register for receiving Norwegian government funding,34 and in 2023

ASSOCIATED PRESS (March 10, 2023), https://apnews.com/article/georgia-foreign-agents-law-protests-parliament-1ab288cb3a3ccf330830ce7cae5603e2 (recounting introduction of Georgia’s foreign agent law and public protests in response).

28 Id.
29 Robinson, supra note 24 at 1095-1096 (describing historical evolution of enforcement of FARA).
30 Id. at 1078-1080 (detailing recent enforcement of FARA after the 2016 Presidential election).
31 Id.
33 Robinson, supra note 24 at 1121-1124.

Whether it is FARA in the US or other foreign influence laws in countries like Australia, the United Kingdom, Israel, Taiwan, or India, the global spread and reach of foreign funding restrictions on nonprofits has not been limited to just countries with authoritarian governments. Given this more complicated global landscape, this article explores how democracies have and should approach regulating the foreign funding of nonprofits.

The article begins in Part I by showing how democracies have adopted strikingly different strategies. To illustrate this, it documents the distinct approaches to regulating foreign funding of NGOs of the world’s three largest democracies or democratic blocs: the European Union, India, and the United States. It labels these approaches: “rights based regulatory liberalism” (EU), “government controlled nonprofit nationalism” (India), and “ambiguous regulatory heavy-handedness” (United States). It describes how these regulatory regimes have frequently negatively impacted civil society—including by “weaponizing” transparency—and compares differing judicial responses.\footnote{That said, there has been limited writing on the topic from some sources. See, e.g., Rutzen, supra note 11 at 31-33 (listing common justifications for restricting foreign funding to nonprofits); GENERAL PRINCIPLES AND GUIDELINES ON ENSURING THE RIGHT TO CIVIL SOCIETY ORGANIZATIONS TO HAVE ACCESS TO RESOURCES – REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION, A/HRC/53/38/Add.4 June 23, 2023, at para. 11. [hereinafter “UNSR 2023 General Principles”]. (describing set of general principles and guidelines for regulating cross-border funding based on state practice and interpretation of international law Id. at 17).}

These regulatory approaches are not static, but rather have shifted, and are likely to shift further in response to the perceived danger, on the one hand of foreign influence and, on the other, of government control of civil society.

Parts II and III consider a surprisingly under-examined topic in the literature, which is justifications for and against restrictions on foreign funding of nonprofits.\footnote{Robinson, supra note 24 at 1090-1092 (describing how different governments around the world have weaponized foreign funding disclosure requirements against nonprofits).}

While there are a number of competing justifications, at the heart of this debate is an argument about how to best further self-governance in a democracy. While recognizing there can be genuine concerns about foreign influence, the article claims that the specter of the “foreign” leads policymakers and judges to frequently underappreciate these foreign...
funding laws negative impact on the health of a democracy. This finding puts into question arguments that courts should be deferential to the government’s regulation of foreign funding of nonprofits because such regulation concerns foreign affairs or national security. Rather, this conclusion points to the need for heightened judicial scrutiny.

To help provide a potential alternative path forward, Part IV lays out a typology of factors that countries have historically used to regulate the foreign funding of nonprofits. After surveying these regulatory strategies, Part V develops and argues for a democracy centered approach for shaping and limiting the regulation of foreign funding of NGOs. This approach entails four key principles: (1) rights focused; (2) differentiated activities; (3) nondifferentiated actors; and (4) problem oriented. Such an approach not only prioritizes rights scrutiny of these laws, but highlights the need to carefully differentiate between regulating activities aimed at influencing democratic decision-making, like lobbying or electioneering, versus the broader public sphere. Further, this approach is problem oriented. Instead of unduly focusing on just foreign actors it centers on addressing underlying disruptive forces within a democracy like the disproportionate voice of those with resources—such as corporations or the wealthy—in decision-making processes, whether or not those voices are foreign or domestic.

This democracy centered approach can be useful not just for the regulation of cross-border funding of nonprofits, but for broader debates about how to regulate foreign influence. Indeed, it is important to emphasize at the outset that many of the laws that regulate foreign funding of nonprofits, like FARA in the U.S., impact far more actors than just NGOs, even if NGOs are frequently disproportionatelly affected. Whether it is addressing concerns over foreign disinformation, lobbying, or electioneering, the approach outlined in this article can provide lessons for how to best target regulation to address genuine threats to democracy, while protecting beneficial cross-border exchange and the broader public sphere.

Finally, a note on terminology. This article defines democracy broadly. Hungary (as part of the EU), India, and the United States—all of which are used as case studies in this article—have recently had their democratic credentials questioned. Hungary and India, in particular, are now viewed by many analysts as no longer full democracies. This article makes no contributions to this categorization debate, but rather recognizes both that

---

38 22 U.S.C. § 611(c) (requiring any actor, not just nonprofits, to register if engaged in covered activity).
39 For example, in 2023 V-Dem Institute ranked both India and Hungary as electoral autocracies. V-DEM INSTITUTE, supra note 9 at 39. Under the index, Hungary lost its status as a liberal democracy in 2018 and India in 2019. Id. at 38.
40 Id.
Regulation of Foreign Funding of Nonprofits

democracy can exist on a spectrum and that the space for civil society to operate freely in a country is closely connected to the health of a democracy.41 Illiberal practices that unduly constrain civil society, like many restrictions on foreign funding to nonprofits, have a detrimental impact on democracy no matter what type of government regime enacts them.

I. REGULATING CROSS BORDER FUNDING OF NONPROFITS

This Part examines how three of the world’s largest democracies, or democratic blocs – the European Union, India, and the United States – have regulated foreign funding of nonprofits. These case studies describe three quite distinct approaches to regulating foreign funding of nonprofits, which are then used in the Article to help create a comparative lens through which to understand the stakes of such regulation and offer an alternative approach.

A. The European Union and Rights Based Regulatory Liberalism

This first case study examines the European Union’s approach to foreign funding of nonprofits, and more specifically its treatment of Hungary’s NGO Transparency Law – the Act on Transparency of Organisations Supported from Abroad.42 In some ways, Hungary’s NGO Transparency Law may seem like an odd place to begin. Hungary is a relatively small country and the law was only in force from 2017 until its repeal in 2021 after the Court of Justice of the European Union found it violated Hungary’s legal commitments in joining the EU.43 The CJEU judgment though created a set of limitations on what types of restrictions governments within the EU, and the EU itself, can place on foreign funding of nonprofits going forward. As such, the Hungarian example is critical to understanding the EU’s broader approach to restrictions of foreign funding of nonprofits.

The government of Hungarian Prime Minister Victor Orban’s has been in power since 2010. It has been criticized by European Union bodies

41 See Tarunabh Khaitan, Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India, 14(1) LAW & ETHICS OF HUMAN RIGHTS 49 (2020) (describing how one the three primary ways liberal democratic constitutions create accountability against the executive is by diagonal, or discursive, accountability through media, the academy, and civil society. Id. at 51).
43 See Amnesty Hungary Public Statement, supra note 17 (describing the repeal of the law).
for being an “electoral autocracy”\textsuperscript{44} and for engaging in a “virulent campaign” against foreign-funded civil society.\textsuperscript{45} In particular, the government has targeted human rights and educational organizations funded by the Hungarian-born U.S. financier George Soros, as well as groups funded from elsewhere in Europe.\textsuperscript{46} Just before introducing the NGO Transparency Law in 2017, the Hungarian government sent a nationwide survey to eight million households with leading questions like whether to “punish” international organizations encouraging “illegal immigrants” to commit unlawful acts.\textsuperscript{47}

The preamble of the 2017 NGO Transparency Law states that it is designed to combat “[f]oreign interest groups” promoting their “own interests” instead of “community objectives” which create a threat to Hungary’s “political and economic interests.”\textsuperscript{48} To do so, the law created a new category of “organisations supported from abroad” that applied to all Hungarian associations and foundations that received over 7.2 million Hungarian forints (or about 23,500 Euros) a year from a foreign source.\textsuperscript{49} These organizations needed to register with the government, with their information then made available in a publicly available portal.\textsuperscript{50} They also were required to indicate their status as “organisation supported from abroad” on their website and publications.\textsuperscript{51} Failure to do so would result in fines and possible termination of the organization.\textsuperscript{52}

The NGO Transparency Law was widely criticized by civil society as a tool to smear the nonprofit community in Hungary as an outside hostile

\begin{itemize}
  \item \textsuperscript{44} Matt Murphy, \textit{Victor Orban: Hungary 'autocracy' verdict from EU correct, say activists}, BBC (Sept. 16, 2022), https://www.bbc.com/news/world-europe-62925460.
  \item \textsuperscript{46} Lili Bayer, \textit{Hungarian Law Targets Soros, Foreign Backed NGOs}, POLITICO (March 7, 2017), https://www.politico.eu/article/hungary-vs-civil-society/ (describing how Hungary’s NGO Transparency Law was motivated in part by the government wanting to curtail organizations who received funding from George Soros).
  \item \textsuperscript{47} Human Rights Watch, \textit{Hungary: Bill Seeks to Stifle Independent Groups} (June 12, 2017), https://www.hrw.org/news/2017/06/12/hungary-bill-seeks-stifle-independent-groups
  \item \textsuperscript{48} Hungary NGO Transparency Law, supra note 42.
  \item \textsuperscript{50} Hungary NGO Transparency Law, supra note 42 at § 2(4).
  \item \textsuperscript{51} Id. at § 2(5).
  \item \textsuperscript{52} Id. at § 3.
\end{itemize}
force. Critics claim it was “styled” on Russia’s “foreign agent” law,\(^{53}\) while the Hungarian government defended its adoption, in part, by claiming it was modeled on FARA in the United States.\(^{54}\) Once the NGO Transparency Law was enacted some nonprofits registered as foreign funded, but, perhaps because of the widespread criticism against the Act, few nonprofits faced legal consequences for not registering.\(^{55}\) Instead, as an Amnesty International report noted the threat of registration created a “chilling effect, self-censorship, and divisions within civil society groups.”\(^{56}\)

Responding to a referral from the European Commission, in June 2020 the Court of Justice of the European Union (CJEU) found the NGO Transparency Law was in breach of Hungary’s obligations under the Charter of Fundamental Rights of the European Union and the Treaty on the Functioning of the European Union.\(^{57}\) The CJEU found that although increasing transparency in the financing of associations was a legitimate goal, the law created a “stigmatizing” environment that created a “climate of distrust” towards foreign funded organizations.\(^{58}\) It held that the law was unjustified and discriminatory, writing that the government was wrong to presume that just because an organization received funding from abroad it would then be “intrinsically liable to jeopardise the political and economic interests of Hungary.”\(^{59}\) Further, the financial threshold for triggering the law was fixed at such a low amount that the Court found it clearly did not “appear to correspond with the scenario of a sufficiently serious threat to a fundamental interest of society” that the law was supposed to prevent.\(^{60}\) The Court held that the Hungarian law violated EU law on the freedom of

---


\(^{54}\) See, FARA’s Double Life Abroad, supra note 25 (describing how the Hungarian government justified their foreign agent laws by pointing to FARA in the U.S.).

\(^{55}\) Amnesty Hungary Report, supra note 53 (describing the impact of the implementation of the law on NGOs in Hungary. Id. at 4).

\(^{56}\) Id.


\(^{58}\) Id. at para 58.

\(^{59}\) Id. at para 86.

\(^{60}\) Id at para 94.
association and the right to privacy, as well as in inhibiting the free movement of capital within the EU. In response to the ruling, the Hungarian government eventually repealed the law in April 2021.

The CJEU decision regarding Hungary’s NGO Transparency Law did not eliminate the ability of governments in the European Union to regulate foreign funding of NGOs. However, the decision indicated that the CJEU would be skeptical of even relatively light touch regulation that targets foreign funded NGOs through transparency requirements (albeit stigmatizing ones).

The CJEU’s decision is not an outlier in the European system. In a June 2022 decision, the European Court of Human Rights (ECHR) held that the Russian foreign agent law, which had been used to target foreign funded nonprofits by labeling them “foreign agents” and requiring extensive reporting requirements, violated the freedom of assembly and association. Among other findings, the ECHR held that there were not “relevant and sufficient” reasons to apply the stigmatizing “foreign agent” label to organizations simply because they received foreign funding. The ruling though was ultimately not enforced by Russia as it withdrew from the ECHR in June 2022 amidst fallout over its invasion of Ukraine.

Following the CJEU and ECHR rulings, the European Union’s approach to restrictions on foreign funding of nonprofits can currently be described as being guided by rights-based regulatory liberalism. Under this approach the rights impact of these laws, particularly that of the freedom of association, is foregrounded and the CJEU and ECHR approach restrictions with a high degree of scrutiny. As such, members of the European Union will need to approach any regulation of foreign funding of nonprofits going forward cautiously.

This rights based approach though could come under new pressure going forward. In particular, in response to a scandal that revealed that Qatar

---

61 Id. at para 65 (finding the law constitute a prohibited restriction on the movement of capital); Id. at para 143 (finding the law violates the freedom of association and the right to privacy).
62 On the same day they repealed the law though the government enacted a new law allowing authorities wide discretion to audit NGOs, which critics claimed would “unduly restrict” NGOs in the name of transparency. Amnesty Hungary Public Statement, supra note 17.
63 See European Ct. of Human Rights, Case of Ecodefence and Others vs. Russia, June 14, 2022, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-217751%22]} (finding that there was a violation of Article 11 of the European Convention on Human Rights. Id. at para. 187).
64 Id. at para 159.
allegedly paid European lawmakers to influence policy decisions and concerns over Chinese and Russian influence, members of the European Parliament have proposed a new foreign influence law. This law could, amongst other measures, require disclosures by nonprofits, academic institutions, and consultancies that receive foreign funding. It is yet to be seen though what legislation, if any, will actually be enacted and how the CJEU and other rights bodies would respond.

B. India and Government Controlled Nonprofit Nationalism

Next, this Part turns to India, where compared to the European Union, the Indian government and Supreme Court have taken a very different approach to the regulation of foreign funding of nonprofits. India’s Foreign Contribution Regulation Act (FCRA) is in important ways significantly more onerous than Hungary’s NGO Transparency Law. The FCRA requires that most nonprofits that receive foreign funding must first be preapproved by and register with the government. The Act has been frequently criticized for being used by the Indian government to harass and shutdown human rights, environmental, and other nonprofits with which the government disagrees. While the CJEU required the Hungarian government to repeal its law, a bench of the Indian Supreme Court not only recently upheld amendments to the FCRA that had made the law more burdensome, but also seemed to proactively advocate for limiting all foreign funding to nonprofits.

The FCRA has its roots in the 1970s, when there was concern that a “foreign hand” was influencing Indian politics amidst allegations that the U.S. CIA had provided funds to favored Indian political parties. In

---

66 Vinocur, supra note 22 (describing how in response to concerns over meddling by the Chinese, Russian, and Qatar governments European Parliamentarians are considering a proposal that could require nonprofits to disclose foreign funding).

67 Id.

68 Foreign Contribution (Regulation) Act of 2010, http://legislative.gov.in/sites/default/files/A2010-42.pdf [hereinafter FCRA 2010] (“no person having a definite cultural, economic, educational, religious, or social programme shall accept foreign contribution unless such person obtains a certificate of registration from the Central Government.” Id. at Art. 11).


70 See, infra note 92 and accompanying text describing Indian Supreme Court’s judgment in Noel Harper v. Union of India in 2022.

71 SANJAY AGARWAL, FCRA 2010: CONTEXT CONCEPTS AND PRACTICE 56 (2021)
response, Indira Gandhi’s government enacted the Foreign Contribution Regulation Act (FCRA) during the Emergency in 1976.72 The Act banned certain individuals and entities, such as political candidates, political parties, and elected officials, from receiving foreign funds.73 At first, the FCRA only required that nonprofit organizations that received foreign funding report so after the fact.74 However, after the government grew wary of the role nonprofits had played in supporting a prominent anti-corruption campaign against Prime Minister Indira Gandhi, the FCRA was modified in 1984 to require pre-clearance, in the form of a registration certificate, from the government to receive foreign funding.75

In 2010, the 1976 version of the FCRA was repealed and replaced by the then Congress-led government with a new Act with the same name.76 Unlike the 1976 Act, which focused on protecting the functioning of democratic institutions,77 the 2010 Act stated that it had the broader goal of ensuring foreign funds would not be used for “activities detrimental to the national interest.”78 The Indian Home Affairs Minister at the time claimed the new Act was needed, in part, because under the previous Act registered nonprofits were not reporting their foreign contributions in compliance with the law.79

In addition to the list of persons and entities barred from receiving foreign contributions in the 1976 FCRA (such as public officials), the 2010 Act added organizations of a “political nature”.80 The government later

---

72 Id. at 57.
74 AGARWAL, supra note 71 at 57.
75 Id. at 58 (describing how the Congress government in 1982 set up a one man commission to investigate the sources of funding for Jaiprakash Narayan’s movement against misrule and corruption in the 1970s that led to the recommendation for the 1984 amendment).
76 Id. at 60.
77 FCRA 1976, supra note 73 at Preamble (declaring that the Act was designed to ensure “parliamentary institutions, political associations and academic and other voluntary organisations as well as individuals working in the important areas of national life may function in a manner consistent with the values of a sovereign democratic republic.”).
78 FCRA 2010, supra note 68 at Preamble; See also AGARWAL, supra note 71 at 82 (contrasting the objectives of the two 1976 and 2010 FCRAs).
79 P. Chidambaram, Rajya Sabha debate, Aug. 19, 2010, https://rsdebate.nic.in/handle/123456789/403118?viewItem=browse. [hereinafter “Rajya Sabha 2010 debate”] (“the number of organizations not reporting is one half the number.” Id. at 399).
80 FCRA 2010, supra note 68 at Ch. II, § 3(f); The 2010 act also added to the list of barred entities any organization broadcasting “audio” or “audio visual” news through “any electronic mode” Id. at Ch. II, § 3 (g).
defined such organizations to include a laundry list of groups, such as trade and student unions, certain youth organizations, and any organization that “habitually” engaged in mass protests. In March 2020, in *INSAF v. Union of India*, the Indian Supreme Court narrowed the government’s definition to only include organizations engaged in “party politics” or “active politics”, but there remains confusion over what the prohibition on “active politics” includes.

Under the 2010 Act, registration certificates to receive foreign funding must be renewed every five years. To receive the registration the person or organization must meet a set of often vague criteria. For example, the acceptance of a foreign contribution must not be likely to prejudicially affect the “public interest” or “the sovereignty and integrity of India”. Failure to comply with the Act can lead not only to the loss of one’s ability to receive foreign funding, but up to five years in jail.

The Indian government has been criticized for using the broad language and burdensome compliance regime of the FCRA to target civil society. In June 2016, three UN Special Rapporteurs jointly called on the Indian government to repeal the FCRA, as they claimed it was “being used more and more to silence organisations involved in advocating civil, political, economic, social, environmental or cultural priorities, which may differ from those backed by the Government.” Later the same year, the government

---

81 *Id.* at Ch. II, § 3(f).
82 *INSAF v. Union of India*, Civ. Appeal No. 1510 of 2020 (finding that organizations “which have absolutely no connection with either party politics or active politics cannot be denied access to foreign contributions.” *Id.* at para 21. However, “active politics” is not defined in the judgment).
83 *Id.* at Ch. III, § 11; FCRA 1976, *supra* note 73 at Ch. II, § 6. (requiring that individuals and other entities not otherwise barred from receiving foreign funding must register if the donations are for a “cultural, economic, educational, religious, or social programme”). FCRA 2010, *supra* note 68 at Ch. III, § 11(1).
84 *Id.* at Ch. III § 12(4)(f) (nor can acceptance of the foreign contribution be likely to prejudicially affect “the security, strategic, scientific or economic interest of the State”; “the freedom or fairness of election to any Legislature”; “friendly relation with any foreign State”; or “harmony between religious, racial, social, linguistic, regional groups, castes or communities.”). Activists have particularly criticized this “public interest” requirement as providing the government too much discretion. Human Rights Watch, India: Foreign Funding Law Used to Harass 25 Groups (Nov. 8, 2016), https://www.hrw.org/news/2016/11/08/india-foreign-funding-law-used-harass-25-groups [hereinafter HRW 2016].
86 HRW 2016, *supra* note 84.
refused to renew certificates for 25 nonprofits, including human rights organizations, because their activities were reportedly not in the “national interest”.\textsuperscript{88} Several prominent organizations have faced FCRA enforcement measures. For instance, both Amnesty International and Greenpeace have had their bank accounts frozen under the law and their offices raided.\textsuperscript{89} Lawyers Collective, a leading domestic human rights organization, had their FCRA registration suspended and then criminal charges brought against leaders of the organization for noncompliance.\textsuperscript{90}

In 2020, the BJP-led government amended the FCRA to create additional restrictions on foreign funding of nonprofits, including requiring all foreign funds be routed through one state bank in New Delhi, capping administrative expenses at 20% for organizations that received foreign funding, and prohibiting sub-granting of foreign funding to other nonprofits, even if they had also registered under the FCRA.\textsuperscript{91}

In April 2022 a three-judge bench of the Indian Supreme Court in \textit{Noel Harper v. Union of India} upheld a challenge to a number of the restrictions in the 2020 amendment.\textsuperscript{92} What was perhaps most striking in the judgement was not the holding, but Justice Khanwilkar’s hostile rhetoric directed against foreign funding of nonprofits. Distinguishing foreign funding of NGOs from foreign investment, he wrote for the Court that “Receiving foreign donation cannot be an absolute or even a vested right. By its very expression, it is a reflection on the constitutional morality of the nation as a whole being incapable of looking after its own needs and problems.”\textsuperscript{93} Justice Khanwilkar continued that “foreign aid can create [the] presence of a foreign contributor

\textsuperscript{88} HRW 2016, supra note 84.


\textsuperscript{92} Noel Harper v. Union of India, Writ Petition (Civil) No. 566 of 2021 (2022) (upholding challenges to 2020 amendments that prohibited subgrants, requirement that funds be deposited in a specific state bank in Delhi, and capping administrative expenses at 20%, but reading down a requirement that NGO officeholders produce their Aadhar (identity) cards for organizations registered under the FCRA. \textit{Id.} at para 87).

\textsuperscript{93} \textit{Id.} at para 53.
and influence the policies of the country. It may tend to influence or impose political ideology.” 94 He therefore concluded that “the presence/inflow of foreign contribution in the country ought to be at the minimum level, if not completely eschewed.” 95 Given this view, he not surprisingly deferred heavily to the “wisdom of the Parliament” in how it chose to regulate foreign funds and found the amendments to the FCRA to be “reasonable” restrictions. 96

Noel Harper was not a direct constitutional challenge to the scheme of regulation in the FCRA itself, but rather certain amendments to the Act. Despite Justice Khanwilkar’s animosity towards foreign funding of nonprofits, it is not clear this view is the dominant one within the Indian Supreme Court. For example, in the Court’s 2020 INSAF judgment a two judge-bench of the Indian Supreme Court emphasized the “rights of the voluntary organizations to have access to foreign funds”. 97 Given these different approaches to the question of foreign funding, the constitutionality of the FCRA’s broader regulatory scheme may eventually need to be heard by a larger constitution bench of the Indian Supreme Court to decide if the Act, or significant parts of it, violate the Indian Constitution. 98

What has emerged in India for the moment though in the regulation of foreign funding of NGOs is a form of government controlled nonprofit nationalism. The FCRA imposes a heavy regulatory burden on nonprofits that receive foreign funding that has repeatedly been weaponized against nonprofits with which the government disagrees. Further, both the government and courts have expressed deep skepticism over the value of civil society receiving cross-border funding. 99

This highly regulated approach arguably forms part of a broader view expressed by some government officials that NGOs should be closely controlled either because they are adversarial to the government or can work at cross-purposes. For example, in 2021, Modi’s National Security Advisor called civil society the “new frontier of war” as NGOs can be used to “hurt

94 Id. at para 54.
95 Id.
96 Id. at para 71, 79.
97 INSAF, supra note 82 at para. 21.
98 For a description of the types of cases that are heard by Constitution benches in India See, Nick Robinson et al., Interpreting the Constitution: Supreme Court Constitution Benches Since Independence, 46(9) EC. & POL. WEEKLY 27 (2011) (providing an overview of the use of constitution benches in India. Id. at 27-28).
99 See, e.g., AGARWAL, supra note 71 at 86 (“The general policy of the Government of India is not to encourage soliciting foreign contribution.”) (quoting FCRA annual report of 2013).
the interests of a nation”. Meanwhile, government officials in 2022 asked Save the Children to halt a fundraising campaign that highlighted child malnutrition in India, a major issue in the country, as they claimed the government was already addressing malnutrition and the campaign cast the country in a bad light. In other words, India’s approach to the regulation of foreign funding of nonprofits can be viewed as part of a broader hands on approach by government on civil society to promote the government’s vision of the national interest.

C. United States and Ambiguous Regulatory Heavy-Handedness

Compared to the European Union’s more liberal rights-based approach or India’s government controlled nonprofit nationalism, the U.S.’s regulatory approach to foreign funding of nonprofits has been marked by a high degree of ambiguity. Traditionally, foreign funded NGOs have operated with relatively few regulatory burdens in the U.S. However, in the last decade, amidst concerns over Russian and Chinese influence, FARA has reemerged as a prominent tool by which the government can regulate foreign influence. As the government’s enforcement of FARA has grown, nonprofits, particularly environmental groups with foreign funding or connections, have increasingly been impacted by the Act, leading to uncertainty about what regulatory burdens nonprofits that receive foreign funding face.

FARA is a criminal statute that was enacted in 1938 and used to combat Fascist propaganda during World War II. Failure to comply with the Act is punishable by up to five years in prison. Perhaps not surprisingly for a wartime statute, FARA has notoriously broad language. Under FARA, those engaged in covered activities on behalf of a “foreign principal” must register

---


101 See Catherine Davison, How India has ramped up its crackdown on NGOs, DEVEX (April 28, 2023), https://www.devex.com/news/how-india-has-ramped-up-its-crackdown-on-ngos-105321 (detailing government’s letter to Save the Children and noting that India’s child malnutrition rate is one of the worst in the world and has recently been rising according to the government’s own data).

102 See, e.g., Robinson, supra note 24 at 1120-1123 (describing reemergence of FARA as a tool to regulate foreign influence and targeting of environmental groups).

103 During World War II, the Act was used to help silence the most active Nazi voices in the country through prosecutions, investigations, and demanding registration requirements. BRETT GARY, NERVOUS LIBERALS: PROPAGANDA ANXIETIES FROM WORLD WAR I TO THE COLD WAR (1999) (describing how during the War period some 7600 individuals and organizations registered under the Act providing the Justice Department with vast amounts of information, Id. at 214-215).

as “foreign agents” with the Justice Department and undertake a set of disclosure requirements, including making a conspicuous statement on covered informational material.\textsuperscript{105}

A wide range of activities require registration. Under FARA, “foreign principals” include not just foreign governments or political parties, but any entity organized under the laws of a foreign country, such as a corporation, foundation, or nonprofit, or any person outside the U.S.\textsuperscript{106} Covered activities include engaging in “political activities”; soliciting or disbursing “things of value”; or acting as a publicity agent or political consultant, for or in the interests of a foreign principal.\textsuperscript{107} These covered activities often have sweeping definitions: “Political activities”, for example, includes any activity that influences “any section of the public within the United States with reference to formulating, adopting, or changing [U.S.] domestic or foreign policies. . .”\textsuperscript{108} As such, much public advocacy by a nonprofit would be considered “political activity” since it involves attempting to influence the U.S. public about government policy. An agency relationship under FARA is also broadly defined. It can be created if one engages in a covered activity at the direction and control of a foreign principal or their intermediary, but also if one does so at their “request” or if they are “subsidized in whole or in major part by a foreign principal”.\textsuperscript{109}

Under these broad definitions, a U.S. nonprofit that advocated for better government policies to fight COVID (i.e. engaged in “political activities”) would seemingly have to register if they were funded in part by a Canadian donor, particularly if they acted at that donor’s “request”. There are a number of exemptions under the Act, including for certain commercial, religious, or academic activity,\textsuperscript{110} but a wide range of activity, particularly for nonprofits, requires registration.\textsuperscript{111}

While FARA does not explicitly ban any speech, in justifying the need for the Act in 1937, a report of the House Judiciary Committee claimed it

\textsuperscript{105} 22 U.S.C. § 614(b).
\textsuperscript{106} 22 U.S.C. § 611(b). A person is not a foreign principle though if they are domiciled in the U.S. Id.
\textsuperscript{107} 22 U.S.C. § 611(c)(1)(i-iv).
\textsuperscript{108} 22 U.S.C. § 611(o).
\textsuperscript{109} 22 U.S.C. § 611(c)(1). (defining intermediary as “a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal”). See Robinson, supra note 24 at 1099-1102 (discussing the agency and intermediary relationships in FARA and debates surrounding their definitions).
\textsuperscript{110} The primary exemptions to registration to FARA are provided in 22 U.S.C. § 613. For a description of each, including the commercial, academic, and LDA exemptions, see Robinson, supra note 24 at 1104-1111.
\textsuperscript{111} For a detailed analysis of the potential FARA obligations of nonprofits, media organizations, and public officials see Robinson, supra note 24 at 1111-1116.
hoped, “the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda.”\textsuperscript{112} In this way, from its origins it was perceived, in part, as a way to curtail speech, partly because of the stigmatizing effect of being labeled a foreign agent and the accompanying regulatory burden. As the historian Brett Gary has written, when the Justice Department has chosen to use it, FARA has provided the Department “an effective and low-profile means for eliminating unwanted political ideas from the U.S. scene without drawing critical attention to its work.”\textsuperscript{113} These unwanted ideas included fascist propaganda during World War II, but also perceived communist voices during the McCarthy era. Most notably, the Justice Department prosecuted several of the officers of an anti-war organization called the Peace Information Center (PIC). One of those officers was the civil rights leader W.E.B. Du Bois, who was seen by the government as sympathetic to communism.\textsuperscript{114} While Du Bois was ultimately acquitted by a jury for failing to register for publishing and disseminating an anti-nuclear petition and other information to the U.S. public at the “request” of a nonprofit based in Paris, the trial both drained his resources and tarred his reputation for the remainder of his life.\textsuperscript{115}

After the abuses of the McCarthy era, FARA fell out of favor as a tool to combat propaganda.\textsuperscript{116} By the 1960s the focus of enforcement of the Act shifted to shedding light on lobbyists and others attempting to influence U.S. government decision-making for foreign interests, but even for this more limited goal many noted it was underenforced.\textsuperscript{117} However, after Russian interference in the 2016 U.S. Presidential election, FARA reemerged as a prominent tool for the federal government to regulate foreign influence in the U.S. political arena. Special Counsel Robert Mueller brought multiple charges, including failure to register under FARA, against President Trump’s

\textsuperscript{112} H.R. Report No. 1381 at 2 (1937).
\textsuperscript{113} Gary, \textit{supra} note 103 at 215-216.
\textsuperscript{115} W.E.B. DU BOIS, IN BATTLE FOR PEACE: THE STORY OF MY 83RD BIRTHDAY 36-37, 89-90, 101 (Henry Louis Gates, Jr. ed., 2007) (providing a first person account of Du Bois experience of his FARA prosecution and the impact on his life and the Peace Information Center).
\textsuperscript{116} See Robinson, \textit{supra} note 24 at 1077-1078, 1095-1096 (describing relative underenforcement of FARA from 1950s until 2016 Presidential election).
\textsuperscript{117} U.S. v. McGoff, 831 F.2d 1071, 1073-1074 (1987) (“Over the years, FARA's focus has gradually shifted from Congress' original concern about the political propagandist or subversive seeking to overthrow the Government to the now familiar situation of lobbyists, lawyers, and public relations consultants pursuing the less radical goal of 'influenc[ing] [Government] policies to the satisfaction [sic] of [their] particular client.'”).
campaign advisor, Paul Manafort, as well as members of Russia’s Internet Research Agency. President Trump’s former National Security Advisor, Michael Flynn, was also charged with violating FARA for lobbying for Turkey without registering. At the request of the Justice Department, two Russian and two Chinese government-funded media organizations registered as “foreign agents” under the Act. Republicans have also repeatedly accused the Biden administration of not properly enforcing the Act against what they alleged are FARA violations by Hunter Biden, President Biden’s son.

While nonprofits as a category did not seem to be the intended target of the Justice Department’s more recent renewed focus on FARA enforcement, they have still been impacted. For example, in a 2020 advisory opinion, the Justice Department demanded the National Wildlife Federation (NWF), a prominent U.S. environmental group, register after it received a grant from the Norwegian Government to work on deforestation in Brazil and other tropical countries. While most of the project was outside the United States,
it did involve a NWF contractor working with U.S. multi-national corporations on creating environmentally sustainable supply chains and so the Justice Department claimed the project met FARA’s requirement of attempting to “influence any section of the U.S. public” with reference to U.S. policy. After registering, NWF publicly complained that doing so had impeded their ability to receive future foreign government grants, undermining their global environmental work.

Given its broad provisions it is not surprising that the Act has also been politicized against select nonprofits. In 2018, the House Natural Resources Committee investigated four prominent US environmental groups, including the NRDC and World Resources Institute, as being potential “foreign agents” based on these organizations’ cross-border connections in China and Japan respectively and criticisms of US environmental policy. These investigations were dropped by the Committee when the House of Representatives switched from Republican to Democratic control in 2019. However, with Republican retaking control of the House of Representatives in 2022, the House Natural Resources Committee again began investigating the U.S. environmental nonprofits for potential FARA violations, including examining whether the League of Conservation Voters should have registered for funding ties to a Swiss national.

The seemingly dangerous breadth of FARA has not escaped notice of the nonprofit community. After the Justice Department announced it was planning changes to FARA’s regulations, a diverse group of prominent U.S. nonprofits including the ACLU, Americans for Prosperity, NRDC, and Oxfam, sent a letter in 2022 to the Justice Department warning that “FARA’s overbreadth and vagueness can undermine and chill First Amendment rights.


124 Id.

125 NWF Comment, supra note 34 at 6 (Registering “had the foreseeable consequence of impeding future grant making from Norad and other similar foreign government development and environmental agencies . . .”)

126 See generally Robinson, supra note 24 at 1121-1124 (discussing 2018 Congressional investigation of these four environmental groups).

127 Id.

128 League of Conservation Voters Letter, supra note 35.
to speech and association” that can be “used to target undesirable expressive conduct.”129

Since the Justice Department brought relatively few FARA enforcement actions during most of its existence, the Act has seen relatively few legal challenges and the Supreme Court has never decided on its constitutional validity.130 That said, although the Supreme Court has often been deferential to legislation, like FARA, impacting U.S. foreign policy,131 there are reasons to believe that if the constitutionality of the Act was challenged the Court might be skeptical of certain provisions. For instance, in Americans for Prosperity v. Bonta in 2021 the Court struck down donor disclosure requirements for nonprofits, such as those that might be at issue in a FARA challenge, finding they unconstitutionally chilled the freedom of association.132 In other cases, the Court has developed a robust jurisprudence taking a skeptical position towards compelled speech, which could be applied in a challenge to FARA’s labeling requirements of covered material.133

Besides FARA, the Justice Department has also used a provision of the Espionage Act, which was enacted during World War I, to target foreign

---

130 In Meese v. Keene a divided Supreme Court in 1987 narrowly upheld from constitutional challenge a FARA requirement at the time that materials covered by the Act be classified as “political propaganda.” However, Justice Stevens, writing for the majority, explicitly stated that the constitutionality of the underlying registration, filing, and disclosure requirements were not at issue nor were “the validity of the characteristics used to define the regulated category of expressive materials.” Meese v. Keene, 481 U.S. at 467.
131 See Ronald Krotosynski, Transborder Political Speech, 94(2) NOTRE DAME L. REV. 473 (2018) (describing how “The most recent [U.S. Supreme Court] cases involving transborder speech either find no serious First Amendment interest or, worse still, sustain transborder speech restrictions under a form of ‘strict scrutiny lite.’” Id. at 483).
132 Americans for Prosperity v. Bonta, 594 U.S. ___ (2021). Chief Justice Roberts, writing for the majority, found that a California donor disclosure requirement did not meet the “exacting scrutiny” demanded by the freedom of association concerns implicated by the legislation because it unnecessarily “imposes a widespread burden on donors’ associational rights.” Id. at 18-19.
133 FARA’s labeling requirements arguably frequently mischaracterize the relationship between those registered under FARA and their foreign principal as an agency relationship, when in fact they may only be acting at the “request” of a foreign principal. In Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018), the Supreme Court struck down a California mandate that certain pregnancy centers disclose that one could obtain a set of services, including abortion, from state-sponsored clinics. Justice Thomas wrote that the mandate violated the First Amendment because it “targets speakers, not speech, and imposes an unduly burdensome disclosure requirement that will chill their protected speech.” Id. at 2378. For more on potential constitutional challenges to FARA, see Robinson, supra note 24 at 1130-1135 (laying out potential constitutional defects in FARA).
funding of U.S. nonprofits. This provision of the Espionage Act makes it unlawful to act as “an agent of a foreign government” without prior notification of the Attorney General. Failure to register can lead to up to 10 years in jail. In 2023, Omali Yeshiteli was indicted under this provision, along with other U.S. members of an African internationalist socialist nonprofit, for, among other measures, accepting a paid trip to a conference and a small amount of money for his organization from the Russian government. Critics of the prosecution have argued that the Justice Department targeted those involved because of their unpopular political views, which are aligned with the Russian government on the war in Ukraine. While this provision of the Espionage Act only applies to agents of foreign governments, this case has raised concerns that it could be used to selectively punish nonprofits in the future that either receive funding or other things of value from a foreign government.

Given these recent uses of FARA and the Espionage Act nonprofits in the U.S. receiving foreign funding face a form of ambiguous regulatory heavy handedness. The federal government has historically allowed for a relatively open environment for the operation of nonprofits, including those that receive foreign funding. However, today with the foreign funding of (at least some) nonprofits again under the federal government’s microscope, NGOs in the U.S. face an increasingly uncertain regulatory landscape. This uncertainty is compounded because the constitutionality of these measures to curb foreign influence, like those in FARA, remain largely untested by the courts. As a result, nonprofits that receive foreign funding and do not register as “foreign agents” must weigh an array of risk factors that might lead to government enforcement action against them. Central among these factors is whether they engage in politically controversial activity that might attract heightened enforcement.

---

138 Collin P. Poiriot and Azadeh Shahshahani, The DOJ is Using “Foreign Agents” Accusations to Repress Black Liberation Organizers, THE NATION (April 25, 2023), https://www.thenation.com/article/politics/foreign-agents-registration-act-political-repression/ (arguing that Justice Department prosecution has weaponized use of federal law against unpopular Black voices in the United States); Andrea Widburg, The Biden Administration’s attack on free speech, AMERICAN THINKER (April 21, 2023), https://www.americanthinker.com/blog/2023/04/the_biden_administrations_attack_on_free_speech.html (describing interview of Glenn Greenwald on Tucker Carlson’s show on Fox News where he argued that the Justice Department prosecution represented the Biden administration criminalizing speech with which it did not agree).
government attention.

II. JUSTIFICATIONS FOR FOREIGN FUNDING RESTRICTIONS

These regulatory examples from the EU, India, and US show how these jurisdictions have taken markedly different approaches to the regulation of cross-border funding of nonprofits. This Part draws on these case studies to survey three common justifications for the regulation of foreign funding of NGOs: (1) protecting democratic self-governance; (2) deterring criminal activity; and (3) more efficient use of resources. Part III, in turn, examines justifications for a more open regulatory environment.

A. Democratic Self-Governance

Perhaps the most frequently invoked justification for restricting foreign funding of nonprofits is the concern that such funding can be a nefarious force that undermines national sovereignty and self-governance.\(^{139}\) As Hungarian Prime Minister Victor Orban argued when justifying reporting and labeling requirements for foreign funders, “We’re not dealing with civil society members, but paid political activists who are trying to help foreign interests here”.\(^{140}\) Or consider Justice Khanwilkar of the Indian Supreme Court in *Noel Harper* maintaining that “...free and uncontrolled flow of foreign contribution has the potential of impacting the sovereignty and integrity of the nation, its public order and also working against the interests of the general public.”\(^{141}\) Or take the claim made by all of the then Republican members of the U.S. House Energy Committee in a March 2022 letter to the Justice Department that the Russian government may be secretly funding “the radical statements and vitriol directed at the U.S. fossil fuel sector” by U.S. environmental nonprofits to weaken the country’s energy security.\(^{142}\)

Breaking down these self-governance concerns further, there are two major types of arguments generally made about why foreign funding of nonprofits can be detrimental to sovereignty. The first argument is that

\(^{139}\) See, e.g., Rutzen, *supra* note 11 at 31 (listing protecting state sovereignty, transparency and accountability, enhancing aid effectiveness, and pursuing national security, counterterrorism, and anti-money laundering as justifications provided by governments for restrictions on foreign funding of nonprofits).


*ICNL Working Paper 2023-1*
Regulation of Foreign Funding of Nonprofits

Foreign actors, including rival nation-states, are providing funding in an attempt to subvert a nation’s democratic community. For example, by providing funding through a spy agency to disrupt elections or funding groups that promote causes that are antithetical to the country’s interests. The second argument is less that outsiders are attempting to actively undermine a country’s sovereignty through malign influence, but rather that foreign funding, even if well intentioned, creates an unhealthy power relationship. This is particularly true in developing where critics have claimed foreign funding of NGOs continue to further “colonial legacies” and “political paternalism”.143 Or as Indian Home Affairs Minister Chidambaram claimed when introducing the 2011 FCRA, “The regulations have been so framed that while legitimate charitable social, educational, medical activity that serves any public purpose is allowed, foreign money does not dominate social and political discourse in India.”144

While protecting a country’s sovereignty is certainly a legitimate goal in any democracy, genuine concerns about foreign influence are frequently used to justify unnecessarily sweeping restrictions.145 For example, in India the 1976 FCRA was enacted after press reports claimed the CIA was providing funding to favored domestic politicians.146 Stopping such alleged funding is certainly a legitimate goal. However, it is not obvious why the government should then require all nonprofits to receive government permission to receive foreign funding. Notably, amendments to the FCRA that required pre-registration of NGOs for foreign funding in 1984 only came amidst the government’s concern about a civil society campaign that had highlighted government corruption.147

Further, politicians concerns about foreign funded subversive expressive activity are often misplaced or politically self-interested. In Hungary, Victor Orban has argued that foreign funded nonprofits have promoted migration that will replace the native-born population, claiming that “What they want

143 Jonas Wolff and Annika Elena Poppe, From closing space to contested spaces: Re-assessing current conflicts over international civil society support, PRIF REPORTS (2015) https://www.hsfk.de/fileadmin/HSFK/hsfk_downloads/prif137.pdf (“the (post) colonial legacies that underlie and shape the practice of international civil society support as well as the continuing experience in the Global South with political paternalism and economic exploitation ….” Id. at 4).
144 Rajya Sabha 2010 debate, supra note 79 at 396.
145 See, e.g., Arash Abizadeh, On the Demos and Its Kin: Nationalism, Democracy, and the Boundary Problem, 106 AM. POL. SCI. REV. 867, 867 (2012) (arguing that democratic theory finds legitimate political power is defined by democratic self-rule of a people who are not subject to alien rule).
146 AGARWAL, supra note 71 at 56.
147 See AGARWAL, supra note 71 at 58 (describing how Kudal Commission that led to 1984 FARA reforms came out of government’s concern over anti-corruption movement against Indira Gandhi’s government).
is that henceforward it will increasingly not be we and our descendants who live here, but others.”148 However, not only is Orban’s concerns about replacement of the native population by immigrants not based in facts (only about 2% of the country is actually foreign born),149 but having nonprofits promote protecting migrants’ rights is arguably a valuable contribution to the country’s democratic discourse – and a view that many Hungarians share. Meanwhile, claims by U.S. politicians that the Russian government has secretly funded U.S. environmental groups have largely been debunked and seem to have persisted because they can be used by members of one political party to discredit groups with which they disagree.150

No doubt there is a needed debate about the disproportionate voice of international nonprofits and donors in some countries, particularly in the Global South. These funders and groups can and have amplified voices who are insufficiently grounded in local communities or context.151 That said, it is not clear that domestic civil society is more empowered when its access to foreign funding is heavily constricted, as then the only option for many nonprofits is to turn for funding to a smaller handful of domestic wealthy individuals, corporations, or the government, or be forced to close. In other words, the alternative to foreign funding is frequently not a vibrant, pluralistic civil society funded by domestic sources, but rather a less robust nonprofit space captured by an even smaller handful of domestic funders with their own biases and interests.

More broadly, the challenge with aggressively regulating foreign funding of nonprofits is that it typically requires the government to proactively surveil and regulate civil society. This can have a significant detrimental impact not just on nonprofits funded from abroad, but all organizations and actors in civil society as they attempt to avoid being tarred as being pawns for foreign forces. This is not to claim that NGOs should be able to engage in any activity with foreign funding without regulation, but rather as Part V will argue that there is a need for a far more targeted approach.

149 Id.
150 See Kessler, supra note 142 (finding that the allegations in a letter by Republicans against environmental groups that they receive Russian funding “crumble into dust” upon closer scrutiny).
151 See, e.g., WILLIAM EASTERLY, THE TYRANNY OF EXPERTS: ECONOMISTS, DICTATORS, AND THE FORGOTTEN RIGHTS OF POOR PEOPLE (2014) (arguing that aid organizations push for expert solutions at the expense of the rights of poor people, including their rights to participate in creating solutions to the problems they face).
B. Deterring Unlawful Activity

Another common justification for more strictly regulating foreign funding of nonprofits is to increase transparency over NGOs in order to prevent criminal activity, particularly money laundering and terrorism financing. The United States has, largely unintentionally, played a leading role in promoting this justification. After the terrorist attacks on the U.S. on September 11, 2001, the U.S. government pushed for countries to enact stronger anti-terrorism and anti-money laundering legislation, including through the Financial Action Taskforce (FATF). For example, India’s 2010 FCRA was enacted after a FATF inspection had found the country “non-compliant” with its FATF commitments and called on the country to more strictly regulate the nonprofit sector. The US government at the time had also advocated that the Indian government revise and strengthen the earlier 1976 FCRA.

As a result of this international pressure, countries have frequently pointed to deterring counterterrorism financing and money laundering when creating new restrictions on foreign funding of nonprofits. In Hungary, for example, the law passed in 2012 was enacted as a response to FATF recommendations. The FATF is an inter-governmental organization dedicated to curbing cross-border money laundering and terrorism financing. See Julia C. Morse, The Counterterror War that America is Winning, THE ATLANTIC (Sept. 15, 2021), https://www.theatlantic.com/ideas/archive/2021/09/america-terrorism-finance/620067/ (describing U.S. support for FATF counter-terrorism financing efforts after 9/11).

---


154 See Ben Hayes, Counter-Terrorism, “Policy Laundering,” and the FATF: Legalizing Surveillance, Regulating Civil Society (2012), https://www.icnl.org/resources/research/ijnl/1-introduction-2 (finding that in July 2010 a FATF inspection had found India “non-compliant” and called on India to more strictly regulate nonprofit organizations).

155 See AGARWAL, supra note 71 at 63-64 (detailing how FATF issued a report on misuse of charities for terrorism funding and describing how the US advocated for the Indian government to revise the FCRA in 2010 to meet commitments to fighting terrorism).

156 Former UN Special Rapporteur, Kiai to Financial Crime Body: Foster Civil Society as a Partner, Not an Enemy, In the Fight Against Terrorism, http://freeassembly.net/news/fatf-recommendation-8/ (describing how recommendation 8 of FATF, which requires FATF member States ensure that their laws sufficiently prevent...
instance, the government cited the justification of fighting “money laundering” in the Preamble of its 2017 NGO Transparency law.\textsuperscript{157}

Yet, while there can be benefit in tracking international financial transactions in order to address money laundering or terrorist financing, it is not clear why foreign funding of nonprofits should be specifically targeted compared to other forms of cross-border transactions, such as commercial activity or family remittances.\textsuperscript{158} Further, the need to combat money laundering does not account for many aspects of these restrictions in foreign funding laws, such as labeling requirements. Instead, as the UN Special Rapporteur on Freedom of Association and Assembly has argued transparency, accountability, and anti-money laundering justifications for foreign funding restrictions on nonprofits has been used in many countries “to exert extensive scrutiny over the internal affairs of associations, as a way of intimidation and harassment.”\textsuperscript{159}

C. Effective Use of Resources

Finally, a justification lawmakers sometimes invoke to regulate the foreign funding of nonprofits is to claim that it promotes more effective use of resources.\textsuperscript{160} This argument generally focuses on ensuring that resources are used in line with the public interest as understood by the government.\textsuperscript{161} In 2014, for example, in response to concerns over foreign funding of nonprofits India issued a joint statement with several other governments at the Human Rights Council that NGOs function more “effectively and

\textsuperscript{157} Hungary NGO Transparency Law, supra note 42 at Preamble.

\textsuperscript{158} Additionally, as FATF has made explicit in its more recent interpretation of recommendation 8, any government regulation of nonprofits to address counter-terrorism financing “should apply focused and proportionate measures” in line with a “risk-based approach”. International Standards on Combatting Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations 13 (2023), https://www.fatf-gafi.org/content/dam/recommendations/FATF%20Recommendations%202012.pdf.coredo wnload.inline.pdf

\textsuperscript{159} Kiai 2013 Report, supra note 152 at 38.

\textsuperscript{160} Rutzen, supra note 11 at 32-33 (describing enhancing aid effectiveness as justification for cross-border funding restrictions).

\textsuperscript{161} Nepal’s government went so far as to release a policy in 2014 which required development partners to channel all assistance through the government rather than NGO’s in order to maximize aid efficiency. \textit{Id.} at 33.
efficiently” with “defined limits” and that it was important to “ensure accountability and responsibility for their actions.”162

In India, the perceived benefit of this type of state oversight has led the government to amend the FCRA to ensure no more than 20% of foreign funding at nonprofits is spent on administrative expenses, seemingly to ensure nonprofits use their funding to focus on their mission.163 Meanwhile, in Hungary the government has proposed taxing foreign funding to nonprofits that is used for the purpose of protecting the rights of migrants, a goal that the Hungarian government sees as a threat to its policy of discouraging immigration.164

These examples from India and Hungary show that while coordinating the goals of nonprofits and government may sound beneficial, the reality can be quite different. As in Hungary, the government can use such regulation as an opportunity to deter actors within civil society, like migrant rights groups, with which it simply disagrees. Alternatively, like the FCRA’s cap on administrative expenses, it can lead to unintended impacts. Under Indian law, administrative expenses include rent for an office, the salaries of many types of employees, the cost of running a vehicle, and many other costs that can be critical to an organization’s mission.165 For many nonprofits these needed expenses can easily exceed the 20% cap, meaning that to comply they must restructure their operations in a less beneficial manner.

III. JUSTIFICATIONS FOR PROTECTING CROSS-BORDER FUNDING

Turning from arguments for regulating foreign funding of nonprofits, this Part advances and develops five justifications for robustly protecting a relatively open environment for cross-border funding of nonprofits: (1)
furthering democratic self-governance; (2) defending government critics; (3) access to resources and expertise (4) encouraging reciprocity; and (5) promoting democratic cosmopolitanism.

A. Democratic Self-Governance

Perhaps the strongest justification for robustly protecting the foreign funding of nonprofits is based in protecting self-governance. This may initially appear surprising as those advocating for foreign funding restrictions also center their justifications in self-governance or sovereignty arguments. In part this seeming contradiction is because of competing considerations about what furthers self-governance, but it is also the result of dueling understandings of the role of government towards civil society in a democracy.

As a first step in building this self-governance argument for an open regulatory environment, it is useful to briefly revisit a claim made by scholars and courts that one of the primary goals of freedom of expression in a democracy is to ensure citizens have adequate information to make informed decisions. As Alexander Meiklejohn famously claimed in defending free speech, “the point of ultimate interest is not the words of the speakers, but the minds of the hearers. . . . The voters . . . must be made as wise as possible.”166 The U.S. Supreme Court has repeatedly embraced this justification for free speech.167 For instance, in Citizens United the majority argued, “[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”168

Such a self-governance justification for freedom of expression applies equally whether the speech originates from a domestic or foreign speaker. As Meiklejohn wrote in supporting the free speech of foreigners, “The essential point is not that the alien has a right to speak but that we citizens have a right to hear from him. The freedom in question is ours.”169 Foreigners can provide a wide set of unique perspectives, including experiences with different policies in other countries or new insights about political ideas like human rights, globalization, or economic policy. Citizens, as well as policymakers,

167 See Robert Post, Citizens Divided: Campaign Finance Reform and the Constitution 40 (2014) (“For the last eighty years, First Amendment jurisprudence has been founded on the premise that ‘speech concerning public affairs is . . . the essence of self-government.’”).
169 Meiklejohn, supra note 166 at 60.
should be able to learn about any pertinent information or views from whatever the source. Ronald Krotoszynski explains that “No necessary relationship exists between the geographic origin of speech or a speaker and its potential utility to the project of democratic self-government.” This right to receive (and impart) information “regardless of frontiers” is enshrined in both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).

Ensuring the wisdom of citizens (and voters) though comes from more than just a theoretical ability to receive information as if it is produced in a vacuum. It requires associations, including media organizations, universities, and a wide variety of nonprofits. These organizations and entities help transmit knowledge to voters, whether this is through reporting or research to inform debate; crafting or amplifying key messages to bring to the attention of the public; or building organizations that at least some citizens trust as a source of information. Not only do associations help spread information that helps inform the public, but they can encourage citizens to engage in public spirited behavior. In this vein Mark Warren has argued that

170 Ronald Krotoszynski, Transborder Political Speech, 94(2) NOTRE DAME L. REV. 473, 476 (2018); See also Timothy Zick, The First Amendment in Trans-Border Perspective: Toward a More Cosmopolitan Orientation, 52(3) BOS. COLLEGE L. REV. 941, 1000 (2011) (“In our interconnected world, a self-governing person must not only have access to information regarding the local community, but she must also have at least a working knowledge of issues of global scope and significance.”); Joseph Thai, The Right to Receive Foreign Speech, 71(1) OKLAHOMA L. REV. 269 (2018) (discussing the marketplace of ideas, or truth-seeking, justification for free speech applies equally if the speaker is domestic or foreign. Id. at 309-310).

171 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at 71, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Id. at Art. 19); 999 U.N.T.S. 171 (Mar. 23, 1976) (“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers . . .” Id. at Art. 19).

172 See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . .”)

173 See JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 363 (1998) (arguing political influence might be acquired by “experienced political leaders and officeholders, established parties, and well-known groups like Greenpeace and Amnesty International. . .”); WARREN, supra note Error! Bookmark not defined., (describing how Alexis de Tocqueville was the first to “detail how the liberal-democratic constitutional government depends on social mores, political culture, and habits of collective action cultivated by horizontal relations of association.” Id. at 29).

174 WARREN, supra note Error! Bookmark not defined., at 9, 18, 22-23 (describing how Michael Sandel, Daniel Bell, Robert Putnam, and other scholars have argued that associations can promote civic virtues such as cooperation and public spiritedness).
“Associational life forms the social infrastructure of public spheres.”\textsuperscript{175} Or as the European Court of Human Rights has found “the right to freedom of association constitutes one of the essential bases of a democratic and pluralist society, inasmuch as it allows citizens to act collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life.”\textsuperscript{176}

In other words, democratic self-governance comes from individual citizens not just having an abstract right of free speech and ability to vote for their leaders. Rather it comes from access to a political ecosystem where a diversity of actors engage in reporting, research, mobilization, and debate, in order to develop, challenge, and refine the views of both government and the public itself.\textsuperscript{177} In this way, citizens have a right to hear from and associate with a diverse range of entities in public life, including through groups that receive foreign funding. Indeed, there is a long history of such cross-border collaborations, including in fights against slavery and colonialism, or for the rights of women, minorities, and others.\textsuperscript{178}

To be clear, this is not to say that protecting self-governance requires no limitations on foreign funding of nonprofits. Political and legal theorists have long recognized the need to distinguish between regulation of different types of expressive activity. Jurgen Habermas, for example, famously argued for a largely unregulated “public sphere” while “decision-oriented deliberations”, such as legislative proceedings or elections, require significantly more regulation.\textsuperscript{179} Habermas claimed that decision-oriented deliberations are structured primarily to create justification and legitimization for decisions in a democracy, and so decisions in these deliberations should be achieved

\textsuperscript{175} Id. at 34
\textsuperscript{176} CJEU Hungary judgment, supra note 57 at para 112.
\textsuperscript{177} MEIKLEJOHN, supra note 166 at 45-46 (“The First Amendment . . . offers defense to men who plan and advocate and incite toward corporate action for the common good.”).
\textsuperscript{178} There have many collaborations of social movements across borders. See e.g., Frederick Douglass in Britain, Impact of the Trip http://frederickdouglassinbritain.com/journey/impact/ (noting that British abolitionists bought the freedom of Frederick Douglass, perhaps the most famous 19th century civil rights leader in the U.S.).
\textsuperscript{179} See HABERMAS, supra note 173 at 307 (discussing the meaning of “decision-oriented deliberation” and “public sphere”). For a short history of the concept of the public sphere and an overview of debates about its meaning see generally Seyla Benhabib, The Embattled Public Sphere: Hannah Arendt, Jurgen Habermas, and Beyond, 90 THEORIA 1 (1997). Robert Post, drawing both on Habermas and First Amendment scholars in the United States, develops a similar categorization. Post distinguishes between when government uses its “managerial authority”, in which it administers its own institutions, like elections, and so can more strictly regulate speech, versus its “governance authority”, in which it governs the general public and so stricter speech protections apply. Robert Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L. REV. 1775 (1987).
through the regulated introduction of information, argument, and reason.\textsuperscript{180} These structured deliberations, in turn, are informed by the public sphere, which Habermas described as a “‘wild’ complex that resists organization as a whole” and which is oriented towards “discovery”.\textsuperscript{181} In the public sphere mass media and various associations are critical to helping shape public opinion.\textsuperscript{182}

This distinction between the regulation of the public sphere and decision-oriented deliberations is important and will be returned to in this article as a meaningful way to help determine the legitimacy of regulation of foreign funding for different types of activities. For example, compared to general public advocacy, there is much more of a justification to regulate electioneering or lobbying so as to protect the legitimacy of the democratic process.\textsuperscript{183}

Arguments about whether or how the government should regulate the public sphere, including nonprofits activities within it, are not new, and can be based in competing visions of government’s relationship to civil society. In the 1920s in the U.S., Walter Lippman famously feared that an unprecedented wave of (largely domestic) propaganda would misguide an all too swayable and ill-informed public.\textsuperscript{184} He claimed there needed to be a heavy government role in managing national debate, including employing a technocratic army of experts to filter information as well as making clear the interests behind propaganda.\textsuperscript{185} John Dewey disagreed, arguing that the proper response to this rise in propaganda required not strong government regulation of the public sphere, but rather experts uncovering facts for the public to help them navigate the new media landscape and citizens debating

\textsuperscript{180} HABERMAS, supra note 173 at 307 ( “[t]he publics of parliamentary bodies are structured predominantly as a context of justification.”).

\textsuperscript{181} Id.

\textsuperscript{182} Id. (“The currents of public communication are channeled by mass media and flow through different publics that develop informally inside associations.”). As Habermas writes, the public sphere not only identifies problems for democratic governments to deal with, but also must “thematize [problems], furnish them with possible solutions, and dramatize them in such a way that they are taken up with and dealt with by parliamentary complexes.” Id. at 359.

\textsuperscript{183} Magnus Ohman, Getting the Political Finance System Right, in FUNDING OF POLITICAL PARTIES AND ELECTION CAMPAIGNS 2 (R. Austin & M. Tjernström Ed. 2003). (noting that foreign donations to political candidates or parties are banned in most countries in order minimize foreign influence and protect self-determination).

\textsuperscript{184} WALTER LIPPMAN, THE PHANTOM PUBLIC (1993) (“No ordinary bystander is equipped to analyze the propaganda by which a public interest seeks to associate itself with the disinterested public.” Id. at 103)

\textsuperscript{185} Id. at 102 (“Thus the genius of any illuminating public discussion is not to obscure and censor private interest but to help it to sail and to make it sail under its own colors.”)
issues at a local level.\textsuperscript{186} While Dewey’s rejection of explicit government censorship arguably won the day in the U.S. government’s larger stance towards domestic propaganda, Lippman, and others like him, were influential in getting the U.S. government to adopt national security laws like FARA.\textsuperscript{187}

A variation of this debate repeated itself in India. The British colonial state heavily regulated the public sphere as they feared both advocacy against their rule and viewed their Indian colonial subjects as “highly excitable” and so easily prone to both taking offense and responding with violence.\textsuperscript{188} As such, the British enacted restrictions on expression like crimes of sedition, promoting enmity between different religious groups, or group defamation.\textsuperscript{189} Many of these laws continued in force post-independence, and the Indian government enacted additional national security measures that could, among other provisions, ban groups that undermine the integrity and sovereignty of India and criminalize associating with them.\textsuperscript{190} These types of restrictions have been heavily criticized. As Indian legal scholar Lawrence Liang has written, speech-regulating laws in India have the impact of “perpetual[ly] infantilising . . . the public sphere”\textsuperscript{191} and attempting to create “consensus through control”,\textsuperscript{192} rather than accepting that a certain degree of conflict is not just inevitable, but desirable in a democracy.\textsuperscript{193} The FCRA arguably fits into this larger, if contested, pattern in India of the government attempting to exert its control over the public sphere, including civil society.

This is not to say that an open civil society does not have vulnerabilities that can undermine democratic debate or should never be regulated. Foreign and domestic voices may have nefarious purposes or they may have a


\textsuperscript{187} See, e.g., Robinson, supra note 24 at 1093-1094 (describing how registration requirements, like Lippman had proposed, became part of FARA and other national security laws like the McCarran Act, which required Communist organizations to register with the Justice Department).

\textsuperscript{188} Lawrence Liang, Free Speech and Expression, Oxford Handbook of the Indian Constitution 818 (2016)

\textsuperscript{189} See, Id. (describing freedom of expression restrictions enacted by British in India).

\textsuperscript{190} Notably the Unlawful Activities Prevention Act, introduced in 2008 and amended in 2019, can be used to designate groups or individuals as “terrorists”. ‘Misused, abused’: India’s harsh terror law under rare scrutiny, Al Jazeera (Aug. 16, 2021), https://www.aljazeera.com/news/2021/8/16/india-uapa-terror-law-scrutiny.

\textsuperscript{191} Liang, supra note 188 at 831.

\textsuperscript{192} Id. at 832.

\textsuperscript{193} Id. at 831.
disproportionately large voice. Still, despite these concerns, a government that does not allow its citizens to actively and robustly engage with the world arguably weakens their ability to engage in the project of self-governance.

B. Protecting Government Critics

Another justification for protecting cross-border funding of nonprofits, focuses not on the benefits of such associational activity to self-governance, but rather on the practical dangers of these restrictive laws to government critics and less popular voices within society. NGO foreign funding laws can be used by governments to weaponize fear of the foreign to discredit domestic political critics as outsiders or collaborators with foreign forces. Their frequently complex requirements can also allow governments to tie up disfavored nonprofits in regulatory burdens, investigations, and even shut them down.194 This type of administrative crackdown on civil society frequently does not face the same public or judicial scrutiny as a violent crackdown or targeting groups explicitly because of their viewpoint.195

The case studies in this Article have already highlighted examples of this type of politicized targeting in India, the U.S., and Hungary.196 However, other foreign funding restrictions have been similarly used to target or prosecute political opponents globally, including in Russia, Latin America, Africa, and elsewhere.197

The fact that a law can be abused to target unpopular or dissenting voices does not mean that it might not serve a useful purpose. That said, the more expansive and restrictive laws are on foreign funding of nonprofits the easier it is to target organizations and activists for failing to comply with these restrictions. As such, the danger presented to government critics by these laws is an important reason for ensuring any restrictions on foreign funding are carefully targeted.

C. Access to Resources and Expertise

194 Chaudhry, supra note 13 (describing how many countries prefer administrative crackdowns to NGOs rather than violent ones as they are less likely to suffer international or domestic blowback. Id. at 557-558).

195 Id.

196 This includes the Indian government investigating and prosecuting human rights and environmental groups under the FCRA, see supra Part I(B), the U.S.’s prosecution of W.E.B. Du Bois under FARA during the McCarthy era, see, supra Part I(C), and the Orban government claiming it would target human rights and other groups under Hungary’s NGO Transparency law, see, supra Part I(A).

197 See, e.g., Rutzen, supra note 11 at 30 (providing chart showing global impact of laws restricting civil society).
Restrictions on foreign funding of nonprofits can also undermine access to resources and expertise needed for the prosperity, development, and social well-being of a country. Restrictions can lead to the stopping of outside funding to civil society within a country, withdraw of international nonprofits, and the shutting down or reduction in size of operations of domestic organizations.\footnote{Van de Velde,\textit{ supra} note 4 at 693 (describing how foreign funding laws can lead to a “reduction in development aid, withdrawal of NGOs from states, and decreased social services for citizens.”).}

This point is particularly obvious for developing countries. For example, Kyrgyz legislators who voted against a bill restricting cross-border funding cited the need for foreign funding: “We get financial assistance from [international organizations] in many fields including healthcare, education, and agriculture among others. We need this money.”\footnote{Annai Lilek,\textit{ 2016. Kyrgyzstan: Foreign Agent Bill Nixed, NGOs Rejoice, OPENDEMCRACY} (May 12, 2016), https://eurasianet.org/kyrgyzstan-foreign-agent-bill-nixed-ngos-rejoice quoted in Chaudhry,\textit{ supra} note 13 at 562.} Even in a comparatively large developing country like India, where Home Affairs Minister Chidambaram defiantly declared “There is enough money for charity within India” when leading the effort to enact the 2010 FCRA, foreign funding continues to be a significant part of the nonprofit sector.\footnote{Rajya Sabha 2010 debate,\textit{ supra} note 79 at 396.} By one estimate, in 2018-2019 some 32% of philanthropic capital in India came from foreign sources.\footnote{\textit{See Centre for Social Impact and Philanthropy, Estimating Philanthropic Capital in Indian 10} (2021). (finding in 2018-2019 16,343 crore Rupees of philanthropic capital in India came from foreign sources out of a total amount of 51,184 crore Rupees).} Another 36% came from state-mandated corporate social responsibility (CSR), and many of these companies had significant foreign investors.\footnote{Id. at 10 (finding 18,653 crore Rs of philanthropic capital in India came from foreign sources out of a total amount of 51,184 crore Rupees).}

This foreign inflow of money to nonprofits though is used not just to provide needed services, but also expertise. As one of the leading newspapers in India declared in an editorial criticizing the use of the FCRA to target a leading Indian think tank: “Collaboration with the world requires the flow of information, personnel and funds in both directions.”\footnote{Power Against Knowledge,\textit{ On Centre for Policy Research FCRA license suspension, THE HINDU} (March 6, 2023), https://www.thehindu.com/opinion/editorial/power-against-knowledge-the-hindu-editorial-on-centre-for-policy-research-fcra-licence-suspension/article66584063.ece.} It continued, “To assume that Indian thinking should be insulated from foreign ones, while seeking international technology and capital inflow at the same time is a
paradox. At any rate, for a country growing as fast as India, a massive expansion in capacity for research is the need of the hour.”

Wealthier countries have also benefitted from access to resources from abroad both historically and today. To name one prominent example, the Statue of Liberty, perhaps the clearest symbol of freedom in the United States, was funded in part by citizen organizing committees in France. Many major U.S. universities significantly benefit from funding from foreign students as well as gifts from foreign alumni. Meanwhile, organizations like Amnesty International and Greenpeace that are headquartered in Europe, are a vibrant part of civic life in the United States, while many prominent U.S. nonprofits, including both universities and advocacy organizations, also operate in Europe, providing important services and expertise.

D. Reciprocity

A separate justification for protecting an open funding environment for nonprofits is the benefits of reciprocity. Cross-border nonprofit activity can help promote or support democracy in other countries, which arguably creates a more stable, prosperous global order that benefits everyone. As such, it is in the self-interest of democracies to support a strong international norm of protecting cross-border funding for civil society.

Academic research has found that democracies are less likely to declare war on each other, and there is substantial evidence they are more likely to trade with each other. A key potential tool of furthering democracy is

---

204 Id.

205 A wide cross-section of people in France donated money for the statue itself, while those in the United States donated money for the pedestal. NATIONAL PARK SERVICE, THE FRENCH CONNECTION, https://www.nps.gov/stli/learn/historyculture/the-french-connection.htm. Organizing committees in France and the United States fundraised directly for the statue’s costs amongst the people in each country. Id.


208 See generally Michael W. Doyle, Three Pillars of the Liberal Peace, 99(3) AM. POL. SCI. REV. 463 (2005) (reviewing literature, including Doyle’s own work, arguing that democracies are less likely to engage in military hostilities towards each other and addressing criticism of these findings).

209 See Nazif Durmaz and John Kagochi, Democracy and Inter-Regional Trade
ensuring that democratic ideas, such as the benefits of free and fair elections, the rule of law, or civil liberties, are allowed to be debated and promoted in other countries. Civil society voices, including nonprofits that receive foreign funding, are often important in these debates. As Suparna Chaudhry has written, “NGOs can be critical to improving both the quality and the conduct of elections” whether that is through voter education about their right to vote, monitoring the integrity of the process, of promoting more equal media access.

When democracies have restrictive laws on foreign funding these can be used to justify similar laws in countries with authoritarian or authoritarian leaning governments. As has already been referenced, a number of countries, including Russia, Nicaragua, and Hungary, have pointed to FARA in the U.S. to justify restrictions on foreign funding of nonprofits. The presence of a law like FARA has not only helped normalize these types of restrictions globally, but put the U.S. and other democracies on the backfoot in their human rights advocacy with other countries. For example, in November 2021 El Salvador’s President Nayib Bukele took to Twitter to troll human rights critics of his proposed “foreign agent” law by linking to a U.S. Justice Department copy of FARA on which he claimed El Salvador’s proposal was modeled. Bukele declared that “To be like developed countries, we have to do what they do, not what they say,” and continued “If that law is good for the United States, why wouldn’t it be good for us?”

Just because democracies create a more open regulatory environment for foreign funding of nonprofits does not mean other countries will reciprocate. However, it seems even less likely that authoritarian and authoritarian leaning

Enhancement in Sub-Saharan Africa: Gravity Model, 6(3) ECONOMIES 45 (2018) (discussing literature that finds that democracies trade more with each other and finding similar results in Sub-Saharan Africa. Id. at 45-46).

See Sina Odugbemi, Public Opinion, Public Sphere, and Quality of Governance: An Exploration in GOVERNANCE REFORM UNDER REAL WORLD CONDITIONS (Sina Odugbemi and Thomas Jacobson eds., 2008) (describing how one of the ways accountable and democratic governance is achieved “is to have in the political community a domain of free flow of information, free expression, argument, debate, and discussion about common concerns.” Id. at 29.)

Chaudhry, supra note 13 at 558.

See FARA’S DOUBLE LIFE ABROAD, supra note 25 at 2-3 (describing how Russia, Hungary, and Nicaragua all justified their foreign agent laws pointing to FARA).

See, e.g., U.S. Embassy in Georgia, Ned Price on Foreign Agents Law (March 2, 2023), https://ge.usembassy.gov/ned-price-on-foreign-agents-law/ (arguing against repeated claims that the proposed 2023 Georgian foreign agent law is based on FARA).


Id.
governments would face pressure to create a more open funding environment for civil society if democracies do not embrace these principles.

E. Democratic Cosmopolitanism

Another reason for defending a more open regulatory environment for foreign funding of nonprofits is found in democratic cosmopolitanism. If a self-governance justification centers the benefits of an open funding environment to the public sphere and citizens ability to make informed decisions about their governance, a democratic cosmopolitan justification focuses on citizens’ stakes in political communities outside their nation.

Individuals are members not just of a national political community, but of multiple other communities that frequently cross national boundaries, whether these are cultural, religious, ethnic, professional, or political identities, or one’s broader relationship to all humans.\(^2\) One of the primary justifications of freedom of speech and association is to foster identity formation, including around these diverse types of cross-border communities.\(^2\) As Jack Balkin has written free expression is meant to promote democratic culture, which he defines as a “participatory culture” where everyone has a fair chance to develop the ideas and produce culture that influence the communities to which they belong.\(^2\)

In order to let their citizens better mobilize around and express their identities and interests, democratic governments need to allow space for their citizens to engage and partner with foreign individuals and organizations. This might include tackling transnational problems in which they feel like they have a stake, like fighting for LGBTQ rights, protecting religious liberty, or combatting climate change, or coming together in professional or cultural groupings, such as an international medical association or a group that furthers the spread of classical music around the world. In order to allow their


\(^2\) Balkin, supra note 217 at 3.
citizens to pursue their interests in these communities, governments will frequently need to protect cross-border funding of civil society organizations.

There are criticisms of this democratic cosmopolitanism perspective. Some, for instance, have claimed that cross-border engagement is frequently driven by self-interested motives or it is counter-productive. 219 Nor is it clear that governments are motivated to prioritize protecting these cosmopolitan interests of their own citizens (let alone citizens of other countries). Still, besides the benefits to their citizens, there are potentially significant economic, social, and political benefits to countries where governments are open to allowing their citizens to engage in these types of civil society cross-border collaboration, which often can bring trade and prestige benefits.

IV. TYPES OF FOREIGN FUNDING RESTRICTIONS

While there are arguments both for and against a more open funding environment for nonprofits, in practice restrictions on foreign funding take on very particular characteristics. This Part creates a typology of criteria that have been used to regulate cross-border funding of nonprofits, which is then used in Part V to begin to develop a framework for how policymakers might better target any foreign funding restrictions. This typology of criteria is organized by (1) which foreign funders; (2) what funding relationship; (3) types of activity; and (4) regulatory mechanisms. The examples used in this Part draw on the case studies of Part I, but also from other democracies.

A. Which Foreign Funders

Some countries that restrict foreign funding to nonprofits treat all foreign funders the same. For example, the FCRA in India requires registration of any organization that receives a “foreign contribution” from any “foreign source” if they are engaged in covered activity. 220 Hungary’s Transparency Law and FARA in the U.S. similarly do not make distinctions between different types of foreign funders. 221

This indiscriminate treatment though is not the only approach. Australia’s FITS, for example, only covers those who undertake registrable activities on the behalf of foreign governments, foreign political parties, or foreign

219 See, e.g., Easterly, supra note 151.
220 See FCRA 2010, supra note 68 at Ch. 1, § 2(1)(h) and § 2(1)(j) (defining foreign contribution and foreign source); Id. at Chapter 3 (describing entities required to register under the act for receiving foreign contribution).
221 See Hungary NGO Transparency Law, supra note 42 at § 1(2) (requiring organizations register for receiving funding “either directly or indirectly from abroad”); 22 U.S.C. 611(b) (defining all foreign principals to include both “a government of a foreign country” and “a person outside the United States”).
government related entities or individuals.\footnote{222} In the US, a Taskforce of the American Bar Association has similarly proposed narrowing FARA so that it only applies to “agents” of foreign governments or political parties or those operating on their behalf, instead of all foreigners.\footnote{223}

There are legitimate reasons a democracy may want to regulate funding from foreign governments more strictly compared to other actors. Some foreign governments may be adversarial or in competition with a democracy and may even be engaged in active efforts to intentionally undermine or attack the country. Further, foreign governments can engage in another country through formal channels like embassies or inter-governmental organizations, which are not available to non-governmental actors.\footnote{224}

A regulatory approach that targets just foreign governments though still has challenges. For example, Israel’s NGO Transparency Law only applies to funding from foreign governments, but this mechanism has been criticized for being a way to target EU government funding to Palestinian rights organizations, leading to claims it is stifling dissent.\footnote{225} Further, it can sometimes be difficult to tell who is a foreign government. Particularly in countries with more authoritarian governments some nonprofits may sometimes be organized by and work on behalf of the government even if they claim to be independent.\footnote{226}

Some have advocated that democracies should only target funding from certain, adversarial, foreign countries, or regulate these connections more

\footnote{222} See FITS Act, supra note 18 at Art. 10 (defining “foreign principal” to include a foreign government, foreign government related entity, foreign political organization, or foreign government related individual). A “foreign political organisation” has been interpreted to be a political party. AUSTRALIAN GOVERNMENT, FOREIGN INFLUENCE TRANSPARENCY SCHEME FACTSHEET (Feb. 2019), https://www.ag.gov.au/sites/default/files/2020-03/foreign-principals.pdf.


\footnote{225} See TOI article, supra note 16 (quoting critics claiming it is targeting anti-occupation advocates, while pro-settler organizations generally do not have to reveal their foreign funding, which is less likely to come from foreign governments).

stringently. Taiwan followed this tactic in its 2019 anti-infiltration act by banning individuals or entities, like nonprofits or companies, from engaging in a set of covered activity—including lobbying, spreading election misinformation, or contributing to political campaigns—at the instruction of or with financial support from a “hostile foreign power”. “Hostile foreign power” is then defined under the law in such a way so as to currently only include China. Under the United Kingdom’s 2023 Foreign Influence Registry the Secretary of State has the power to designate certain foreign governments and persons of heightened concern, triggering registration requirements for a much broader set of activities by actors in the UK, including nonprofits. Multiple bills have also been introduced in the U.S. Congress that would strengthen some of FARA’s requirements, but only for agents of certain foreign government adversaries, such as China, designated by the Executive.

There have been a number of critics though of this country specific approach. While there may at times be consensus about adversarial foreign powers in certain contexts, such as during a state war, in other contexts such a system can easily become politicized. Further, there are fears that such a tiered system might be used to target certain communities. For example, Canadian Senator Woo has raised the concern that a proposed foreign registry

---

227 Ben Judah & Nate Sibley, The West is Open for Dirty Business, FOR. POLICY (Oct. 5, 2019), https://foreignpolicy.com/2019/10/05/eu-us-fight-corruption-kleptocracy/ (arguing that Congress should “effectively exclude antagonistic nondemocracies from U.S. public life by mandating the creation of a blacklist of adversarial authoritarian regimes engaged in serious corruption or human rights abuses.” Continuing that “States on the blacklist, politically exposed persons, and their proxies would be banned from owning media and funding think tanks, political action groups, or lobbyists.”).

228 Anti-Infiltration Act passed by Taiwan’s legislature, TAIWAN TODAY (Jan. 2, 2020), https://nspp.mofa.gov.tw/nspp/content_tt.php?unit=2&post=168755&unitname=Taiwan-Today&postname=Anti-Infiltration-Act-passed-by-Taiwan%E2%80%99s-Legislature (describing key components of anti-infiltration act, including how “hostile foreign power” is defined as a country at war or in a military standoff with Taiwan).

229 Id.

230 UK NSA 2023, supra note 21 at Art. 65 and 66 (requiring registration for “relevant activities” by a “specified person” both of which are defined by the Secretary of State through regulation).

231 See, e.g., International Center for Not-for-Profit Law, Foreign Agents Registration Act (describing introduced bills that would reform FARA to target countries of concern, including in the 118th Congress, S. 434, and in the 117th Congress, S 1754, S 4901, HR 9199).

might only be targeted at those with connections with China. In doing so, it could force many Chinese immigrants “to cut off ties” with their native countries or create “stigmatization” of Chinese immigrants and generate fear within the community as the “threat of registration is always hanging over them”. Others worry a targeted approach to certain countries may also backfire geopolitically. As one commentator in the U.S. wrote, “Rather than viewing….asymmetry [with authoritarian powers like China] as unfair, we should recognize its symbolic value: America wins when it can show the world that it’s an open and democratic country.”

B. What Funding Relationship

Another potential difference between foreign funding restrictions is the nature of the funding relationship. Many foreign funding laws, such as India’s FCRA, are triggered by any amount of funding from a foreigner. Other foreign funding laws though have quantum or agency requirements. Hungary’s NGO Transparency Law, for instance, only applied to nonprofits that received over about 23,500 Euros a year from foreign sources (which the CJEU, in turn, found too low a threshold). Meanwhile, in Israel, the country’s nonprofit transparency law only applies to nonprofits that receive over 50% of their operating budget from foreign governments. And in the U.S., while there is an academic exemption to FARA, universities covered by the Higher Education Act are required to disclose gifts or contracts over $250,000 a year from a foreign source that are then posted online by the Department of Education.

---


234 Id.


236 See FCRA 2010, supra note 68 at Sec. 6 (requiring that any organization engaged in covered activity under the Act receive clearance from the government to receive foreign funding).

237 ECNL, supra note 49. The CJEU found this small amount “clearly do not appear to correspond with the scenario of a sufficiently serious threat to a fundamental interest of society, which those obligations are supposed to prevent.” CJEU Hungary judgment, supra note 57 at para. 94.


In some countries covered relationships with foreigners are not triggered by funding alone. For example, FARA in the U.S. has an agency requirement between the foreign principal and foreign agent. In some ways this requirement is more sweeping than a funding relationship as it can capture those who do not receive any foreign funding at all – such as those acting merely the “request” of a foreigner in covered activity. However, it is also in other ways narrower. Under FARA, if a recipient of foreign funding does not act at the “request” of a foreigner or there is not “control” then the person or entity seemingly does not have to register. However, although it hasn’t had to, the Justice Department has generally interpreted receiving funding as indicative of an agency relationship.

C. Types of Activity

Laws that regulate foreign influence can regulate a broad range of activities. Some, like the FCRA in India or Hungary’s 2017 Transparency Law, regulate nonprofits that receive foreign funding that engage in almost any activity. Meanwhile, FARA has been criticized for the sweeping and frequently vague list of activities that require registration under the Act. Other countries though take a more targeted approach, covering those that only engage in certain activities.

Most democracies including in the U.S., India, and Europe, have bans on foreign funding of electioneering. Many also have laws that are focused on making more transparent the lobbying activities of foreigners. Australia’s

---

240 22 U.S.C. § 611(c) (defining an “agent” under the Act); Similarly, Australia’s Foreign Influence Transparency Scheme is not triggered by receiving funding alone, but requires that the recipient undertake registrable activities in the service of the foreign principal, at their order or request, or through another covered arrangement. ATTORNEY GENERAL’S DEPARTMENT, FOREIGN INFLUENCE TRANSPARENCY FACTSHEET 4 (Feb. 2019) https://www.ag.gov.au/sites/default/files/2020-03/acting-on-behalf-of-foreign-principals.pdf.


242 See, e.g., NWF Advisory Opinion, supra note 123 (finding that although NWF claimed its grant agreement with the Norwegian government did not give them “direction or control” over NWF that NWF was still an “agent” because under the agreement it is “obligated to engage in activities to advance the deforestation priorities of the [foreign government].” Id. at 2).

243 Hungary NGO Transparency Law, supra note 42 at § 1(4) and § 2(1) (requiring NGOs register for any activity unless they are related to certain religious, sports, and minority activities); See FCRA 2010, supra note 68 at § 6 (requiring that an organization receive government clearance if accepts foreign contribution to engage in a “definite, cultural, economic, educational, religious, or social programme”).

244 See Robinson, supra note 24 at 1097-1099 (describing broad list of covered activities under FARA).

245 Ohman, supra note 183 at 2.
Foreign Influence Transparency Scheme or the UK’s Foreign Influence Registry, for example, have as a major goal making foreign government lobbying of lawmakers more transparent.246

Beyond electioneering and lobbying, some restrictions focus on certain types of public communications. FARA, which was originally an anti-propaganda measure, famously, and controversially, covers a broad range of communications. For example, it requires an agent of a foreign principal register who, on their behalf, publishes any oral, visual, or written information247 or attempts to influence U.S. public opinion on any foreign or domestic policy issue.248 Australia’s FITS takes a narrower approach in targeting communications, but still requires registration for “communications activity” for the purpose of “political or governmental influence” on behalf of a foreign government or political party or foreign government related entity or individual.249 The Act defines “political” though to only include attempting to influence elections, the proceedings of Parliament, or a federal government decision.250

Some foreign funding laws ban foreign funding for activities the government deems detrimental to the country. In India under the FCRA, for example, the government can deny registration if an organization is likely to engage in a range of conduct, including activity against the “public interest”.251 Organizations like Oxfam India have been denied registration under this ground leading to claims that the “public interest” is being conflated with not being critical of the government.252

Countries may also regulate certain disbursement activity of things of value on behalf of a foreigner. FARA requires registration for anyone who “disburses . . . contributions, loans, money, or other things of value for or in the interest of [a foreigner].”253 Meanwhile, in Australia one must register only for “disbursement activity” in the country for on behalf of a foreign government or political party for the purpose of “political or governmental influence”.

---

246 UK NSA 2023, supra note 21 at §§ 69 and 70 (requiring persons to register for engaging in “political influence activity” under the Act); FITS Act, supra note 18 at Art. 20 (detailing parliamentary lobbying as first covered activity).
247 22 U.S.C. § 611(h) (defining “publicity agent” under the law).
248 22 U.S.C. § 611(o) (defining “political activities” under the law).
249 FITS Act, supra note 18 at Art. 21 (describing covered activities for purposes of “political or governmental influence”).
250 Id. at Article 12(1) (defining “political or governmental influence”
251 FCRA 2010, supra note 68 at Ch. 5, § 12(a).
252 See Bharti Jain, MHA for CBI probe against Oxfam India over FCRA norms, Times of India (April 7, 2023), https://timesofindia.indiatimes.com/india/mha-for-cbi-probe-against-oxfam-india-over-fcra-norms/articleshow/99306444.cms?from=mdr (describing how Oxfam was denied renewal of its FCRA registration in 2021 on “public interest” grounds).
influence”.

Many acts that regulate foreign influence also include a set of exemptions. In the U.S., for example, FARA provides exemptions for “bonafide” commercial activity, as well as certain academic, humanitarian, or religious activities. In Australia, there is an exemption for registered charities and many other actors if the covered activity is not a disbursement activity and at the time it is undertaken it is “apparent or disclosed to the public” that the activity is being undertaken on behalf of a foreign principal. While these exemptions can help better target these laws, they can also create confusion and often still allow for a broad swath of activities nonprofits routinely engage in to be covered.

D. Regulatory mechanisms

There are a variety of tools that governments have used to regulate the foreign funding of nonprofits. These range from outright bans to various registration or reporting schemes. While some of these regulatory mechanisms impose greater burdens than others, even lighter touch regulation can potentially be stigmatizing or create administrative costs that can interfere with the operations of nonprofits. Understanding the details and contexts of specific regulations is important to assess their actual impact.

Prohibitions on foreign support are the most onerous type of regulation. While many countries ban foreign contributions for electioneering, some, like India, also ban such contributions for a range of other activities, such as if a nonprofit organization engages in religious conversion or activities against an amorphously defined “public interest.”

Registration schemes for receiving foreign funding can require either prior or post facto registration. UN human rights officials have called for an end to preregistration schemes, like the FCRA in India, that require government approval before an organization can receive foreign funding. These schemes are a form of prior restraint and allow the government greater discretion to deny or delay disfavored organizations from receiving any

---

254 FITS Act, supra note 18 at Art. 21(describing covered activities for purposes of “political or governmental influence”).

255 See Robinson, supra note 24 at 1104-1110 (detailing important exemptions under FARA).

256 FITS Act, supra note 18 at Art. 29c (detailing an exemption for registered charities in certain contexts).

257 Ohman, supra note 183 at 2.

258 FCRA 2010, supra note 68 at Ch. 5, § 12(a).

259 See, e.g., UNSR 2023 General Principles, supra note 37 (“States must not require prior authorization to civil society organizations to be able to access domestic and foreign funding and resources.” Id. at para 18).
Regulation of Foreign Funding of Nonprofits

foreign funding at all.\textsuperscript{260} In comparison, post-registration schemes, like FARA in the U.S. or Hungary’s NGO Transparency Law, are less restrictive, but as the case studies showed they can still be used as a tool by governments to create burdens or stigma against civil society and disfavored organizations.

Reporting requirements for either preregistration or post-registration schemes can vary extensively. Some, like FARA in the U.S., require extensive reporting for every time an “agent” engages in a covered activity.\textsuperscript{261} This information is then posted to a public website.\textsuperscript{262} Others may only require a statement that a foreign donation has been received and from whom.\textsuperscript{263} More burdensome requirements can easily drown nonprofits in paperwork or create more opportunities and discretion for governments to investigate nonprofits or their officers for noncompliance.

Beyond reporting requirements, some countries engage in extensive government control in how foreign funds can be used. India is one of the most invasive examples amongst democracies. Not only is prior approval required to receive foreign funding, but recent amendments to the FCRA require only 20% of foreign funding to the nonprofit can be used for administrative expenses, none of the money can be sub-granted to another organization, and all foreign funding must be maintained at a State Bank of India branch in New Delhi.\textsuperscript{264} This type of micromanaging of activities is often made in the name of security or to ensure these funds are used for the benefit of society, but can impose substantial costs and greater surveillance and control over civil society organizations.

Finally, some countries have labeling requirements that require the organization make clear on its website or publications that it receives foreign funding. As the CJEU noted in its judgment against the Hungary NGO Transparency Law these labels can be stigmatizing.\textsuperscript{265} Organizations in countries like Russia and Nicaragua, for example, have shut down rather than

\textsuperscript{260} By empowering government officials with this authority, this type of scheme is arguably also more susceptible to corruption. For example, in 2022, Indian investigators uncovered a corruption scheme in which middlemen bribed FCRA officials to clear held up FCRA applications for bribes ranging from 5 to 10% of the foreign funding the NGO was to receive. FCRA bribery: 437 intercepted calls by CBI; show demands made for 5-10 per cent of held up funds, Economic Times (July 31, 2022), https://economictimes.indiatimes.com/news/india/fcra-bribery-437-calls-intercepted-by-cbi-show-demands-made-for-5-10-per-cent-of-held-up-funds/articleshow/93250057.cms

\textsuperscript{261} See Robinson, supra note 24 at 1103 (describing reporting requirements under FARA).

\textsuperscript{262} Id.

\textsuperscript{263} See U.S. Dept. of Education, supra note 239 (describing reporting requirements for foreign gifts to universities under the U.S. Higher Education Act).

\textsuperscript{264} ICNL on 2020 FCRA Amendments, supra note 91 (describing 2020 FCRA amendments).

\textsuperscript{265} CJEU Hungary judgment, supra note 57 at 58.
faced the stigma, and potential harassment by the government or third parties, of being labeled “foreign agents”.  

Governments have a wide range of regulatory tools available to them to address potential problems raised by the foreign funding of nonprofits. What is striking though is how frequently they use one-size-fits all strategies. For example, the FCRA requires nonprofits to receive a government certificate to receive foreign funding for most activities they engage in and no matter how much foreign funding they receive. Meanwhile, FARA, at least on paper, requires groups to register for a stunningly broad set of activities and undertake burdensome reporting and labeling requirements. Given the variety of activities nonprofits engage in, and the importance of protecting an independent civil society, there is a need for a more tailored approach. It is to that approach that the next section turns.

V. A DEMOCRACY CENTERED APPROACH

This article advocates that when considering restrictions on cross-border funding to nonprofits countries should follow what it terms a democracy centered approach. This approach recognizes and robustly protects the important role of a pluralistic civil society in democratic debate. It contrasts with India’s government controlled nonprofit nationalism in which the government has consistently exercised excessive power over, and imposes heavy burdens on, civil society organizations. It also contrasts with the U.S.’s ambiguous regulatory heavy handedness, where the government has generally been hesitant to enforce restrictions, but then has weaponized the Act against politically disfavored targets. This democracy centered approach is closer to the rights-based regulatory liberalism of the European Union, but highlights an even broader set of self-governance concerns.

This approach recognizes that while there are genuine foreign threats to self-governance, the specter of the foreign can obscure the benefits of cross-border collaboration. In response, it forefronts the rights impact of any regulation; carefully differentiates between regulation impacting democratic decision-making versus the public sphere; and where there is regulation on foreign funding applies it equally to all actors. This democracy centered approach recognizes that there are an array of disruptive forces to democratic self-governance. These include disinformation, election interference, or the disproportionate voice of those with deep pockets to influence democratic

---

266 See FARA’S DOUBLE LIFE ABROAD, supra note 25 at 2-3 (describing impact of foreign agent laws in Nicaragua in Russia).
267 FCRA 2010, supra note 68 at Ch. II, Sec. 6 (describing requirements for registration).
268 See Robinson, supra note 24 at 1097-1099 (describing broad list of covered activities under FARA).
decision-making processes. It urges policymakers to address these underlying problems by focusing not just on foreign actors, but whatever its source.

A. Rights Focused

Restrictions on cross-border funding of nonprofits have been repeatedly used to target civil society and government critics. Given this history, it is important for policymakers to forefront and address rights concerns raised by these laws. As the UN Special Rapporteur on the Freedom of Association has written, “International human rights law and standards amply recognize the freedom to access resources as part of the right to freedom of association.”

Where there are restrictions on funding they should meet basic rights principles such as being for a legitimate purpose, necessary, proportionate, and nondiscriminatory. In doing so, courts and lawmakers should not just examine whether restrictions on foreign funding still allow an organization to theoretically operate, but rather carefully analyze what the practical consequences of these regulations actually are.

Courts though have a mixed record of closely scrutinizing the impact of these laws. In *Noel Harper* Justice Khanwilkar of the Indian Supreme Court engaged in a relatively dismissive analysis of freedom of association concerns in analyzing amendments to the FCRA. In a representational part of his judgment, he found the requirement that all foreign money for nonprofits be routed through one State Bank of India branch in Delhi was a “matter of security of the State, public order and in the interests of the general public” and so “it is not open to question the validity of such a law on the touchstone of [the freedom of association] or [the freedom of trade and profession].” In justifying this position, he noted that since this provision did not ban associational activity entirely, but rather just burdened it, it did not raise freedom of association issues and did not require further analysis.

The U.S. Supreme Court has also fallen into the trap of failing to appropriately weigh the burdens created by these laws aimed at curtailing foreign influence. While the U.S. Supreme Court has never directly assessed

---

269 UNSR 2023 General Principles, supra note 37 at para. 11.
270 See, e.g., Van De Velde, supra note 4 at 725 (arguing that states should challenge foreign agent restrictions under the ICCPR’s optional dispute resolution and finding that under the ICCPR “[u]nless the State is able to show that the restriction at issue is prescribed by law, in the interest of legitimate government aims, and necessary in a democratic society, then that restriction is not justified.”).
271 Noel Harper, supra note 92 at para. 75.
272 Id. (“It is not a provision to completely prohibit forming of the associations or engaging in business of charity as such. It is a provision for regulating the manner of doing business more importantly, concerning foreign contribution.”).
the constitutional validity of the registration requirements of FARA, in its 1982 decision in *Meese v. Keene* the Court upheld a First Amendment challenge to the Justice Department classifying films made by the Canadian government as “political propaganda” (a term used at the time in FARA, but that was removed from the Act by Congress in 1995).\(^{273}\) In a divided ruling, Justice Stevens found that the term “political propaganda” did not place these materials “beyond the pale of legitimate discourse.”\(^{274}\) Largely ignoring polling data to the contrary and the common stigmatizing use of the term, Stevens claimed the public understood “political propaganda” as a “neutral”, rather than “pejorative” term.\(^{275}\) In dissent, Justice Blackmun argued the classification should be struck down, finding that, “By ignoring the practical effect of the Act’s classification scheme, the Court unfortunately permits Congress to accomplish by indirect means what it could not impose directly—a restriction of appellee’s political speech.”\(^{276}\)

In contrast to these cases, European courts have generally engaged in a more searching analysis of the impact of foreign funding regulation. In analyzing the Hungarian NGO Transparency Law, the CJEU noted how the law creates a set of regulations that that single out NGOs as “organisations in receipt of support from abroad” and require them to “present themselves to the public as such.”\(^{277}\) The Court continued that “[i]n thus stigmatising those associations and foundations, those provisions are such as to create a climate of distrust with regard to them, apt to deter natural or legal persons from other Member States or third countries from providing them with financial support.”\(^{278}\) Similarly, in ruling the Russian “foreign agent” law violated the European Convention of Human Rights, the ECHR critiqued how the law’s “burdensome” requirements and its “stigmatising” labeling requirement created a “significant chilling effect”.\(^{279}\) Such a textured approach that closely scrutinizes the actual burdens these laws impose on protected rights provide a more fruitful pathway for courts and policymakers to follow when assessing the merits of any restrictions on foreign funding.

\(^{273}\) Robinson, *supra* note 24 at 1131-1132 (describing the finding of the Court in *Meese v. Keene* and noting that the majority did address the constitutionality of the underlying registration scheme in FARA. *Id.* at 1132).

\(^{274}\) *Meese v. Keene*, 481 U.S. 465, 487 (1987) (rejecting the District Court’s conclusion in finding that “the term ‘political propaganda does nothing to place regulated expressive materials ‘beyond the pale of legitimate discourse.’” *Id.*).

\(^{275}\) *Id.* at 483.

\(^{276}\) *Id.* at 491.

\(^{277}\) CJEU Hungary judgment, *supra* note 57 at para 58.

\(^{278}\) *Id.*.

\(^{279}\) Case of Ecodefence and Others, *supra* note 63 at para 136 and 173.
B. Differentiated Activities

Primary to any democracy centered approach to regulating foreign funding of nonprofits is appropriately targeting these restrictions. After all, there are very different self-governance stakes involved in regulating a nonprofit that engages in electioneering compared to a group that provides food assistance to the poor or produces a report to better inform public debate about a public health crisis. Policymakers should assess the merits of regulation of foreign funding depending on the activity in which a nonprofit, or any other entity, engages.

Consider how a differentiated approach applies to expressive political activity. More significant restrictions or reporting requirements on foreign funding might be appropriate in relation to democratic decision-oriented activities like electioneering, lobbying, or testifying before a legislative body. As then DC District Court judge Brett Kavanaugh wrote in rejecting a challenge to a prohibition on foreign citizens contributing to election campaigns, “the Supreme Court has drawn a fairly clear line: The government may exclude foreign citizens from activities ‘intimately related to the process of democratic self-government.’”280 On the other hand, lawmakers and courts should be much more skeptical of restrictions on foreign funding that can be used as a way to directly or indirectly control debate in the broader public sphere.281 Such restrictions have the potential to undermine the more wide ranging public debates that are needed to inform voters and policymakers in a democracy.

While there are more justifiable reasons to regulate decision-oriented deliberations more heavily, that does not permit the government a free hand. For example, onerous regulation on lobbying by foreigners or foreign funded nonprofits can make it difficult to hear from actors less capable of complying with lobbying regulations or those that may have legitimate reasons to fear too much transparency. A small international nonprofit that wants to introduce lawmakers to a foreign human rights dissident may be deterred from doing so if complying with lobbying laws is too burdensome or if they

280 Bluman v. FEC, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) citing Bernal v. Fainter, 467 U.S. 216, 220 (1984). The U.S. Supreme Court has generally held that the government may exclude foreign citizens from activities like “voting, serving as jurors, working as police or probation officers, or teaching at public schools.” Id. at 283. But see Citizens United v. FEC, 558 U.S. 310, 362 (2010) (holding, in the context of regulating campaign finance, that the Supreme Court is not deciding "whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process.") (J. Kennedy).

281 See supra notes 182 through 188 and accompanying text, describing distinction between regulating activity in the public sphere and democratic decision oriented deliberation.
require publicly revealing information about the dissident’s meeting with lawmakers, potentially putting the dissident’s family in danger in their home country. Further, many advocates of stricter regulation of lobbying are not only concerned about direct advocacy meetings with officials, but also broader influence campaigns directed at policymakers. Such campaigns though, which can include reports from nonprofits or media appearances by their staff, may have lawmakers as one audience, but also members of the public as another. As such, if not carefully tailored stricter regulation can also potentially end up undermining debate in the broader public sphere.

Governments may also restrict foreign funding for a broad range of other activities, such as regulating foreign investment in certain economic sectors like the defense industry, banking, transportation, or industries that raise unique political economy concerns. Most of these types of restrictions have traditionally had less direct impact on nonprofits. This article will not examine the merits of these industry specific restrictions. What is important to see though is that unlike, for example, regulation of foreign investment in the banking sector, regulation of foreign funding of nonprofits is frequently an attempt to regulate voices within the public sphere. As such, it raises more significant self-governance and rights concerns than many of these other types of foreign influence restrictions.

C. Nondifferentiated Actors

Laws targeting foreign influence should focus on specific activities and not on nonprofits as a category of actors. After all, whether a government

282 See, e.g., Ganesh Sitaraman, The Regulation of Foreign Platforms, 74 STANFORD L. REV. 1073 (2022) (explaining that restrictions on foreign ownership or influence have been common in the U.S. in the banking, communications, transportation, and energy sectors. Id. at 1079).

283 This is not to say governments can never regulate foreign influence in the public sphere. For example, the Communications Act of 1934 allows only 25 percent foreign investment “in a U.S. broadcast, common carrier, or aeronautical fixed or en route radio licensee,” and FCC approval is required for more than 25 percent foreign investment. Brian Weimer & Drew Svor, FCC Liberalizes Rules for Foreign Investment in U.S. Broadcast Licensees, FCC L. BLOG (Oct. 10, 2016), https://www.fcclawblog.com/2016/10/articles/fcc/fcc-liberalizes-rules-for-foreign-investment-in-u-s-broadcast-licensees. However, regulating foreign ownership over key platforms for the public sphere, like common carriers, is arguably quite different than regulating participants in these debates.

284 International law also recognizes the principle that nonprofits should not be discriminated against in mobilizing resources. UNSR 2023 General Principles, supra note 37 (finding civil society organizations should not be subject to burdens “different [than] that of corporations to mobilize international resources and seek, receive and use foreign funding.” Id. at para 50).
is concerned about hidden foreign influence in electioneering or lobbying, or the role of foreign funding in money laundering or terrorism financing, it should not matter whether this is happening through a nonprofit or through a corporation or individual. However, many foreign funding laws, including the FCRA in India, the NGO Transparency Law in Hungary, or FARA in the U.S., have to different degrees singled out nonprofits while exempting or limiting their impact on other actors, most notably corporations.

These exemptions for commercial actors in laws regulating foreign influence can create counter-intuitive and absurd outcomes. In India, for instance, a nonprofit must receive permission from the government and meet burdensome reporting requirement to receive foreign funding. However, critics have pointed out that “a salaried lobbyist, or an executive employed by a multinational corporation, bidding for mining leases, etc. is not covered under the Act.” Yet, given their deep pockets, there are many reasons to believe that corporations that receive foreign funding will frequently have more influence over politicians than nonprofits.

In the U.S., new proposals to curb foreign influence have also unduly targeted the nonprofit sector. In response to concern about foreign government funding to prominent U.S. think tanks, Senator Grassley introduced a bill in 2023 that required disclosure of foreign funding of think tanks. Since “think tanks” do not have a legal definition, the proposal instead targets nonprofits that spend more than 20% of their funding directly or indirectly trying to influence public policy or public opinion. This approach would capture far more than traditional think tank activity, but also many advocacy groups, such as nonprofits engaged in public campaigns against climate change. However, besides being overbroad, it also discriminates against nonprofits compared to other types of entities. As a

---

285 Kiai 2013 Report, supra note 152 at para 24. (“noting that commercial companies and other entities have been abused for terrorist purposes”).

286 For a description of the functioning of these laws, see, supra Part I (describing how the requirements of the FCRA and Hungary’s NGO Transparency Law explicitly target nonprofits and how FARA’s exemption for commercial activities disproportionately impacts nonprofits, since they cannot generally claim this exemption).


288 Id.


290 S 1087, 118th Congress (2023-2024), § 4(A)(i) (defining covered entities to include nonprofits that spend more than 20% annually to directly or indirectly influence public policy or public opinion) https://www.grassley.senate.gov/imo/media/doc/think_tank_transparency_act.pdf
result, if the bill was enacted foreign funders who did not want their funding divulged would likely simply move the same advocacy work from think tanks to law firms, public relations firms, or other entities that would not need to meet the proposed disclosure requirements.

A number of countries have ensured that their laws targeting foreign influence are applicable to anyone engaged in regulated activities, irrespective of whether they are a nonprofit. Australia’s FITS, for example requires registration of any type of actor, commercial or nonprofit, engaged in covered activity under the law.291 Similarly, the UK’s Foreign Influence Registry does not distinguish between nonprofit and other actors.292 Such a principle of nondifferentiation can help ensure both that laws achieve their stated purpose and lessen the chances they will be used to unduly target civil society organizations.

D. Problem Oriented

A democracy centered approach to regulating foreign funding of nonprofits should be problem oriented. Voters’ and policymakers’ anxiety over foreign influence can often create overly aggressive regulatory responses. This can lead to legislation that is a poor fit or an inappropriate scope for the underlying problem that policymakers are trying to address.

Legislation that regulates foreign funding of nonprofits is often criticized for not actually addressing the problem that motivated the policy. After reports in 2022 that the Chinese government had been running secret police stations in Canada that harassed and applied pressure on Chinese immigrants, the government proposed a foreign influence registry that would capture those who engaged in lobbying for foreign governments as well as “malign” foreign influence.293 However, by the time the proposal was introduced Canadian law enforcement claimed to have already shut down their operations, and there was criticism that some of the claimed secret police stations were just local Chinese community centers that had been wrongly vilified.294 Regardless, it is not clear that anyone involved in a secret police

---

291 FITS Act, supra note 18 at Art. 21 (describing covered activities under the Act).
292 UK NSA 2023, supra note 21 at § 69 (requiring registration if carrying out “political influence activities” no matter who is carrying out the activities).
293 PUBLIC SAFETY CANADA, supra note 22 (describing Canadian foreign influence proposal).
294 See Sidhartha Banerjee, RCMP must release evidence of alleged Chinese police stations in Montreal, senator says, MONTREAL GAZETTE (May 8, 2023), https://montrealgazette.com/news/local-news/rcmp-must-release-evidence-of-alleged-chinese-police-stations-in-montreal-senator-says (describing controversy over whether some of the alleged secret Chinese police stations were just community centers and claims by Canadian law enforcement that they had shut down these operations).
station would have registered if they were being run clandestinely.

Similar efficacy concerns have been raised about foreign influence laws in other countries. For example, a 2023 Australian Parliamentary hearing that examined the effectiveness of FITS found it had imposed significant new regulatory burdens, including on cross-border collaboration for the university sector, and even led to two former Prime Ministers to register for mundane activity like interviews with the BBC. However, critics claimed it had done little to further the government’s goal for the Act, which was to reduce and make more transparent Chinese political influence campaigns in the country – in part because these were covert campaigns and so those involved were unlikely to register.

Not only are laws that regulate the foreign funding of nonprofits often a poor fit for purpose, but they frequently fail to address the underlying disruptive force that is of concern. Consider the issue of making more transparent foreign lobbying. In the U.S., FARA has been used to better illuminate how foreign governments lobby the U.S. Congress. Qatar, for example, has recently spent millions of dollars on lobbyists to attempt to dissuade the U.S. government from taking the side of Saudia Arabia and the United Arab Emirates in an ongoing regional dispute. While providing more detailed information about foreign government lobbying can be helpful to place a check on excessive influence on legislators, FARA does not capture wealthy domestic actors that also lobby Congress. The top five U.S. defense industry contractors, for example, spent over $1 billion lobbying Congress during the Afghan War, during which time they received over $2 trillion in contracts. While these lobbying efforts of both the Qatar government and


297 Ben Freeman, The Qatar Lobby in Washington, CENTER FOR INTERNATIONAL POLICY (May 2020), https://static.wixstatic.com/udg/3ba8a1_eae58acd2c11459894d8e45fbee1552d.pdf (finding that Qatar had spent over $18 million with FARA registered firms in 2018).

298 See, e.g., Eli Clifton, Top defense firms spend $1B on lobbying during Afghan war, see $2T, RESPONSIBLE STATECRAFT (Sept. 2, 2021), https://responsiblestatecraft.org/2021/09/02/top-defense-firms-see-2t-return-on-1b-investment-in-afghan-war/ (finding that the top five U.S. defense contractors spent over $1 billion on lobbying the U.S. Congress from 2001 to 2021 and received over $2 trillion in contracts during the same time period).
U.S. defense contractors should be of interest to the U.S. public only the former fall under the detailed reporting requirements of FARA. As a result, disclosure statutes that only target foreigners can provide a distorted view of which powerful actors are trying to influence policymakers and not address the underlying democracy issue, which is not foreigners lobbying Congress without public transparency, but rather powerful vested interests lobbying Congress without public transparency.

The same problem of scope frequently repeats itself. Some foreign influence laws, for example, are enacted over concerns over foreign misinformation. However, while misinformation can be decimated by foreign sources, the largest sources of misinformation are frequently domestic, including national media outlets, prominent social media personalities, or politicians.299 Studies, for example, have found President Trump to be the leading source of disinformation in the United States about the Coronavirus pandemic as well as false claims about widespread voter fraud during the 2020 election.300 Similarly, in India critics have argued that disinformation is not driven primarily from foreign sources, but rather domestic ones, including politicians who are in power.301 Laws that target foreign misinformation or propaganda though, like FARA, do not put the public in a better position to navigate these broader challenges of misinformation as they only make clear if the information is from a foreign source, not whether the information is accurate, inaccurate, or misleading. Instead, these laws can empower governments, not infrequently led by politicians spreading disinformation themselves, to use stigmatize voices with which they disagree as foreign. In this way, only targeting foreign funded sources of information can add confusion, be weaponized, and distract from other remedies to address the larger problem, such as civic education, public support to help fund a diverse

299 See, e.g., YOCHAI BENKLER, ROBERT FARIS, & HAL ROBERTS, NETWORK PROPAGANDA (2018) (finding Russian misinformation campaigns had little impact on the 2016 U.S. election and that the major sources of disinformation were from shifts that had occurred within domestic, mostly conservative, media ecosystem. Id. at 385).

300 See Dylan Scott, Trump has been the biggest source of COVID-19 misinformation, study finds, Vox (Oct. 5, 2020), https://www.vox.com/coronavirus-covid19/21497221/donald-trump-covid-19-coronavirus-news-misinformation-study (citing study finding Trump was leading source of COVID disinformation); Philip Bump, A year of election misinformation from Trump, visualized, Wash. Post (Feb. 11, 2021), https://www.washingtonpost.com/politics/2021/02/11/year-election-misinformation-trump-visualized/ (finding Trump repeatedly laid groundwork for false claims the 2020 election was fraudulent will before the actual election).

media ecosystem, or making more transparent the manipulative techniques of social media platforms.\textsuperscript{302}

CONCLUSION

This article has tried to begin to outline the impact of foreign funding restrictions in democracies on non-profits and the broader public sphere. It recognizes there are real threats posed by foreign influence, such as election interference or secret lobbying by foreign governments. However, in response, it calls on governments to adopt a democracy centered approach that addresses these concerns, but protects the vital role that a robust and diverse civil society plays in pursuing the project of democratic self-governance.

\textsuperscript{302} See, e.g., JOINT CIVIL SOCIETY AND DEMOCRACY ORGANISATIONS’ PRIORITIES FOR THE DEFENCE OF DEMOCRACY PACKAGE (March 2023), https://epd.eu/wp-content/uploads/2023/04/defence-of-democracy-package-v3.pdf (developing a set of recommendations from European civil society organizations to better protect democracy); HEDVIG ORDEN AND JAMES PAMMENT, WHAT IS SO FOREIGN ABOUT FOREIGN INFLUENCE OPERATIONS?, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Jan. 26, 2021), https://carnegieendowment.org/2021/01/26/what-is-so-foreign-about-foreign-influence-operations-pub-83706 (advocating for an approach that to misinformation that does not focus on foreignness, but how to address misinformation, including through regulating social media algorithms).