

THE REGULATION OF FOREIGN FUNDING OF NONPROFITS IN A DEMOCRACY

*Nick Robinson**

Governments around the world have increasingly regulated nonprofits access to foreign funding. These regulations, which often take the form of registration requirements, are justified as needed to protect a country's politics from undue foreign influence. Yet, they have also placed new burdens on nonprofits and been used by governments to discredit critics, creating significant new constraints on activism on issues from fighting climate change to protecting human rights. While authoritarian governments have been the most aggressive proponents of these restrictions, many democracies have also embraced variants of them, creating new uncertainty about how foreign funding of nonprofits should be regulated.

In this moment of global regulatory flux, this article argues for what it calls a democracy centered approach. It begins by surveying the quite different regulatory approaches to cross-border funding of nonprofits in the world's three largest democracies or democratic blocs: the United States, India, and the European Union. It labels their current respective approaches: "ambiguous regulatory heavy-handedness", "government controlled nonprofit nationalism", and "rights-based regulatory liberalism."

Drawing on these examples, the article examines justifications for restricting cross-border funding to nonprofits as well as justifications for more open regulation. Significantly, it finds that perhaps the strongest argument both for and against limitations on foreign funding is protecting 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.

It then develops a novel framework for how democracies should approach the regulation of cross-border funding of nonprofits that rests on five key principles that should shape and limit any such regulation. The potential benefits of this approach have implications not just for the regulation of the cross-border funding of nonprofits, but also the broader regulation of foreign influence in civil society.

* 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.

TABLE OF CONTENTS

Introduction 1

I. Regulating Cross-Border Funding of Nonprofits..... 10

 A. United States: Ambiguous Regulatory Heavy-Handedness 10

 B. India: Government Controlled Nonprofit Nationalism 18

 C. European Union: Right Based Regulatory Liberalism 23

II. Justifications for Foreign Funding Restrictions 27

 A. Democratic Self-Governance 27

 B. Combatting Unlawful Activity..... 29

 C. Effective Use of Resources 31

III. Justifications for a More Open Funding Environment..... 32

 A. Democratic Self-Governance 32

 B. Protecting Government Critics..... 36

 C. Access to Resources 37

 D. Encouraging Reciprocity..... 38

 E. Democratic Cosmopolitanism 40

IV. A Typology of Regulatory Factors 41

 A. Who is Regulated 41

 B. Which Foreign Funders..... 42

 C. What Funding Relationship 43

 D. Covered Activity 45

 E. Regulatory Mechanisms..... 46

V. A Democracy Centered Approach 49

 A. Rights Focused 49

 B. Differentiated Activities..... 51

 C. Differentiated Funders 53

 D. Nondifferentiated Actors..... 54

 E. Problem Oriented 55

Conclusion 58

INTRODUCTION

Over the last two decades, governments around the world have increasingly imposed new regulations 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, commentators celebrated the rise of nonprofits, or non-governmental organizations (NGOs), as “one of the most spectacular

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).

developments of the twentieth century.”² Some even acclaimed that they now even acted as a type of far-reaching “global conscience.”³ 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”⁴ and the “viral-like spread of new laws” restricting their operations.⁵ Perhaps the most important and widespread among these new restrictions are laws regulating NGOs access to foreign funding.⁶

Much of this shift in the treatment of nonprofits tracks changing geopolitical winds. The shifting of power away from the West,⁷ the lingering policy repercussions of the global war on terror,⁸ and a well-documented decline in democracy worldwide,⁹ has helped to undermine international norms around an open regulatory space for nonprofits and civil society more

² KENNETH E. BOULDING, *THE THREE FACES OF POWER* 244 (1989).

³ Joseph S. Nye Jr., *The Rising Power of NGOs*, PROJECT SYNDICATE (June 24, 2002), <https://www.project-syndicate.org/commentary/the-rising-power-of-ngo-s-2004-06>.

⁴ Harriet Sherwood, *Human Rights Groups Face Global Crackdown ‘Not Seen in a Generation’*, GUARDIAN (Aug. 26, 2015), <http://www.theguardian.com/law/2015/aug/26/ngos-face-restrictions-laws-human-rights-generation>; See also, Jacqueline Van De Velde, *The Foreign Agent Problem: An International Legal Solution to Domestic Restrictions on Non-Governmental Organizations*, 40 CARDOZO L. REV. 687 (2019) (finding foreign agent restrictions on nonprofits “spreading like wildfire from Africa, across Europe and the Caucasus, and to Asia within only the last decade.” *Id.* at 697).

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).

generally.¹⁰ After the Color Revolutions and Arab Spring, governments in 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.¹¹ 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.¹²

Yet this trend towards more heavily regulating nonprofits' access to cross-border funding has been propelled not just by authoritarian governments, but also many democracies, who have increasingly adopted or strengthened registration requirements to combat foreign influence.¹³ Significantly, both the motivations for these registration requirements in democracies, as well as the actual requirements themselves, have varied markedly.

Some democracies have pursued regulations that specifically target foreign funding to nonprofits. This is particularly true for governments that have been criticized for democratic backsliding in recent years.¹⁴ For example:

- India strengthened its law in 2010 (and again in 2020) that requires nonprofits register with and receive permission from the government before receiving foreign funding.¹⁵ The government has used these requirements to investigate and shut down human rights and

¹⁰ See Bromley et al, *supra* note 1 (describing restrictions on nonprofits as a backlash against liberal international order).

¹¹ See, e.g., *Donors: Keep Out*, THE ECONOMIST (Sept. 11, 2014), <https://www.economist.com/international/2014/09/12/donors-keep-out> (describing how countries like Russia adopted foreign agent laws, in part, in response to funding of some NGOs involved in the Orange Revolution in Ukraine by Open Society Foundations); Douglas Rutzen, *Authoritarianism Goes Global (II): Civil Society Under Assault*, 26(4) J. OF DEMOCRACY 28, 32 (Oct. 2015) (describing how Russia adopted its foreign agent law in response to regime change during the Arab Spring and China began work on a foreign agent law as a way to block the possibility of a Color Revolution).

¹² See, e.g., CAROTHERS & BRECHENMACHER, *supra* note 5 at 5-11 (describing the impact of these foreign funding restrictions in various countries around the world).

¹³ Suparna Chaudhry, *The Assault on Civil Society: Explaining State Crackdown on NGOs*, 76(3) INTERNATIONAL ORGANIZATION 549 (2022) (finding based on an analysis of NGO restrictions from across the world that “[b]oth democracies and autocracies” have used the tactic of hampering foreign funding “to repress NGOs.” *Id.* at 550).

¹⁴ For example, in 2023 V-Dem Institute ranked both India and Hungary as electoral autocracies. V-DEM INSTITUTE, *supra* note 9 at 39.

¹⁵ See G Sampath, *Time to Repeal the FCRA*, THE HINDU (Dec. 27, 2016), <https://www.thehindu.com/opinion/lead/Time-to-repeal-the-FCRA/article16946222.ece> (examining major differences between 1976 and 2010 FCRA). It was strengthened further in amendments in 2020.

environmental nonprofits, particularly those that receive funding from U.S. and European sources.¹⁶

- Israel enacted a registry for nonprofits that receive foreign government funding in 2016 that was criticized as being designed to target Palestinian rights groups that receive European government funding.¹⁷
- Hungary adopted a nonprofit registration law in 2017 that detractors claimed was intended to stigmatize human rights and anti-corruption nonprofits that received money from European and U.S. funders.¹⁸ The law was repealed after a judgment against the law by the Court of Justice of the European Union (CJEU) in 2021.¹⁹

Other democracies have recently enacted or proposed registration requirements that do not *per se* target foreign funded nonprofits, but rather specific types of foreign influence. However, these laws can still impact NGOs. For example:

- Australia enacted a foreign influence registration scheme in 2018 amidst concerns over Chinese influence in its domestic politics.²⁰ It was not designed to target the foreign funding of nonprofits, but can require them to register in more limited circumstances, such as in the

¹⁶ 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.)

¹⁷ See, e.g., Peter Beaumont, *Israel passes law to force NGOs to reveal foreign funding*, GUARDIAN (July 12, 2016), <https://www.theguardian.com/world/2016/jul/12/israel-passes-law-to-force-ngos-to-reveal-foreign-funding> (reporting on findings that NGO law disproportionately impacts Palestinian rights groups).

¹⁸ Amnesty International, *Hungary Repeals Controversial Laws Restricting the Right of Association But Concerns Remain* (July 28, 2021), <https://www.amnesty.org/en/documents/eur27/4526/2021/en/> [hereinafter “Amnesty Hungary Public Statement”] (detailing how Hungary adopted the NGO Transparency Law, its impact, and how it was forced to repeal it).

¹⁹ *Id.*

²⁰ See Kelsey Munro, *Australia’s new foreign-influence laws: Who is targeted?*, THE LOWY INSTITUTE, Dec. 5, 2018, <https://www.lowyinstitute.org/the-interpreter/australia-s-new-foreign-influence-laws-who-targeted> (finding that Australia’s new transparency law was targeted at pushing back on Chinese influence); The Parliament of Australia, *Foreign Influence Transparency Scheme Act 2018*, available at <https://www.legislation.gov.au/Details/C2018A00063> [hereinafter “FITS Act”] (requiring those engaged in certain communications and distribution activities for foreign principals to register with the Australian government).

context of lobbying government officials or certain communications activities.²¹

- The United Kingdom enacted a foreign influence registration scheme in 2023 in response to concerns about political influence by perceived hostile foreign governments.²² Under the law, nonprofits can be required to register for receiving foreign government funding in a limited set of contexts.²³
- The European Commission introduced a proposed directive in 2023 under which EU member states would need to create foreign influence registries in the wake of the Qatargate political scandal and concerns over Russian influence.²⁴ NGOs and others receiving foreign government funding would be required to register for certain types of lobbying and other activities.²⁵

The United States has played a particularly prominent, if largely inadvertent, role in the global spread of these laws. A broad range of governments have pointed to the U.S.’s Foreign Agents Registration Act (FARA) as justification and inspiration for their own registration requirements regulating foreign influence, including the foreign funding of nonprofits.²⁶ This list includes governments from most of the countries cited

²¹ *Id.*

²² See Cristina Gallardo, *UK narrows scope of political influence register following criticism*, POLITICO (Feb. 23, 2023), <https://www.politico.eu/article/uk-narrow-scope-political-influence-criticism-national-security-bill-foreign-influence-registration-scheme/> (describing motivation of the registry to increase transparency around lobbying by hostile foreign governments).

²³ See National Security Act 2023, Part IV <https://www.legislation.gov.uk/ukpga/2023/32/enacted> [hereinafter “UK NSA 2023”] (requiring anyone engaged in “political influence activity” in the UK as part of an agreement with a foreign power register with the UK government. *Id.* at § 69).

²⁴ See Sarah Wheaton, *EU Commission wants registry for foreign lobbyists*, POLITICO, Dec. 12, 2013, <https://www.politico.eu/article/eu-commission-wants-registry-for-foreign-lobbyists/> (describing elements of proposed registry and how it was introduced in response to concerns over foreign influence by authoritarian powers like Russia and Qatar).

²⁵ *Id.*

²⁶ See INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW, FARA’S DOUBLE LIFE ABROAD (May 2021), <https://www.icnl.org/post/analysis/faras-double-life-abroad> [hereinafter FARA’S LIFE ABROAD] (describing how governments, including in Russia, Israel, and Hungary, justified their foreign agent laws on FARA); Kelsey Munro, *Australia’s new foreign-influence laws: Who is Targeted?*, THE INTERPRETER, (Dec. 5, 2018), (“Concerns about overreach and too-broad definitions saw some significant tightening, and the legislation, modelled partly on the US Foreign Agents Registration Act, passed with bipartisan support mid-year.”); Home Office, IMPACT ASSESSMENT: FOREIGN INFLUENCE REGISTRATION SCHEME, Sept. 8, 2023,

above, including both authoritarian and democratic governments, such as Russia, Hungary, Israel, the United Kingdom, and Australia.²⁷

The diversity of the types of governments that have cited to FARA is striking and points to the continuing influence of U.S. law to a broad range of foreign governments. It also raises a larger question about what the underlying objectives of FARA actually are.

Enacted in the runup to World War II to combat Nazi propaganda, FARA requires those who engage in a notoriously broad range of activity on behalf of a foreigner register with the government as a “foreign agent”.²⁸ While ostensibly a transparency statute, it was in fact used by the Justice Department to shut down fascist publication outlets during the War by tying them up with burdensome reporting and stigmatizing labeling requirements.²⁹ In this way, FARA is an early and prominent example of a government weaponizing transparency through a national security law.³⁰

After the War, the U.S. government’s enforcement of FARA fell into relative hibernation by the second half of the 1950s. The Act 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.³¹ As a result, the Justice Department brought high-profile FARA enforcement actions against alleged lobbyists for foreign governments who had failed to register, including top officials and confidants of President Trump, as well as against Chinese and Russian government owned broadcasters.³²

When the U.S. government has more vigorously enforced FARA it has frequently captured the activities of nonprofits, underscoring concerns about not only the Act’s overbreadth, but its continued potential for weaponization against domestic critics. Perhaps the most famous FARA prosecution was during the height of the McCarthy era in the early 1950s when the Justice

<https://www.gov.uk/government/publications/national-security-bill-overarching-documents/impact-assessment-foreign-influence-registration-scheme-accessible> (describing how the Parliament’s Intelligence and Security Committee initially proposed developing a foreign agent registration scheme “building on the international precedents” of FARA in the U.S. and the FITS Act in Australia).

²⁷ *Id.*

²⁸ See Nick Robinson, “*Foreign Agents*” in *an Interconnected World: FARA and the Weaponization of Transparency*, 69 DUKE L. J. 1075, 1077-1082 (2020) (discussing enactment of FARA, its traditional underenforcement, and its recent use as a tool to combat “foreign influence”).

²⁹ *Id.* at 1095-1096 (describing historical evolution of enforcement of FARA).

³⁰ *Id.* at 1077 (arguing that FARA and similar laws can be used as a form of the weaponization of transparency).

³¹ *Id.* at 1078-1080 (detailing recent enforcement of FARA after the 2016 Presidential election).

³² *Id.*

Department used FARA to prosecute officers of an anti-war nonprofit that included the civil rights icon W.E.B. Du Bois.³³ More recently, in both 2018 and 2023, Congressional Republicans launched investigations into whether several well-known U.S. environmental groups have violated FARA by not registering.³⁴ And in 2020, the Justice Department forced the National Wildlife Federation to register for receiving Norwegian government funding.³⁵ Given the increased attention on FARA, nonprofits in the U.S. that receive foreign funding face new uncertainty about whether they need to register and whether the government may use the Act as a tool against those with which they disagree.

As these examples from different democracies around the world demonstrate, norms around whether or how democracies should regulate foreign funding to nonprofits are in an unusual degree of flux. The stakes of getting this regulatory response correct are significant. Democracies face real foreign threats, particularly from authoritarian governments attempting to sway their elections or secretly lobby their public officials.³⁶ Democratic governments have a significant interest in stopping or deterring these types of interventions by outside powers. That said, foreign influence registration requirements, like those examined in this article, have an unclear track record in actually preventing malign foreign influence. They also have been used by governments to burden and discredit domestic critics, undermining the open civil society needed to sustain democracy in the first place.³⁷ Moreover, these regulations risk further walling off and nationalizing civil society in a time when many of the world's most pressing problems require global

³³ Andrew Lanham, *When W.E.B. Du Bois Was Un-American*, BOS. REV. (Jan. 13, 2017), <http://bostonreview.net/race-politics/andrew-lanham-when-w-e-b-du-bois-was-un-american>

³⁴ See Robinson, *supra* note 28 at 1121-1124 (detailing the House Natural Resources Committee's investigation against environmental nonprofits in 2018); HOUSE NATURAL RESOURCES COMMITTEE, COMMITTEE INVESTIGATES LEAGUE OF CONSERVATION VOTERS FARA COMPLIANCE (June 21, 2023), <https://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=413505> [hereinafter "League of Conservation Voters Letter"] (linking to letter to League of Conservation Voters from the House Natural Resources Committee questioning whether they have complied with FARA for allegedly receiving money from a Swiss national).

³⁵ National Wildlife Federation, Comment Submitted in Response to the FARA Unit's Dec. 19, 2021 ANPRM, Feb. 10, 2022, <https://www.regulations.gov/comment/DOJ-LA-2021-0006-0010> [hereinafter, "NWF Comment"] (describing how the Justice Department in an advisory opinion concluded NWF must register under FARA for receiving a Norwegian government grant and NWF's disagreement with this "overly expansive interpretation").

³⁶ See generally, *infra*, Part II for common justifications of foreign funding restrictions on nonprofits.

³⁷ See Robinson, *supra* note 28 at 1090-1092 (describing how different governments around the world have weaponized foreign funding disclosure requirements against nonprofits).

cooperation, including in addressing climate change, economic inequality, or global public health.

How democracies regulate cross-border funding of civil society has become one of the major fault lines in the battle for democracy worldwide. The lack of a principled and unified approach among major democracies has created challenges for democracy activists globally. In particular, the sweeping breadth of FARA in the U.S. has been taken advantage of by more authoritarian leaders to justify aggressive registration requirements that have then been used to target government critics.³⁸ There are fears that the proposed EU directive on foreign influence registries could be similarly exploited.³⁹

In the context of these stakes and the fluid global landscape, this article examines how democracies should regulate the foreign funding of nonprofits. Part I shows how democracies have adopted strikingly different approaches. To illustrate this, it surveys how the world’s three largest democracies or democratic blocs—the United States, India, and the European Union—have regulated foreign funding of NGOs. It labels their approaches: “ambiguous regulatory heavy-handedness” (United States), “government controlled nonprofit nationalism” (India), and “rights based regulatory liberalism” (EU). It claims these differing approaches have been driven by not only different perceptions about foreign threats, but also by contrasting government and judicial attitudes towards what level of government control of civil society is acceptable.

Parts II and III draw on the case studies in Part I to consider a surprisingly under-examined topic, which is justifications for and against restrictions on foreign funding of nonprofits.⁴⁰ While there are a number of

³⁸ See, e.g. FARA’s DOUBLE LIFE ABROAD, *supra* note 26 at 2-3 (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”); Sophiko Megreldze, *Georgia drops foreign agent law after massive protest*, ASSOCIATED PRESS (March 10, 2023), <https://apnews.com/article/georgia-foreign-agents-law-protests-parliament-1ab288cb3a3ccf330830ce7cae5603e2> (recounting introduction of foreign agent law in Georgia that authors claimed was based on FARA and large street protests in response out of fear the law would draw the country closer to Russia).

³⁹ See Emilia Korkea-aho, “*This is Not a Foreign Agents Law*”, VERFASSUNGSBLOG, Dec. 19, 2023, <https://verfassungsblog.de/this-is-not-a-foreign-agents-law/> (raising concern that directive could be abused by “autocratic, xenophobic, or otherwise vindictive leaders”);

⁴⁰ 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,

competing justifications, at the heart of this debate is an argument about how to best further self-governance in a democracy. Although there are genuine reasons to regulate foreign influence in some contexts, 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 casts doubt on arguments that courts should be deferential to the government's regulation of foreign funding of nonprofits because it concerns foreign affairs or national security. Rather, it points to the need for heightened judicial scrutiny.

The last two parts of the Article develop an alternative path forward. Part IV creates a typology to better understand how democracies have historically regulated the foreign funding of nonprofits. Drawing on this typology, Part V argues for a democracy centered approach for shaping and limiting the regulation of foreign funding of NGOs. This approach rests on five key principles: (1) rights focused; (2) differentiated activities; (3) differentiated funders; (4) nondifferentiated actors; and (5) problem oriented. Importantly, instead of unduly focusing on just foreign actors, this approach centers on addressing underlying disruptive forces within a democracy, like the disproportionate voice of those with resources in decision-making processes, whether or not those forces 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 in civil society. Whether it is addressing concerns over foreign disinformation, lobbying, or electioneering, the approach outlined in this article can provide lessons for how to best 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.⁴¹ Hungary and India, in particular, are now viewed by many analysts as no longer full democracies.⁴² This article makes no contributions to this categorization debate, but rather recognizes both that 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

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).

⁴¹ 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.

⁴² *Id.*

democracy.⁴³ 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 enacts them.

I. REGULATING CROSS-BORDER FUNDING OF NONPROFITS

This Part examines how the world's three largest democracies, or democratic blocs, approach the regulation of foreign funding of nonprofits through registration requirements. These regulatory approaches are not static, but rather have shifted, and are likely to shift further in response to the perceived danger of foreign influence on the one hand and of government control of civil society on the other. These examples are drawn upon in the remainder of the Article to help illustrate the stakes involved in this type of regulation and propose a more democracy centered approach.

A. *United States and Ambiguous Regulatory Heavy-Handedness*

The U.S.'s regulatory approach to foreign funding of nonprofits has been marked by a high degree of ambiguity. The United States is well known for having a vibrant civil society and in practice has, at least until recently, allowed for generally open cross-border funding to NGOs.⁴⁴ However, in the last decade, amidst concerns over Russian and Chinese influence, the U.S. government has increased enforcement of laws already on the books that were designed to combat or make more transparent foreign influence. As a result of this heightened enforcement, nonprofits that receive foreign funding have increasingly been impacted, leading to uncertainty about what regulatory burdens they face.⁴⁵

Foremost among these U.S. foreign influence laws that have affected nonprofits is FARA. The Act is a criminal statute that was enacted in 1938 and used to combat Fascist propaganda during World War II.⁴⁶ Failure to

⁴³ 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 of 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).

⁴⁴ See Freedom House, *Freedom in the World 2023*, United States, <https://freedomhouse.org/country/united-states/freedom-world/2023> ("US laws and practices give wide freedom to NGOs and activists to pursue their civic or policy agendas, including those that directly oppose government policies.").

⁴⁵ See, e.g., Robinson, *supra* note 28 at 1120-1123 (describing reemergence of FARA as a tool to regulate foreign influence and targeting of environmental groups).

⁴⁶ During World War II, the Act was used to help silence the most active Nazi voices in

comply with the Act is punishable by up to five years in prison.⁴⁷

Written in the fever and fear of wartime, FARA is what contemporary commentators have described as an “extremely broad” law.⁴⁸ Under FARA, those engaged in covered activities on behalf of a “foreign principal” must register as a “foreign agent” with the Justice Department, where their registration statements detailing covered activity are made available to the public.⁴⁹ Those registered must also make a “conspicuous statement” on covered informational material that they were prepared on behalf of a foreign principal and that additional information is available at the Justice Department.⁵⁰

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.⁵¹ 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.⁵² These covered activities often have broad 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. . .”⁵³ 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 capaciously defined. An agency relationship can be created if one engages in a covered activity at the

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).

⁴⁷ 22 U.S.C. § 618(a)(2)(A).

⁴⁸ Robert Kelner, Brian D. Smith, Zachary G. Parks & Derek Lawlor, *The Foreign Agents Registration Act (“FARA”): A Guide for the Perplexed*, NAT’L L. REV. (Jan. 11, 2018), <https://www.natlawreview.com/article/foreign-agents-registration-act-fara-guide-perplexed>

⁴⁹ 22 U.S.C. § 614(a).

⁵⁰ 22 U.S.C. § 614(b). In 2020 Congress enacted legislation barring those registered under FARA from accessing the COVID Paycheck Protection Program (PPP), marking perhaps the first time FARA registration has triggered the denial of government benefits. Consolidated Appropriations Act 2021, Public Law No. 116-260, § 311(a) (amending the Small Business Act to make those registered under FARA ineligible for the second drawdown of PPP loans).

⁵¹ 22 U.S.C. § 611(b). A person is not a foreign principle though if they are domiciled in the U.S. *Id.*

⁵² 22 U.S.C. § 611(c)(1)(i-iv).

⁵³ 22 U.S.C. § 611(o).

direction and control, or even at the “request”, of a foreign principal or their intermediary.⁵⁴ Under the awkwardly worded Act, one must also register if one engages in covered activity for an intermediary who is “subsidized in whole or in major part by a foreign principal”.⁵⁵

Under these broad definitions, a U.S. nonprofit that, for example, 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,⁵⁶ but a wide range of activity, including that which nonprofits often engage in, is not exempted.⁵⁷

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 hoped, “the spotlight of pitiless publicity will serve as a deterrent to the spread of pernicious propaganda.”⁵⁸ In this way, from its origins FARA was perceived, in part, as a way to curtail speech, or at least certain types of speech. This was both due to the stigmatizing effect of being labeled a foreign agent and because the Act’s broad set of covered activities and extensive registration requirements created avenues for the Justice Department to investigate or prosecute disfavored voices for noncompliance. As the historian Brett Gary has written, when the Justice Department has chosen to use it, FARA’s requirements have 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.”⁵⁹

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

⁵⁴ 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 28 at 1099-1102 (discussing the agency and intermediary relationships in FARA and debates surrounding their definitions).

⁵⁵ *Id.*

⁵⁶ 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 28 at 1104-1111.

⁵⁷ For a detailed analysis of the potential FARA obligations of nonprofits, media organizations, and public officials *see* Robinson, *supra* note 28 at 1111-1116. While some have claimed that an exemption for “other activities not predominantly serving a foreign interest”, immunizes nonprofits and others who are not acting on behalf of a foreign government or political party, this provision has not been clearly interpreted by either the courts or Justice Department. *Id.* at 1108-1111.

⁵⁸ H.R. Report No. 1381 at 2 (1937).

⁵⁹ GARY, *supra* note 46 at 215-216.

nonprofit called the Peace Information Center (PIC).⁶⁰ One of those officers was the civil rights leader W.E.B. Du Bois, who was seen by the government as sympathetic to communism.⁶¹ Du Bois and the others were charged with failure 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.⁶² While ultimately acquitted by a jury, the trial both drained Du Bois’s resources and tarred his reputation for the remainder of his life.⁶³

After the abuses of the McCarthy era, FARA fell out of favor as a tool to combat propaganda.⁶⁴ 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 the Act was chronically underenforced.⁶⁵ 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 campaign advisor, Paul Manafort,⁶⁶ as well as members of Russia’s Internet Research Agency.⁶⁷ President Trump’s former National Security Advisor, Michael Flynn, was also charged with violating FARA for lobbying

⁶⁰ Robinson, *supra* note 28 at 1118-1121 (recounting prosecution of Du Bois under FARA).

⁶¹ See Andrew Lanham, *When W.E.B. Du Bois Was Un-American*, BOS. REV. (Jan. 13, 2017), <http://bostonreview.net/race-politics/andrew-lanham-when-w-e-b-du-bois-was-un-american> (describing prosecution of Du Bois of FARA during McCarthy era).

⁶² Robinson, *supra* note 28 at 1118-1121

⁶³ 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).

⁶⁴ See Robinson, *supra* note 28 at 1077-1078, 1095-1096 (describing relative underenforcement of FARA from 1950s until 2016 Presidential election).

⁶⁵ 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.’”).

⁶⁶ Paul Manafort was the Chairman of Donald Trump’s Presidential election campaign from June to August of 2016. Indictment in United States of America v. Paul J. Manafort Jr. and Richard W. Gates III, U.S. District Court of District of Columbia, Oct. 30th, 2017, at 27 available at <https://www.justice.gov/file/1007271/download> The Justice Department also prosecuted Richard Gates, who was a business associate of Paul Manafort and his deputy when Manafort was Chairman of Trump’s campaign. *Id.*

⁶⁷ Indictment in United States of America v. Internet Research Agency and others, U.S. District Court of District of Columbia, Feb. 16th, 2018, at 19-20, <https://www.justice.gov/file/1035477/download>

for Turkey without registering.⁶⁸ At the request of the Justice Department, two Russian and two Chinese government-funded media organizations registered as “foreign agents” under the Act.⁶⁹ And in 2023 Senator Menendez was prosecuted under FARA (and other laws) for allegedly receiving bribes from Egyptian government officials.⁷⁰

While the Justice Department’s renewed focus on FARA has not explicitly targeted nonprofits, it still has impacted them. 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.⁷¹ 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.⁷² After registering, NWF publicly objected that they did not believe by accepting a grant they had become an “agent” of Norway and complained that registering had impeded their ability to receive future foreign government grants, undermining their global environmental work.⁷³

⁶⁸ See Murray Waas, *Michael Flynn ignored official warnings about receiving foreign payments*, GUARDIAN (April 8, 2021), <https://www.theguardian.com/us-news/2021/apr/08/michael-flynn-ignored-official-warnings-receiving-foreign-payments>

⁶⁹ In 2017, *RT TV America* and *Sputnik*, the U.S. arms of Russian media, registered as “foreign agents” under the Act. Megan R. Wilson, *Russian news outlet Sputnik registers with DOJ as foreign agent*, THE HILL (Nov. 11, 2017), <http://thehill.com/business-a-lobbying/business-a-lobbying/360912-russian-news-outlet-sputnik-registers-with-doj-as>, In September 2018, the Justice Department asked two Chinese media organizations, *Xinhua News Agency* and *China Global Television Network*, to register. Kate O’Keeffe & Aruna Viswanatha, *Justice Department Has Ordered Key Chinese Media Firms to Register as Foreign Agents*, WALL ST. J. (Sept. 18, 2018), <https://www.wsj.com/articles/justice-department-has-ordered-key-chinese-state-media-firms-to-register-as-foreign-agents-1537296756>

⁷⁰ Shayna Jacobs & Isaac Stanley-Becker, *Sen. Menendez charged with conspiring to act as a foreign agent*, WASHINGTON POST (Oct. 12, 2023), <https://www.washingtonpost.com/national-security/2023/10/12/senator-menendez-fara-new-indictment-egypt/#> (Senator Menendez was charged with conspiring to act as a “foreign agent” on behalf of the Egyptian government in violation of FARA).

⁷¹ NWF Comment, *supra* note 35. For the original redacted advisory opinion, see U.S. Department of Justice National Security Division, RE: Advisory Opinion Pursuant to 28 C.F.R. Sec. 5.2 (March 13, 2020), <https://www.justice.gov/nsd-fara/page/file/1287616/download> [hereinafter “NWF Advisory Opinion”].

⁷² *Id.*

⁷³ NWF Comment, *supra* note 35 at 6 (Registering “had the foreseeable consequence of

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 Earthjustice, as being potential “foreign agents” based on these organizations’ cross-border connections in China and Japan respectively.⁷⁴ These investigations were dropped by the Committee when the House of Representatives switched from Republican to Democratic control in 2019.⁷⁵ However, with Republicans retaking control of the House of Representatives in 2022, the House Natural Resources Committee again began investigating U.S. environmental nonprofits in 2023 for potential FARA violations, including examining whether the League of Conservation Voters should have registered for receiving foreign funding from a U.S. foundation of a Swiss national.⁷⁶

FARA’s dangers have not escaped notice of the nonprofit community. After the Justice Department announced it was planning changes to FARA’s regulations, a diverse group of U.S. nonprofits including the ACLU, Americans for Prosperity, NRDC, and Oxfam, sent a letter in 2022 to the Department warning that “FARA’s overbreadth and vagueness can undermine and chill First Amendment rights to speech and association” that can be “used to target undesirable expressive conduct.”⁷⁷

Since the Justice Department brought relatively few FARA enforcement actions during most of the Act’s existence, FARA has seen relatively few legal challenges and the Supreme Court has never decided on its underlying constitutionality.⁷⁸ Although the Supreme Court has often been deferential to

impeding future grant making from Norad and other similar foreign government development and environmental agencies . . .”) Other nonprofits have also registered under FARA. For example, in 2019, Earthjustice registered under FARA for working with Greta Thunberg and other foreign environmental youth activists to petition the United Nations to take action on climate change and assist them in making public appearances across the country. *See* Earthjustice FARA Registration Statement, Sept. 20, 2019, <https://efile.fara.gov/docs/6725-Registration-Statement-20190920-1.pdf> (detailing that Earthjustice will help file a petition with the United Nations and that they will help educate audiences across the US on climate change on behalf of environmental youth activists).

⁷⁴ *See generally* Robinson, *supra* note 28 at 1121-1124 (discussing 2018 Congressional investigation of these four environmental groups).

⁷⁵ *Id.*

⁷⁶ League of Conservation Voters Letter, *supra* note 34.

⁷⁷ Letter to Jennifer Kennedy Gellie, U.S. Dept. of Justice (Feb. 11, 2022), <https://www.icnl.org/wp-content/uploads/FARA-ANPRM-Sign-On-2022.pdf>

⁷⁸ 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

legislation, like FARA, impacting U.S. foreign policy,⁷⁹ 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.⁸⁰ 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.⁸¹

It is not just FARA though that can be used to regulate foreign funding of nonprofits in the U.S. The Justice Department has also recently used a provision of the Espionage Act, which was enacted during World War I, to target foreign funding of U.S. nonprofits.⁸² Sometimes confused with FARA, this separate provision of the U.S. Code—18 U.S.C. 951—makes it unlawful to act as “an agent of a foreign government” without prior notification of the Attorney General.⁸³ Failure to register can lead to up to 10 years in jail.⁸⁴ In 2023, Omali Yeshiteli was indicted under this provision, along with other members of a U.S. African internationalist socialist nonprofit, for, among

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.

⁷⁹ See, e.g., Ronald Krotoszynski, *Transborder Political Speech*, 94(2) NOTRE DAME L. REV. 473 (2018) (describing how “The most recent [U.S. Supreme Court] cases involving trans-

border 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).

⁸⁰ *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.

⁸¹ 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 28 at 1130-1135 (laying out potential constitutional defects in FARA).

⁸² 18 U.S.C. § 951. See generally David Aaron, *18 U.S.C. Section 951 and the Non-Traditional Intelligence Actor Threat from the First World War to the Present Day*, 45(1) SETON HALL LEG. J. 1 (2021) (describing the functioning and history of 18 U.S.C. § 951).

⁸³ 18 U.S.C. § 951.

⁸⁴ 18 U.S.C. § 951(a).

other actions, accepting a paid trip to a conference as well as a relatively small amount of money for his organization from a Russian nonprofit that was funded by the Russian government.⁸⁵ The U.S. government claimed Yeshiteli's nonprofit then assisted the Russian nonprofit in spreading Russian propaganda.⁸⁶ 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.⁸⁷ While this provision of the Espionage Act only applies to agents of foreign governments (not any foreigner as with FARA), this case has raised concerns that it could be used to selectively punish nonprofits or activists that receive funding or other things of value from a foreign government or a foreign government funded organization, such as a foreign university or NGO.⁸⁸

Given the stepped up enforcement of FARA and the Espionage Act, the current U.S. approach to foreign funding of nonprofits can be described as a type 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

⁸⁵ Justice Department Indictment of Omali Yeshitela and others, case no 8:22-cr-259-WFJ-AEP, <https://www.justice.gov/opa/press-release/file/1580251/download> (alleging Yeshitela conspired to violate 18 USC 951 by failing to notify Attorney General acting as foreign agent of Russian government because among other actions he accepted a paid trip to a conference in Moscow organized by the Anti-Globalization Movement of Russia, which was funded through Russian government, and Yeshitela's organization – the Africa People's Socialist Party and Uhuru Movement – received at least \$8,700 in payments from the Anti-Globalization Movement of Russia to help cover expenses for a U.S. speaking tour and a protest. *Id.* at para. 12, 25, 27(11), 27(24), 27(26), and 62).

⁸⁶ *Id.*

⁸⁷ See Collin P. Poirot 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).

⁸⁸ Less controversially (so far), the U.S. government has also increased enforcement of a once neglected provision of the Higher Education Act, requiring universities that receive federal funds to disclose donations or contracts of over \$250,000 a year from a foreign source that are then posted online by the Department of Education. See, e.g., U.S. Department of Education, Section 117 Foreign Gift and Contract Reporting, <https://fsapartners.ed.gov/knowledge-center/topics/section-117-foreign-gift-and-contract-reporting> (providing resources on reporting requirements of Section 117 of the Higher Education Act).

heightened concerns among U.S. policymakers around foreign influence from countries like China and Russia, NGOs in the U.S. face an increasingly uncertain regulatory landscape. This regulatory uncertainty is compounded because the constitutionality of these measures to curb foreign influence, like those in FARA, remain largely untested in the courts. As a result, nonprofits that receive foreign funding must weigh an array of risk factors that could lead to government enforcement action against them. Central among these risk factors is whether they engage in politically controversial activity that might attract heightened government attention.⁸⁹

B. India and Government Controlled Nonprofit Nationalism

In contrast to FARA in the United States, as well as many of the other foreign influence registries discussed in this article, India's Foreign Contribution Regulation Act (FCRA) is not an ex post facto registration scheme. Rather, the FCRA requires that most nonprofits that receive foreign funding must first register with and be preapproved by the government.⁹⁰ In this way, India has adopted a regulatory approach that is closer to a government like China, which also requires government approval for nonprofits to receive foreign funding.⁹¹ The Indian government has frequently been criticized for using the requirements of the FCRA to harass and shutdown human rights, environmental, and other nonprofits with which the government disagrees.⁹²

Prime Minister Indira Gandhi's government enacted the FCRA in 1976 amidst allegations that the U.S. CIA had provided funds to Indian political

⁸⁹ Other risk factors include if they work in certain regions of the world, like China and Russia, or if those they partner with are likely to contact the Justice Department for an advisory opinion asking whether they need to register under FARA.

⁹⁰ 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).

⁹¹ Choetsow Tenzin, *Peace Out NGOs*, HARVARD INTERNATIONAL REVIEW (Oct. 31, 2022), <https://hir.harvard.edu/peace-out-ngos/> (describing how a 2017 Chinese law that requires that nonprofits that receive foreign funding first register with the government through an “extensive and exhaustive” process where groups can be denied on the basis of “ambiguous” clauses like if it might “harm national interests”).

⁹² See, e.g., UN Rights Experts Urge India to Repeal Law Restricting NGO's Access to Crucial Foreign Funding (June 16, 2016), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20112&LangID=E> [hereinafter “UNSR Joint India Report 2016”] (describing how the Act has been increasingly used to “silence” organizations with which the government disagrees).

parties in an attempt to influence internal government affairs.⁹³ The Act banned certain individuals and entities, such as political candidates, political parties, and elected officials, from receiving foreign funds.⁹⁴ At first, the FCRA only required that nonprofit organizations that received foreign funding report so after the fact.⁹⁵ However, after the government grew wary of the role nonprofits had played in supporting a prominent anti-corruption campaign against Indira Gandhi, the FCRA was modified in 1984 to require that nonprofits that receive foreign funding were pre-cleared by the government, in the form of being approved for FCRA registration.⁹⁶

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.⁹⁷ Unlike the 1976 Act, which focused on protecting the functioning of democratic institutions,⁹⁸ 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.”⁹⁹ 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.¹⁰⁰

In addition to the list of persons and entities barred completely from receiving foreign contributions in the 1976 FCRA (such as public officials), the 2010 Act added organizations of a “political nature”.¹⁰¹ The government

⁹³ SANJAY AGARWAL, *FCRA 2010: CONTEXT CONCEPTS AND PRACTICE* 56 (2021) (describing context of drafting of Act amidst allegations of CIA involvement in Indian elections in the late 1960s). Notably, the FCRA was enacted during the Emergency when Parliament was suspended. *Id.* at 57.

⁹⁴ The Foreign Contributions (Regulation) Act of 1976, Ch. II, § 4. <http://legislative.gov.in/sites/default/files/A1976-49.pdf> [hereinafter *FCRA 1976*] (describing which entities and individuals were banned from receiving foreign funds).

⁹⁵ AGARWAL, *supra* note 93 at 57.

⁹⁶ *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).

⁹⁷ *Id.* at 60.

⁹⁸ *FCRA 1976, supra* note 94 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.”).

⁹⁹ *FCRA 2010, supra* note 90 at Preamble; *See also* AGARWAL, *supra* note 93 at 82 (contrasting the objectives of the two 1976 and 2010 FCRA’s).

¹⁰⁰ 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).

¹⁰¹ *FCRA 2010, supra* note 90 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).

later 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.¹⁰² 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.¹⁰³

Under the 2010 Act, a NGO’s FCRA registration must be renewed every five years.¹⁰⁴ 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”.¹⁰⁵ 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.¹⁰⁶

The Indian government has been criticized for using the broad language and burdensome compliance regime of the FCRA to target civil society.¹⁰⁷ 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.”¹⁰⁸ Later the same year, the government

¹⁰² *Id.* at Ch. II, § 3(f).

¹⁰³ *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).

¹⁰⁴ *Id.* at Ch. III, § 11; FCRA 1976, *supra* note 94 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 90 at Ch. III, § 11(1).

¹⁰⁵ *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].

¹⁰⁶ FCRA 2010, *supra* note 90 at Ch. VII, § 35, § 38.

¹⁰⁷ HRW 2016, *supra* note 105.

¹⁰⁸ UN Rights Experts Urge India to Repeal Law Restricting NGO’s Access to Crucial Foreign Funding, June 16, 2016, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20112&LangID=E> [hereinafter “UNSR Joint India Report 2016”]

refused to renew the FCRA registration for 25 nonprofits, including human rights organizations, because their activities were reportedly not in the “national interest”.¹⁰⁹ 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.¹¹⁰ Lawyers Collective, a leading domestic human rights organization, had their FCRA registration suspended and then criminal charges brought against leaders of the organization for alleged violations of the Act.¹¹¹

In 2020, the BJP-led government amended the FCRA to create additional restrictions on foreign funding of nonprofits. These included 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 received a FCRA registration.¹¹²

In April 2022 a three-judge bench of the Indian Supreme Court in *Noel Harper v. Union of India* upheld a challenge to a number of the restrictions in the 2020 amendment.¹¹³ What was most striking in the judgement was not the holding, but rather 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.”¹¹⁴ Justice

¹⁰⁹ HRW 2016, *supra* note 105.

¹¹⁰ Krishna N. Das, *Amnesty India Says Raid, Frozen Accounts Aimed at Silencing Government Critics*, REUTERS (Oct. 26, 2018), <https://www.reuters.com/article/us-india-amnesty/amnesty-says-raid-at-india-office-aimed-at-silencing-government-critics-idUSKCN1N00IK> (documenting raid on and freezing of Amnesty International’s bank accounts by the government); Tushar Dhara, *Greenpeace India may be forced to halve staff, operations amid government crackdown*, CARAVAN (Jan. 23, 2019), <https://caravanmagazine.in/government/greenpeace-crackdown-halve-staff-operations>

¹¹¹ Human Rights Watch, *India: Rights Groups Harassed Over Foreign Funding* (June 26, 2019), <https://www.hrw.org/news/2019/06/26/india-rights-groups-harassed-over-foreign-funding> [hereinafter “HRW 2019”].

¹¹² International Center for Not-for-Profit Law, *India’s 2020 FCRA Amendments Impact on Association* (July 2021), <https://www.icnl.org/post/analysis/indias-2020-fcra-amendments-impact-on-association> [hereinafter “ICNL on 2020 FCRA Amendments”] (providing overview of substance of 2020 FCRA amendments).

¹¹³ *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. *Id.* at para 87).

¹¹⁴ *Id.* at para 53.

Khanwilkar continued that “foreign aid can create [the] presence of a foreign contributor and influence the policies of the country. It may tend to influence or impose political ideology.”¹¹⁵ He therefore concluded that “the presence/inflow of foreign contribution in the country ought to be at the minimum level, if not completely eschewed.”¹¹⁶ 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.¹¹⁷

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 emphasized the “rights of the voluntary organizations to have access to foreign funds”.¹¹⁸ Given these different approaches to the question of regulating foreign funding, the constitutionality of the FCRA’s broader regulatory scheme will likely eventually need to be examined by a larger constitution bench of the Indian Supreme Court.¹¹⁹

For the moment though what has emerged in India is a regulatory regime that emphasizes government control over foreign funding of nonprofits in the name of the national interest. 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. As one government FCRA annual report noted “The general policy of the Government of India is not to encourage soliciting foreign contribution.”¹²⁰

C. The European Union and Rights Based Regulatory Liberalism

In contrast to the U.S. and India, the European Union has stressed a more rights-based approach to the regulation of foreign funding of nonprofits. This section begins by analyzing the EU’s treatment of Hungary’s NGO

¹¹⁵ *Id.* at para 54.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at para 71, 79.

¹¹⁸ *INSAF*, *supra* note 103 at para. 21.

¹¹⁹ 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).

¹²⁰ See, e.g., AGARWAL, *supra* note 93 at 86. (quoting FCRA annual report of 2013).

Transparency Law.¹²¹ In some ways, this focus may seem odd. Hungary is a relatively small country within the EU and the law was only in force from 2017 until its repeal in 2021 after the CJEU found it violated Hungary’s legal commitments in joining the EU.¹²² The CJEU judgment though created a set of limitations on what types of restrictions governments within the EU can place on foreign funding of nonprofits going forward. The Hungarian experience has also deeply informed the EU’s proposed 2023 Defense of Democracy package to combat foreign influence, whose potential impact on foreign funding of nonprofits is briefly examined at the end of this section.

Since 2010, Victor Orban has been Prime Minister of Hungary. His government has been criticized by European Union bodies for being an “electoral autocracy”¹²³ and for engaging in a “virulent campaign” against foreign-funded civil society.¹²⁴ In particular, the government has been accused of targeting human rights, immigrant rights, and educational organizations funded by the Hungarian-born U.S. financier George Soros, as well as groups funded from elsewhere in Europe.¹²⁵

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.”¹²⁶ 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

¹²¹ Hungary Law on the Transparency of Organisations Receiving Support from Abroad (adopted 13 June 2017), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2017\)031-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2017)031-e) [hereinafter “Hungary NGO Transparency Law”].

¹²² See Amnesty Hungary Public Statement, *supra* note 18 (describing the repeal of the law).

¹²³ Matt Murphy, *Victor Orban: Hungary ‘autocracy’ verdict from EU correct, say activists*, BBC (Sept. 16, 2022), <https://www.bbc.com/news/world-europe-62925460>.

¹²⁴ Venice Commission, Opinion 889/2017, Hungary Opinion on the Draft Law on the Transparency of Organisations Supported from Abroad 17 (June 2017) [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)015-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)015-e).

¹²⁵ Lili Bayer, *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). 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. Human Rights Watch, *Hungary: Bill Seeks to Stifle Independent Groups* (June 12, 2017), <https://www.hrw.org/news/2017/06/12/hungary-bill-seeks-stifle-independent-groups>

¹²⁶ Hungary NGO Transparency Law, *supra* note 121.

Hungarian forints (or about 23,500 Euros) a year from a foreign source.¹²⁷ These organizations needed to register with the government, with their information then made available in a publicly available portal.¹²⁸ They also were required to indicate their status as “organisation supported from abroad” on their website and publications.¹²⁹ Failure to do so would result in fines and possible termination of the organization.¹³⁰

The NGO Transparency Law was criticized by many in civil society as a tool to smear the nonprofit community in Hungary as an outside hostile force. Critics claim it was “styled” on Russia’s “foreign agent” law,¹³¹ while the Hungarian government defended its adoption, in part, by claiming it was modeled on FARA in the United States.¹³² 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.¹³³ Instead, as an Amnesty International report noted the threat of registration created a “chilling effect, self-censorship, and divisions within civil society groups.”¹³⁴

Responding to a referral from the European Commission, in June 2020 the CJEU held 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.¹³⁵ The CJEU wrote

¹²⁷ See, EUROPEAN CENTER FOR NOT-FOR-PROFIT LAW (ECNL), HUNGARY’S NEW LAW ON THE TRANSPARENCY OF ORGANISATIONS RECEIVING SUPPORT FROM ABROAD: WHAT’S AT STAKE? (2020) <https://ecnl.org/news/hungarian-law-transparency-organisations-supported-abroad-what-stake> (describing the primary requirements of the Hungarian Transparency Law).

¹²⁸ Hungary NGO Transparency Law, *supra* note 121 at § 2(4).

¹²⁹ *Id.* at § 2(5).

¹³⁰ *Id.* at § 3.

¹³¹ AMNESTY INTERNATIONAL, HUNGARY: LIVING UNDER THE SWORD OF DAMOCLES 5 (2021), <https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR2739682021ENGLISH.pdf> [hereinafter “AMNESTY HUNGARY REPORT”]

¹³² See, FARA’S DOUBLE LIFE ABROAD, *supra* note 26 (describing how the Hungarian government justified their foreign agent laws by pointing to FARA in the U.S.).

¹³³ AMNESTY HUNGARY REPORT, *supra* note 131 (describing the impact of the implementation of the law on NGOs in Hungary. *Id.* at 4).

¹³⁴ *Id.*

¹³⁵ See, European Commission, European Commission Refers Hungary to the Court of Justice for its NGO Law, Dec. 7, 2017, https://ec.europa.eu/commission/presscorner/detail/ES/IP_17_5003 (referring Hungary to CJEU for its NGO Law); European Commission v. Hungary, Judgement of the Court of Justice of the European Union, C-78/18, June 18, 2020, <https://curia.europa.eu/juris/liste.jsf?num=C-78/18> [“hereinafter CJEU Hungary judgment”] (finding that the Transparency Law “introduced discriminatory and unjustified

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.¹³⁶ It found that the law was unjustified and discriminatory. 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.”¹³⁷ As a result, the Court held that the Hungarian law violated EU law on the freedom of association and the right to privacy, as well as in inhibiting the free movement of capital within the EU.¹³⁸ In response to the ruling, the Hungarian government eventually repealed the law.¹³⁹

The CJEU decision regarding Hungary’s NGO Transparency Law did not eliminate the ability of governments in the EU 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 an ex post facto registration scheme (albeit a stigmatizing scheme).

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 Russia’s 2012 foreign agent law, which required foreign funded nonprofits engaging in a broad swath of political activity undertake extensive reporting requirements and labeled them “foreign agents”, violated the freedom of assembly and association.¹⁴⁰ 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.¹⁴¹ The ruling though was ultimately not enforced as Russia

restrictions on foreign donations to civil society organisations, in breach of its obligations under Article 63 TFEU and Articles 7, 8 and 12 of the Charter” *Id.* at para 143).

¹³⁶ *Id.* at para 58.

¹³⁷ *Id.* at para 86. 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. *Id.* at para 94.

¹³⁸ *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).

¹³⁹ 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 19.

¹⁴⁰ See European Ct. of Human Rights, Case of Ecodefence and Others vs. Russia, June 14, 2022, [https://hudoc.echr.coe.int/eng#%7B%22itemid%22:\[%22001-217751%22\]%7D](https://hudoc.echr.coe.int/eng#%7B%22itemid%22:[%22001-217751%22]%7D) (finding that the law violated Article 11 of the European Convention on Human Rights. *Id.* at para. 187).

¹⁴¹ *Id.* at para 159.

withdrew from the ECHR in June 2022 amidst fallout over its invasion of Ukraine.¹⁴²

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. This rights-based approach though could come under new pressure. In response to a scandal that revealed that Qatar allegedly paid European lawmakers to influence policy decisions and concerns over Chinese and Russian influence, the European Commission adopted the “Defense of Democracy” package in December 2023.¹⁴³ It included a proposal for a directive on foreign influence legislation for member states.¹⁴⁴

The Commissioner who introduced the foreign influence register was careful to note that it did not have a labeling requirement and so “is not a foreign agents law”, distancing the proposal from FARA in the U.S., but also Russia and Hungary’s foreign agent laws.¹⁴⁵ The proposal requires EU member governments set up registries for anyone engaged on behalf of a foreign government in “interest representation activity”, which is defined as “an activity conducted with the objective of influencing the development, formulation or implementation of policy or legislation, or public decision-making processes.”¹⁴⁶ Critics have expressed concern that if enacted by the European Parliament, member states—and those looking to accede to the EU—might view the directive as a greenlight to enact overbroad registration requirements that could be used to target civil society and government critics that receive foreign funding and engage in political advocacy.¹⁴⁷

II. JUSTIFICATIONS FOR FOREIGN FUNDING RESTRICTIONS

¹⁴² *Russia Parliament votes to break with European Court of Human Rights*, REUTERS (June 7, 2022), <https://www.reuters.com/world/europe/russian-parliament-votes-exit-european-court-human-rights-2022-06-07/> (reporting on Russia leaving the ECHR).

¹⁴³ See Wheaton, *supra* note 24; European Commission, *Defense of Democracy – Commission proposes to shed light on covert foreign influence*, Dec. 12, 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6453 (announcing proposed new foreign influence registration scheme).

¹⁴⁴ *Id.*

¹⁴⁵ Korkea-aho, *supra* note 39.

¹⁴⁶ Proposal for a Directive of the Eur. Parliament and of the Council establishing harmonised requirements in the internal market on transparency of interest representation carried out on behalf of third countries and amending Directive (EU) 2019/1937, 2023/0463(COD) at Ch. 1, Art. 2(1) [hereinafter “Proposed EU Directive”], <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A637%3AFIN>

¹⁴⁷ See, e.g. Korkea-aho, *supra* note 39; Wheaton, *supra* note 24 (describing opposition of democracy groups to the proposal claiming that singling out foreign funding for the registry is tantamount to a Russia’s “foreign agent” law).

Part I described the different approaches of the US, India, and EU to the regulation of cross-border funding of nonprofits. This Part draws on these examples 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. The remainder of the article then uses this examination of the normative stakes raised by this regulation to develop a democracy centered approach.

A. Democratic Self-Governance

Perhaps the most frequently invoked justification for more heavily regulating foreign funding of nonprofits is the concern that such funding can be a nefarious force that undermines national sovereignty and self-governance.¹⁴⁸ As Hungarian Prime Minister Victor Orban argued when justifying registration and labeling requirements for foreign funded nonprofits: “We’re not dealing with civil society members, but paid political activists who are trying to help foreign interests here”.¹⁴⁹ 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.”¹⁵⁰ 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 in order to weaken the country’s energy security.¹⁵¹

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 foreign actors, including rival nation-states, are providing funding in an attempt to subvert a nation’s democratic community. For example, by

¹⁴⁸ 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).

¹⁴⁹ *Donors: Keep Out*, THE ECONOMIST (Sept. 11, 2014), <https://www.economist.com/international/2014/09/12/donors-keep-out>.

¹⁵⁰ Noel Harper, *supra* note 113 at para 24.

¹⁵¹ Glenn Kessler, *The bogus “allegation” that Putin is funding a California environmental charity*, WASHINGTON POST (March 17, 2022), <https://www.washingtonpost.com/politics/2022/03/17/bogus-allegation-that-putin-is-funding-california-environmental-charity/>.

providing funding to nonprofits to disrupt elections or 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 concern may be particularly acute in the Global South where critics have claimed foreign funding of NGOs continue to further "colonial legacies" and "political paternalism".¹⁵²

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.¹⁵³ For example, in India the 1976 FCRA was enacted after press reports claimed the CIA was providing funding to favored domestic politicians.¹⁵⁴ Stopping such alleged secretive funding of politicians is certainly a legitimate goal. However, there was no allegation that this CIA funding was being routed through nonprofits. Even if it was, requiring all nonprofits to receive government permission to receive foreign funding seems like a disproportionate regulatory response. 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 corruption within the government.¹⁵⁵

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 is that henceforward it will increasingly not be we and our descendants who live here, but others."¹⁵⁶ However, not only is Orban's concerns about replacement of the native population by immigrants dubious

¹⁵² 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).

¹⁵³ 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).

¹⁵⁴ AGARWAL, *supra* note 93 at 56.

¹⁵⁵ See AGARWAL, *supra* note 93 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).

¹⁵⁶ Zach Beauchamp, *The European country where "replacement theory" reigns supreme*, VOX (May 19, 2022), <https://www.vox.com/2022/5/19/23123050/hungary-cpac-2022-replacement-theory>.

(only about 2% of the country is actually foreign born),¹⁵⁷ but having nonprofits promote protecting migrants' rights is arguably a valuable contribution to the country's democratic discourse – and a view that many Hungarians likely share. Meanwhile, claims by U.S. politicians that the Russian government has secretly funded U.S. environmental groups have largely been found to be false.¹⁵⁸ Instead, these claims seem to have persisted because amplifying them is in the interest of some Members of Congress trying to discredit groups with which they disagree.¹⁵⁹

No doubt there is a needed debate about the outsized voice of international nonprofits and donors in some countries, particularly in the Global South. These groups and funders can be insufficiently grounded in local communities or context.¹⁶⁰ That said, it is not clear that domestic civil society is more empowered when its access to foreign funding is constricted. When it is, the only option for many nonprofits is to then turn for funding to a smaller set 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 requires the government to proactively surveil and regulate NGOs. Such regulation can have a burdensome impact not just on nonprofits funded from abroad, but on civil society more broadly. This is not to claim that foreign funding of NGOs should be unregulated, but rather as Part V will argue that there is a need for a far more targeted approach.

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 or terrorism financing.¹⁶¹ The United States has, largely unintentionally, played a leading

¹⁵⁷ *Id.*

¹⁵⁸ See Kessler, *supra* note 151 (finding that the allegations in a letter by Republicans against environmental groups that they receive Russian funding “crumble into dust” upon closer scrutiny).

¹⁵⁹ *Id.*

¹⁶⁰ 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).

¹⁶¹ United Nations, Report of the Special Rapporteur on the rights to freedom of peaceful

role in promoting this justification. After the terrorist attacks on the U.S. on September 11, 2001, the U.S. government pushed for governments to enact stronger anti-terrorism and money laundering legislation, including through the Financial Action Taskforce (FATF)—an intergovernmental organization.¹⁶² 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.¹⁶³

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.¹⁶⁴ In Hungary, for instance, the government cited the justification of fighting “money laundering” in the Preamble of its 2017 NGO Transparency law.¹⁶⁵

Yet, while there can be benefit in tracking international financial transactions in order to deter criminal activity, it is not clear why foreign funding of nonprofits should be specifically targeted compared to other cross-

assembly and of association, Maina Kiai A/HRC/23/39, 24 April 2013, para. 22. [Hereinafter Kiai 2013 Report] https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf (“One of the most common reasons used by governments to limit access to funding relate to security measures, including protection against terrorism and prevention of money-laundering.”). https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf

¹⁶²FATF is an inter-governmental organization dedicated to curbing cross-border money laundering and terrorism financing. See Julia C. Morse, *The Counterterrorism 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).

¹⁶³ 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). The US government at the time had also advocated that the Indian government revise and strengthen the earlier 1976 FCRA. See AGARWAL, *supra* note 93 at 63-64 (describing how the US advocated for the Indian government to revise the FCRA in 2010 to meet commitments to fighting terrorism).

¹⁶⁴ 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 nonprofit organizations from financing of terrorism, had been used by governments as an excuse to crack down on dissent).

¹⁶⁵ Hungary NGO Transparency Law, *supra* note 121 at Preamble.

border transactions.¹⁶⁶ Instead, as the UN Special Rapporteur on Freedom of Association and Assembly has argued transparency, accountability, and anti-money laundering justifications for foreign funding regulations of nonprofits has been used in many countries “to exert extensive scrutiny over the internal affairs of associations, as a way of intimidation and harassment.”¹⁶⁷

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.¹⁶⁸ This argument generally focuses on ensuring that outside resources are used in line with the public interest as understood by the government.¹⁶⁹

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.¹⁷⁰ 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

¹⁶⁶ 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.coredownload.inline.pdf>

¹⁶⁷ Kiai 2013 Report, *supra* note 161 at 38.

¹⁶⁸ Rutzen, *supra* note 11 at 32-33 (describing enhancing aid effectiveness as justification for cross-border funding restrictions).

¹⁶⁹ 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. *Id.* at 33. 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 efficiently” with “defined limits” and that it was important to “ensure accountability and responsibility for their actions.” Human Rights Council 25th Session Joint Statement: Panel discussion on the importance of the protection and promotion of the civil society space, March 28, 2014, <https://pmindiaun.gov.in/pageinfo/OTEx> (“There have also been those civil society organizations, who have digressed from their original purpose and indulged in the pursuit of donor-driven agendas. It is important to ensure accountability and responsibility for their actions and the consequences thereof and also guard against compromising national and international security.”).

¹⁷⁰ ICNL on 2020 FCRA Amendments, *supra* note 112.

the Hungarian government sees as a threat to its policy of discouraging immigration.¹⁷¹

These examples from India and Hungary show that while coordinating the goals of nonprofits with those of the 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 Indian FCRA's cap on administrative expenses, it can lead to excessive burdens and unintended impacts. Under Indian law, administrative expenses include rent for an office, the salaries of many types of employees, and other costs that can be critical to an organization's mission.¹⁷² For many nonprofits these expenses can easily exceed the 20% cap, meaning that to comply they must restructure their operations in a potentially 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 democratic self-governance. This may initially appear surprising as those advocating for foreign funding restrictions also frequently center their justifications in self-governance or sovereignty arguments. In part this seeming contradiction arises out 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.

¹⁷¹ *Hungary wants to levy penal tax on refugee NGOs*, EURO TOPICS (Jan. 22, 2018), <https://www.eurotopics.net/en/192988/hungary-wants-to-levy-penal-tax-on-refugee-ngos> (describing law proposed by Orban government to tax foreign funding to organizations that work with refugees).

¹⁷² Centre for Advancement of Philanthropy, *Foreign Contribution Regulation (Amendment) Rules 2020 further tightens the bolts* (Nov. 11, 2020) <https://capindia.in/foreign-contribution-regulation-amendment-rules-2020-further-tightens-the-bolts/> (recounting what expenses count as "administrative expenses" under the 2020 FCRA rules).

As a first step in building this self-governance argument, it is useful to 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 argued 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.”¹⁷³ The U.S. Supreme Court has repeatedly embraced this justification for free speech.¹⁷⁴ 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.”¹⁷⁵

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.”¹⁷⁶ Foreigners can provide a wide set of unique perspectives, including new insights about human rights, globalization, public health, or economic policy. Citizens, as well as policymakers, 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.”¹⁷⁷ This right to receive (and impart) information “regardless of frontiers” is enshrined in both the Universal Declaration of Human Rights

¹⁷³ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948).

¹⁷⁴ 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.’”).

¹⁷⁵ *Citizens United v. Federal Election Commission*, 558 U.S. 310, 339 (2010) (J. Kennedy).

¹⁷⁶ MEIKLEJOHN, *supra* note 173 at 60.

¹⁷⁷ 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).

(UDHR) and the International Covenant on Civil and Political Rights (ICCPR).¹⁷⁸

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.¹⁷⁹ 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.¹⁸⁰ Not only do associations help spread information that helps inform the public, but they can encourage citizens to engage in public spirited behavior.¹⁸¹ In this vein Mark Warren has argued that “Associational life forms the social infrastructure of public spheres.”¹⁸² 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.”¹⁸³ In this way, citizens have a right to hear from and associate with a diverse range of entities in public life, including groups that receive foreign funding. Indeed, there is a long history of such cross-border collaborations,

¹⁷⁸ 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).

¹⁷⁹ *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 . . .”)

¹⁸⁰ *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. . .”); MARK E WARREN, DEMOCRACY AND ASSOCIATION (2001) (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).

¹⁸¹ *Id.* 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).

¹⁸² *Id.* at 34

¹⁸³ CJEU Hungary judgment, *supra* note 135 at para 112.

such as in the movements for the abolition of slavery and against colonialism or for the rights of women, minorities, and others.¹⁸⁴

To be clear, an argument for a more open regulatory environment for foreign funding of nonprofits to protect self-governance is not the same as claiming there should be no limitations on such funding. 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 claiming “decision-oriented deliberations”, such as legislative proceedings or elections, require significantly more regulation.¹⁸⁵ Habermas argued 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 through the regulated introduction of information, argument, and reason.¹⁸⁶ 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”.¹⁸⁷ In the public sphere mass media and various associations are critical to helping shape public opinion.¹⁸⁸

This distinction between the regulation of the public sphere and decision-oriented deliberations is a significant distinction and will be

¹⁸⁴ There have been 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.).

¹⁸⁵ *See* HABERMAS, *supra* note 180 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).

¹⁸⁶ HABERMAS, *supra* note 180 at 307 (“[t]he publics of parliamentary bodies are structured predominantly as a *context of justification*.”).

¹⁸⁷ *Id.*

¹⁸⁸ *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.

returned to in this article as a meaningful way to help determine the legitimacy of regulation of foreign funding for different types of activities.¹⁸⁹ That said, a government that aggressively restricts its citizens' ability to actively engage with the world through onerous regulation of foreign funding of nonprofits 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 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. These laws' frequently complex requirements can also allow governments to tie up disfavored nonprofits in regulatory burdens, investigations, and even shut them down.¹⁹⁰ 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.¹⁹¹

The case studies in this Article have already highlighted examples of this type of politicized targeting in India and the United States.¹⁹² However, foreign funding restrictions have been similarly used to target or prosecute political opponents globally, including in Russia, Latin America, Africa, and elsewhere.¹⁹³

The fact that a law can be abused to target unpopular or dissenting voices does not mean that it does not serve a legitimate purpose. That said, the more expansive and burdensome laws are that regulate foreign funding of nonprofits the easier it is to target organizations and activists for failing to comply with their requirements. As such, the potential use of these laws to

¹⁸⁹ See Part V(B).

¹⁹⁰ 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).

¹⁹¹ *Id.*

¹⁹² 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).

¹⁹³ See, e.g., Rutzen, *supra* note 11 at 30 (providing chart showing global impact of laws restricting civil society).

silence government critics is an important reason for ensuring any regulation of foreign funding be carefully targeted.

C. Access to Resources

Overly aggressive regulation of foreign funding of nonprofits can also undermine the access to resources and expertise needed for the prosperity of a country.¹⁹⁴ This point is particularly obvious for less wealthy countries. For example, a Kyrgyz legislator who voted against a bill restricting cross-border funding stated: “We get financial assistance from [international organizations] in many fields including healthcare, education, and agriculture among others. We need this money.”¹⁹⁵ Even in a large lower to middle income country like India, where Home Affairs Minister Chidambaram 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.¹⁹⁶ By one estimate, in 2018-2019 some 32% of philanthropic capital in India came from foreign sources.¹⁹⁷ Another 36% came from state-mandated corporate social responsibility (CSR), and many of these companies had significant foreign investors.¹⁹⁸

Foreign funding of nonprofits is used not just to provide needed services to the population, like education or healthcare, but also expertise. As one of the leading newspapers in India declared in an editorial criticizing the government’s suspension of the FCRA registration of a prominent Indian think tank: “Collaboration with the world requires the flow of information, personnel and funds in both directions.”¹⁹⁹ 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

¹⁹⁴ Van de Velde, *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.”).

¹⁹⁵ Annai Lilek, 2016. *Kyrgyzstan: Foreign Agent Bill Nixed, NGOs Rejoice*, OPENDEMOCRACY (May 12, 2016), <https://eurasianet.org/kyrgyzstan-foreign-agent-bill-nixed-ngos-rejoice> quoted in Chaudhry, *supra* note 13 at 562.

¹⁹⁶ Rajya Sabha 2010 debate, *supra* note 100 at 396.

¹⁹⁷ 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).

¹⁹⁸ *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).

¹⁹⁹ *Power Against Knowledge, 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>.

any rate, for a country growing as fast as India, a massive expansion in capacity for research is the need of the hour.”²⁰⁰

Wealthier countries have also benefitted from nonprofits having access to resources from abroad. Many major U.S. universities receive significant funding from foreign students as well as gifts from foreign alumni.²⁰¹ 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 both services and expertise.²⁰²

D. Reciprocity

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

Academic research has found that democracies are less likely to declare war on each other,²⁰³ and there is substantial evidence they are more likely to trade with each other.²⁰⁴ A key potential tool of furthering democracy is 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

²⁰⁰ *Id.*

²⁰¹ See Liam Knox, *International Enrollment Rebounds*, INSTITUTE FOR HIGHER EDUCATION (Nov. 13, 2022), <https://www.insidehighered.com/news/2022/11/14/international-students-are-coming-back-us-campuses> (reporting on a study that found international students contributed \$34 billion to the U.S. economy in 2021).

²⁰² See, e.g., Amnesty International History, The Nobel Prize, <https://www.nobelprize.org/prizes/peace/1977/amnesty/history/> [hereinafter Amnesty International History] (describing Amnesty International as a “world-embracing movement” that is “independent of all governments”).

²⁰³ 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).

²⁰⁴ See Nazif Durmaz and John Kagochi, *Democracy and Inter-Regional Trade 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).

other countries.²⁰⁵ Civil society voices, including nonprofits that receive foreign funding, are often prominent in these debates. Civil society can also play an important role in limiting control of the state, exposing corruption of government officials, advocating for good governance reforms, promoting political participation, and developing the “values of democratic life.”²⁰⁶

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.²⁰⁷ The presence of a law like FARA has not only helped normalize these types of stigmatizing and restrictive registries for nonprofits globally, but put the U.S. and other democracies on the backfoot when attempting to convince other countries not to adopt similar laws.²⁰⁸ 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.²⁰⁹ 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?”²¹⁰

Just because democracies create a more open regulatory environment for foreign funding of nonprofits does not mean other countries will necessarily reciprocate. However, authoritarian and authoritarian leaning governments are arguably more likely to aggressively restrict foreign funding for civil society when democracies do the same.

²⁰⁵ 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.)

²⁰⁶ Larry Diamond, What Civil Society Can Do to Develop Democracy, Feb. 10, 2004 (Presentation to NGO Leaders, Convention Center, Baghdad) <https://diamond-democracy.stanford.edu/speaking/speeches/what-civil-society-can-do-develop-democracy>

²⁰⁷ See FARA’S DOUBLE LIFE ABROAD, *supra* note 26 at 2-3 (describing how Russia, Hungary, and Nicaragua all justified their foreign agent laws pointing to FARA).

²⁰⁸ 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).

²⁰⁹ Marcos Aleman and Christopher Sherman, *‘Foreign’ agents pitch has El Salvador civil society on edge*, ASSOCIATED PRESS, Nov. 17, 2021, <https://apnews.com/article/media-United-states-nayib-bukele-el-salvador-san-salvador-fbc5b491ccb99289719765e9a7aea1>.

²¹⁰ *Id.*

E. Democratic Cosmopolitanism

A final argument for defending a more open regulatory environment for foreign funding of nonprofits is found in democratic cosmopolitanism. This justification focuses on the interest of citizens in political communities outside their nation and the responsibility and incentives of government to protect citizens' ability to pursue these interests.

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, familial, professional, ethnic, or political identities, or one's broader relationship to all humans.²¹¹ 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.²¹² 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.²¹³

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 invested, like fighting for LGBTQ rights, protecting religious liberty, or combatting climate change. Or it might involve coming together in professional or cultural groupings, such as professional exchanges in an international medical association or a group that promotes Indian classical music globally. In order to allow their citizens—and the citizens of other countries—to pursue these interests, governments will frequently need to have a protective legal environment for international funding of civil society organizations.

²¹¹ See, e.g., Kwame Anthony Appiah, *The Importance of Elsewhere: In Defense of Cosmopolitanism*, FOREIGN AFFAIRS (March/April 2019), <https://www.foreignaffairs.com/articles/2019-02-12/importance-elsewhere> ("Cosmopolitanism is an expansive act of the moral imagination. It sees human beings as shaping their lives within nesting memberships: a family, a neighborhood, a plurality of overlapping identity groups, spiraling out to encompass all humanity.").

²¹² See John Inazu, *Virtual Assembly*, 98(5) CORNELL L. REV. 1093, 1102 (2013) (identifying identity formation; self-governance; and dissent as key justifications for the freedom of association.); Jack Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 NYU L. REV. 1 (2004) (arguing that free speech justifications should focus on fostering democratic culture); For a review of philosophical justifications for protecting association see generally WARREN, *supra* note 180 at 17-38.

²¹³ Balkin, *supra* note 212 at 3.

IV. A TYPOLOGY OF REGULATORY FACTORS

Parts II and III highlighted the normative stakes of more restrictive or open approaches to regulating foreign funding of nonprofits. However, in practice the regulation of foreign funding takes on particular characteristics that can have a determinative effect on their actual impact. This Part creates a typology of factors by which democracies have regulated the foreign funding of nonprofits. It is organized by (1) who is regulated; (2) which foreign funders; (3) what funding relationship; (4) types of activity; and (5) regulatory mechanisms. This typology is then drawn upon in Part V to develop a framework for how policymakers might better target foreign funding restrictions. The examples used in this Part draw on the case studies of Part I, but also from other democracies.

A. *Who is Regulated*

One of the most basic distinctions when comparing foreign funding regulation of nonprofits across countries is whether the regulation only applies to nonprofits or more generally. Hungary's NGO Transparency Law, for example, only covered nonprofits, while FARA in the U.S. requires registration of anyone—nonprofits or otherwise—who engages in covered activity.²¹⁴ Meanwhile, India's FCRA specifically targets nonprofits for registration, although it also has other provisions with different restrictions for foreign funding in the media or funding received by public officials.²¹⁵

Even when foreign influence legislation is of general applicability it may have provisions that can create a disproportionate impact on nonprofits. FARA, in the U.S., for example, applies generally, but exempts “any person engaging or agreeing to engage only . . . in private and nonpolitical activities in furtherance of the bona fide trade or commerce” of a foreign principal.²¹⁶ The breadth of this commercial exemption is much debated, but nonprofit activity is generally not considered to be covered by it.²¹⁷ As such, FARA can potentially create registration requirements for nonprofits, but not for commercial enterprises that engage in similar activities—for example, under the Act a nonprofit that solicits or disburses funds on behalf of a foreign

²¹⁴ ECNL, *supra* note 127 (describing requirements of NGO Transparency Law); 22 U.S.C. § 611(c) (requiring any actor, not just nonprofits, to register if engaged in covered activity).

²¹⁵ See Part I(B) for discussion of the registration requirements under the FCRA.

²¹⁶ 22 U.S.C. § 613(d)(1).

²¹⁷ Robinson, *supra* note 28 at 1111 (describing debates around the breadth of the commercial exemption in FARA).

principal may have to register, but not a commercial actor engaging in the same activity.²¹⁸

B. Which Foreign Funders

Some laws that regulate 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.²¹⁹ FARA in the U.S. and Hungary’s repealed NGO Transparency Law similarly do not make distinctions between different types of potential foreign funders.²²⁰

This indiscriminate treatment though is not the only approach as in many countries their foreign influence registration requirements are only triggered by activities undertaken on behalf of foreign governments. Australia’s FITS, for example, only covers those who undertake registrable activities on the behalf of foreign governments, foreign political parties, or foreign government related entities or individuals.²²¹ Similarly, the UK’s Foreign Influence Registry or the EU’s proposed foreign influence registry directive focuses on those engaged in covered activities on behalf of a foreign government or political party.²²² In the US, a Taskforce of the American Bar Association has proposed narrowing FARA so that it only applies to “agents” of foreign governments or political parties or those operating on their behalf,

²¹⁸ Under FARA, covered activities include soliciting or disbursing “things of value”. 22 U.S.C. § 611(c)(1)(iii).

²¹⁹ See FCRA 2010, *supra* note 90 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).

²²⁰ See Hungary NGO Transparency Law, *supra* note 121 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”).

²²¹ See FITS Act, *supra* note 20 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>.

²²² See UK NSA 2023, *supra* note 23 at §§ 32 and 69(1) (requiring registration on covered activities on behalf of a “foreign power” defined to include a foreign government or political party); Proposed EU Directive, *supra* note 146 at Art. 2 (requiring registration for select activities provided to a “third party entity” defined as a foreign government at any level government or a public or private entity whose actions can be attributed to a foreign government).

instead of all foreigners.²²³

Out of a desire to more carefully tailor their regulatory approach, some democracies create restrictions that only apply to funding from certain, adversarial, foreign countries.²²⁴ 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 or spreading election misinformation—at the instruction of or with financial support from a “hostile foreign power”.²²⁵ “Hostile foreign power” is then defined under the law in such a way so as to currently only include China.²²⁶ The United Kingdom’s 2023 Foreign Influence Registry has an enhanced tier under which the Secretary of State may designate certain foreign governments of heightened concern, like Russia or China, triggering registration requirements for a much broader set of activities for those acting at the “direction” of the foreign power.²²⁷ Multiple bills have also been introduced in the U.S. Congress that would broaden the set of activities requiring registration under FARA, but only for agents of certain foreign government adversaries, such as China, designated by the executive.²²⁸

C. What Funding Relationship

²²³ See, INTERNATIONAL LAW SECTION AMERICAN BAR ASSOCIATION, REPORT OF THE TASKFORCE ON THE FOREIGN AGENTS REGISTRATION ACT (FARA) (July 16, 2021), <https://www.fara.us/assets/htmldocuments/ABA%20ILS%20FARA%20Task%20Force%20Report%2009-29-21.pdf> (calling for narrowing the “foreign principal” definition in FARA. *Id.* at 8).

²²⁴ 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.”).

²²⁵ *Anti-Infiltration Act passed by Taiwan’s legislature*, TAIWAN TODAY (Jan. 2, 2020), https://nspp.mofa.gov.tw/nsppe/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).

²²⁶ *Id.*

²²⁷ UK NSA 2023, *supra* note 23 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).

²²⁸ See, e.g., International Center for Not-for-Profit Law, Foreign Agents Registration Act, <https://www.icnl.org/our-work/us-program/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, and HR 9199).

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 receiving any amount of funding from a foreigner.²²⁹ 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).²³⁰ Meanwhile, in Israel, the country's nonprofit transparency law only applies to nonprofits that receive over 50% of their operating budget from foreign governments.²³¹

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 at the “request” of a foreigner to engage in a covered activity.²³² For example, the Justice Department has found that U.S. church congregants had to register under FARA because they printed out political banners at the “request” of European congregants traveling to the U.S. for a pro-life rally against abortion.²³³ However, an agency requirement can also theoretically be narrower. Under FARA, if a recipient of foreign funding does not act at

²²⁹ See FCRA 2010, *supra* note 90 at § 6 (requiring that any organization engaged in covered activity under the Act receive clearance from the government to receive foreign funding).

²³⁰ ECNL, *supra* note 127. 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 135 at para. 94.

²³¹ *EU criticizes Israel law forcing NGOs to reveal their funding*, BBC (July 12, 2016), <https://www.bbc.com/news/world-middle-east-36775032>. 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. See, e.g., U.S. Department of Education, Section 117 Foreign Gift and Contract Reporting, <https://fsapartners.ed.gov/knowledge-center/topics/section-117-foreign-gift-and-contract-reporting> (providing resources on reporting requirements of Section 117 of the Higher Education Act).

²³² 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>.

²³³ See Nick Robinson, *Fixing the FARA Mess*, JUST SECURITY, March 16, 2022, <https://www.justsecurity.org/80690/fixing-the-fara-mess/> (describing and linking to advisory opinion requiring church congregants to register).

the “request” of a foreigner or there is not “control” then the person or entity seemingly does not have to register.²³⁴ However, the Justice Department has generally interpreted receiving funding as indicative of an agency relationship under FARA.²³⁵

D. Types of Activity

The regulation of foreign funding of nonprofits is triggered in some countries by most activities a nonprofit engages in. The FCRA in India or Hungary’s 2017 NGO Transparency Law, for example, create registration requirements for nonprofits that receive foreign funding that engage in almost any activity.²³⁶ Other countries’ laws though only cover nonprofits that receive foreign funding that engage in a narrower set of activities. This section includes some of the more common activities that trigger registration requirements.

Many foreign influence laws, for example, are focused on making more transparent the lobbying activities of foreigners. Australia’s Foreign Influence Transparency Scheme and the UK’s Foreign Influence Registry, for example, have as a major goal making foreign government lobbying of lawmakers more transparent, although they also cover additional activities.²³⁷

In some countries, these registration requirements cover certain types of public communications. FARA in the U.S., 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 information²³⁸ or attempts to influence U.S. public opinion on any foreign or domestic policy issue.²³⁹ Australia’s FITS takes a narrower approach in targeting communications, but still requires registration for “communications

²³⁴ 22 U.S.C. § 611(c).

²³⁵ See, e.g., NWF Advisory Opinion, *supra* note 71 (finding that although NWF claimed its grant agreement with the Norwegian government did not give them “direction or control” over NWF that the Justice Department determined 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).

²³⁶ Hungary NGO Transparency Law, *supra* note 121 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 90 at § 6 (requiring that an organization receive government clearance if it accepts foreign contribution to engage in a “definite, cultural, economic, educational, religious, or social programme”).

²³⁷ See UK NSA 2023, *supra* note 23 at §§ 69 and 70 (requiring persons to register for engaging in “political influence activity” under the Act); FITS Act, *supra* note 20 at Art. 20 (detailing parliamentary lobbying as first covered activity).

²³⁸ 22 U.S.C. § 611(h) (defining “publicity agent” under the law).

²³⁹ 22 U.S.C. § 611(o) (defining “political activities” under the law).

activity” for the purpose of “political or governmental influence” on behalf of a foreign government or political party.²⁴⁰ Australia’s Act defines “political” more narrowly than FARA to only include attempting to influence elections, the proceedings of Parliament, or a federal government decision.²⁴¹

Countries may also require registration of certain disbursement activity 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].”²⁴² Notably, under FARA this disbursement activity does not even have to be for promoting a political activity.²⁴³ Meanwhile, in the United Kingdom one must register only for “disbursement activity” in the country for on behalf of a foreign government or political party only for influencing an election, the proceedings of a political party, or the decision of certain high ranking UK political officials.²⁴⁴

Significantly, many foreign influence registration requirements also include a set of exemptions. In the U.S., for example, FARA provides exemptions for “bona fide” commercial activity, as well as certain academic, humanitarian, or religious activities.²⁴⁵ 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.²⁴⁶

E. Regulatory mechanisms

Finally, 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 significantly greater burdens than others, even lighter touch regulation can potentially be stigmatizing or create administrative costs that can interfere with the operations of nonprofits. As such, the type of regulation requires careful analysis to assess its potential impact.

Prohibitions on foreign support to nonprofits are the most onerous type of regulation. Most countries, for example, ban foreign contributions for

²⁴⁰ FITS Act, *supra* note 20 at Art. 21

²⁴¹ *Id.* at Article 12(1) (defining “political or governmental influence”).

²⁴² 28 U.S.C. § 611(c)(1)(iii).

²⁴³ *Id.*

²⁴⁴ UK NSA 2023, *supra* note 23 at §70.

²⁴⁵ See Robinson, *supra* note 28 at 1104-1110 (detailing important exemptions under FARA).

²⁴⁶ FITS Act, *supra* note 20 at Art. 29c (detailing an exemption for registered charities in certain contexts).

electioneering activity, including through nonprofits.²⁴⁷ India adopts a more extreme position amongst democracies by also banning foreign contributions for nonprofits that engage in a set of other loosely defined activities that it deems contrary to the national interest. Under the FCRA, the government can deny a NGO the ability to receive foreign funding if an organization is likely to engage in a range of conduct, including activity against the “public interest”.²⁴⁸ Organizations like Oxfam India have been denied registration under this ground leading to claims that activity against the “public interest” is being conflated with activity that can be considered critical of the government.²⁴⁹

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.²⁵⁰ These schemes are a form of prior restraint and allow the government greater discretion to deny or delay disfavored organizations from receiving any foreign funding at all.²⁵¹ 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 show can still be used as a tool by governments to burden or stigmatize nonprofits.

Reporting requirements for foreign influence registration schemes can vary extensively. Some, like FARA in the U.S., require extensive reporting

²⁴⁷ 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).

²⁴⁸ FCRA 2010, *supra* note 90 at Ch. 5, § 12(a).

²⁴⁹ 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).

²⁵⁰ See, e.g., UNSR 2023 General Principles, *supra* note 40 (“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).

²⁵¹ 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>

for every time an “agent” engages in a covered activity.²⁵² This information is then posted to a public website.²⁵³ Others may only require a statement that a foreign donation has been received during the calendar year and from whom.²⁵⁴ More burdensome requirements, if not tailored to very specific activity, can easily drown nonprofits in paperwork or create more discretion for governments to investigate nonprofits or their officers for noncompliance.

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.²⁵⁵ Organizations in countries like Russia and Nicaragua, for example, have shut down rather than face the stigma, and potential harassment by the government or third parties, of being labeled “foreign agents”.²⁵⁶

Beyond registration and labeling requirements, some countries engage in extensive government control in how foreign funds can be used. Under India’s FCRA, for example, 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 and all foreign funding must be maintained at a State Bank of India branch in New Delhi.²⁵⁷

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 register with and receive approval from the government before receiving foreign funding for most activities they engage in and no matter how much foreign funding they receive.²⁵⁸ Meanwhile, FARA, at least on paper, requires groups to register and undertake the same burdensome reporting and labeling requirements for a broad set of activities, whether it is a more politically sensitive activity, like lobbying for the government of Saudi Arabia, or the more mundane, like a U.S. citizen providing funding to a Guatemalan educational nonprofit at their

²⁵² See Robinson, *supra* note 28 at 1103 (describing reporting requirements under FARA).

²⁵³ *Id.*

²⁵⁴ See U.S. Dept. of Education, *supra* note 88 (describing reporting requirements for foreign gifts to universities under the U.S. Higher Education Act).

²⁵⁵ CJEU Hungary judgment, *supra* note 135 at 58.

²⁵⁶ See FARA’S DOUBLE LIFE ABROAD, *supra* note 26 at 2-3 (describing impact of foreign agent laws in Nicaragua in Russia).

²⁵⁷ ICNL on 2020 FCRA Amendments, *supra* note 112 (describing 2020 FCRA amendments).

²⁵⁸ FCRA 2010, *supra* note 90 at Ch. II, § 6 (describing requirements for registration).

“request”.²⁵⁹ 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 final part argues that governments should follow a much more targeted democracy centered approach when considering restrictions on cross-border funding to nonprofits. The approach argued for in this part recognizes that while there are genuine foreign threats to self-governance, the fear of the foreign can obscure the benefits of cross-border collaboration and the dangers of over-regulation. In doing so, it provides guidance for democracies struggling with how to approach the question of how, or if, to regulate foreign funding of nonprofits as well as providing a potential framework for how to regulate foreign influence in civil society more generally.

A. Rights Focused

Registration requirements for cross-border funding of nonprofits have been repeatedly used to discredit civil society and government critics. Given this history, it is particularly 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.”²⁶⁰ Where there are restrictions on funding they should meet basic rights principles such as being for a legitimate purpose, necessary, proportionate, and nondiscriminatory.²⁶¹ 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. As discussed earlier in this article, in *Noel Harper Justice*

²⁵⁹ See Robinson, *supra* note 28 at 1097-1099 (describing broad list of covered activities under FARA).

²⁶⁰ UNSR 2023 General Principles, *supra* note 40 at para. 11.

²⁶¹ 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.”).

Khanwilkar of the Indian Supreme Court engaged in a relatively dismissive analysis of freedom of association concerns in weighing the constitutionality of amendments to the FCRA. In a representational part of his judgment, Khanwilkar 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]”.²⁶² 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 concerns.²⁶³

The U.S. Supreme Court has also fallen into the trap of failing to appropriately weigh the burden and stigma created by these laws. While the U.S. Supreme Court has never directly assessed 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 and distributed in the U.S. as “political propaganda” (a label used at the time in FARA, but that was removed from the Act by Congress in 1995).²⁶⁴ In a divided five to three decision, Justice Stevens found for the Court that the term “political propaganda” did not place these materials “beyond the pale of legitimate discourse.”²⁶⁵ 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.²⁶⁶ 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.”²⁶⁷

In contrast to these cases, European courts have generally engaged in a more searching analysis of the impact of foreign funding registration requirements. In analyzing the Hungarian NGO Transparency Law, the CJEU

²⁶² Noel Harper, *supra* note 113 at para. 75.

²⁶³ *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.”).

²⁶⁴ Robinson, *supra* note 28 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).

²⁶⁵ *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.*).

²⁶⁶ *Id.* at 483.

²⁶⁷ *Id.* at 491.

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.”²⁶⁸ 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 . . .”²⁶⁹ 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”.²⁷⁰ Such a textured approach that closely scrutinizes the actual burdens these laws impose on protected rights provide a more robust path for courts and policymakers to follow when assessing the merits of any regulation of foreign funding, including registration requirements.

B. Differentiated Activities

Central 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.

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 [U.S.] 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.’”²⁷¹ On the other hand, lawmakers and courts

²⁶⁸ CJEU Hungary judgment, *supra* note 135 at para 58.

²⁶⁹ *Id.*

²⁷⁰ Case of Ecodefence and Others, *supra* note 140 at para 136 and 173.

²⁷¹ *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).

should be significantly 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.²⁷² 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 justifiable reasons to regulate decision-oriented deliberations more heavily, that does not permit the government a free hand. For example, onerous regulation on lobbying can make it difficult for policymakers to hear important perspectives. For example, a small international nonprofit that wants to introduce lawmakers to a foreign human rights dissident may be deterred from doing so if lobbying regulations are too burdensome or if they 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 of lobbying can also potentially end up undermining debate in the broader public sphere.

Governments also frequently restrict foreign funding for a broad range of other activities that traditionally have less impact on the nonprofit sector, such as regulating foreign investment in the defense, finance, or transportation industries.²⁷³ This article does not examine the merits of these industry specific restrictions. What is important to see though is that given the unusually active role of nonprofits in public debate regulation of foreign funding of nonprofits can raise unique expression and self-governance concerns compared to many other types of foreign influence restrictions.²⁷⁴

²⁷² See *supra* notes 182 through 188 and accompanying text, describing distinction between regulating activity in the public sphere and democratic decision oriented deliberation.

²⁷³ 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).

²⁷⁴ 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),

As such, regulation impacting nonprofits' expressive functions will require careful scrutiny from the judiciary.

C. Differentiated Funders

As part of a broader democracy centered approach, there can be benefits to differentiating between different types of foreign funders. As described in Part IV, some countries have created registration requirements for nonprofits receiving funding from any foreign source. Other countries, meanwhile, target their registration schemes at those who are acting on behalf of a foreign government or political party.

There are legitimate reasons a democracy may want to strictly regulate funding from foreign governments for certain activities, such as lobbying. Foreign governments may be adversarial to a democracy and may even be engaged in active efforts to intentionally undermine or attack the country, creating an existential threat to the nation. Further, foreign governments, unlike most other types of actors, have the option to engage domestic government officials through formal channels like embassies or inter-governmental organizations.²⁷⁵

A regulatory approach that targets just foreign governments though still can be suspect and should be carefully tailored based on the activity being regulated. For example, Israel's NGO Transparency Law only applies to groups that receive funding from foreign governments, but has been criticized for being a way to selectively target Palestinian rights organizations, which are more likely to receive European government funding.²⁷⁶

Some countries, like the UK, have enhanced registration requirements aimed at those from certain particular countries of concern, like China or Russia. This approach has intuitive appeal as a way to better target foreign influence laws as many of these laws are motivated about concerns by the meddling of specific adversarial foreign governments. However, while there may at times be consensus about adversarial foreign powers, in other contexts such a system could easily become mired in politicized debate. Further, there are fears that such a tiered system might be used to target certain

<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.

²⁷⁵ See United Nations Seventieth Anniversary, History of the UN, <https://www.un.org/un70/en/content/history/index.html> (describing how the United Nations provides a forum for its 193 member states to express their views).

²⁷⁶ See Beaumont, *supra* note 17 (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).

communities. For example, Canadian Senator Yuen Pau Woo has raised the concern that a proposed foreign influence registry in Canada would be more aggressively enforced against those with connections with China.²⁷⁷ 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”.²⁷⁸ 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.”²⁷⁹

D. Nondifferentiated Actors

Laws regulating foreign influence should not specifically target nonprofits, but rather be triggered by particular covered activities.²⁸⁰ After all, whether a government 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 influence is routed through a nonprofit, a commercial entity, or an individual.²⁸¹ However, many foreign funding laws, including the FCRA in India and the NGO Transparency Law in Hungary have singled out nonprofits while exempting or limiting their impact on other actors, most notably corporations.²⁸²

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

²⁷⁷ Letter from Senator Yuen Pau Woo to Minister Mendicino on the Foreign Influence Transparency Registry (April 18, 2023), <https://senatoryuenpauwoo.ca/en/media/press-releases/letter-to-minister-mendicino-on-the-foreign-influence-transparency-registry/>.

²⁷⁸ *Id.*

²⁷⁹ Glenn S. Gerstell, *The Problem with Taking Tiktok Away from Americans*, NY TIMES (Feb. 1, 2023), <https://www.nytimes.com/2023/02/01/opinion/tiktok-ban-china.html?smid=nytcare-ios-share&referringSource=articleShare>.

²⁸⁰ International law also recognizes the principle that nonprofits should not be discriminated against in mobilizing resources. UNSR 2023 General Principles, *supra* note 40 (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).

²⁸¹ Kiai 2013 Report, *supra* note 161 at para 24. (“noting that commercial companies and other entities have been abused for terrorist purposes”).

²⁸² 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).

burdensome reporting requirement to receive foreign funding.²⁸³ 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.”²⁸⁴ Yet, given their deep pockets, there are many reasons to believe that corporations that receive foreign funding will frequently have more influence over politicians and policymaking 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.²⁸⁵ 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.²⁸⁶ This approach would capture many advocacy groups that are not typically considered think tanks, 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 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 commercial entities.

In contrast to approaches that single out nonprofits, a number of countries, such as Australia and the UK, have ensured that their recently enacted registration requirements targeting foreign influence are applicable to any type of entity or person engaged in regulated activities.²⁸⁷ Such a principle of nondifferentiation can both help improve the effectiveness of these laws and lessen the chances they will be used to unduly target civil society organizations.

E. Problem Oriented

²⁸³ Shahruckh Alam, *Foreign Disturbances: Reading the FCRA in Times of Modi Govt's Global Outreach*, THE WIRE (June 22, 2023) <https://thewire.in/law/foreign-disturbances-reading-the-fcra-in-times-of-modi-govts-global-outreach>.

²⁸⁴ *Id.*

²⁸⁵ Senator Grassley, *Grassley Reintroduces Think Tank Transparency Act to Expose Foreign Influence Campaigns* (March 30, 2023) <https://www.grassley.senate.gov/imo/media/doc/117sxthinktanktransparencyact.pdf>

²⁸⁶ 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

²⁸⁷ See FITS Act, *supra* note 20 at Art. 21 (describing covered activities under the Act); UK NSA 2023, *supra* note 23 at § 69 (requiring registration if carrying out “political influence activities” no matter who is carrying out the activities).

The anxiety of the public and policymakers towards 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. In response, a democracy centered approach to regulating foreign funding of nonprofits should be rigorously problem oriented.

Legislation that regulates foreign funding of nonprofits is often criticized for not actually addressing the problem that motivated the policy. For example, 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 on behalf of foreign governments as well as “malign” foreign influence.²⁸⁸ However, by the time the proposal was introduced Canadian law enforcement claimed to have already shut down the secret Chinese police stations.²⁸⁹ In other words, it seems as if the identified foreign influence problem could already be addressed through current law enforcement tools. Further, it is not clear the proposed registry would have helped deter these police stations as it is unlikely anyone involved in a clandestine police station for a foreign government would have registered in the proposed registry.

Similar efficacy concerns have been raised about foreign influence registration requirements in other countries. For example, in 2023 there was an Australian Parliamentary hearing that examined the effectiveness of the 2018 Foreign Influence Transparency Scheme.²⁹⁰ The committee received testimony the registry 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.²⁹¹ 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

²⁸⁸ PUBLIC SAFETY CANADA, *supra* note 25 (describing Canadian foreign influence proposal).

²⁸⁹ 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).

²⁹⁰ See Matthew Doran, *Foreign influence regime under Parliamentary microscope, with calls for shakeup*, ABC NEWS (Feb., 20, 2023), <https://www.abc.net.au/news/2023-02-20/foreign-influence-regime-under-the-parliamentary-microscope/102001306> (describing testimony describing regulatory burdens created by FITS and criticism of its ineffectiveness).

²⁹¹ *Id.*

register.²⁹²

Not only are foreign influence laws 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 government 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 Saudi Arabia and the United Arab Emirates in an ongoing regional dispute.²⁹³ While providing more detailed information about foreign government lobbying can help place a check on excessive influence on legislators, FARA's disclosure requirements do 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.²⁹⁴ While the lobbying efforts of both the Qatar government and 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. In this way, it does not address the underlying democracy issue, which is not foreigners lobbying Congress without public transparency, but rather powerful 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 disinformation. However, while disinformation can be decimated by foreign sources, the largest sources of disinformation are frequently domestic, including national media outlets, prominent social media personalities, or

²⁹² *Id.* See also, Daniel Hurst and Caitlin Cassidy, *China is carrying out 'blatant' influence operations in Australia, Malcolm Turnbull Says*, THE GUARDIAN (Feb. 20, 2023), <https://www.theguardian.com/australia-news/2023/feb/21/china-is-carrying-out-blatant-influence-operations-in-australia-malcolm-turnbull-says> (describing criticism of the Act's ineffectiveness against Chinese influence campaigns, but burdens it is imposing on others, including the education sector).

²⁹³ Ben Freeman, *The Qatar Lobby in Washington*, CENTER FOR INTERNATIONAL POLICY (May 2020), https://static.wixstatic.com/ugd/3ba8a1_eae58acd2c11459894d8e45fbbe1552d.pdf (finding that Qatar had spent over \$18 million with FARA registered firms in 2018).

²⁹⁴ 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).

politicians.²⁹⁵ 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.²⁹⁶ 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.²⁹⁷ Further, registration and labeling laws that target foreign disinformation, like FARA in the U.S., are only designed to make clear if the information is from a foreign source. They do not help the public understand if the information is accurate, inaccurate, or misleading. Instead, these types of foreign influence laws can empower governments—not infrequently led by politicians spreading disinformation themselves—to discredit voices with which they disagree. 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.²⁹⁸

CONCLUSION

²⁹⁵ 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).

²⁹⁶ 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).

²⁹⁷ See Christophe Jaffrelot, *Disinformation campaigns shrink the possibility of genuine debate ahead of polls*, INDIAN EXPRESS (April 8, 2019), <https://indianexpress.com/article/opinion/columns/truth-facts-upa-government-gandhi-niti-ayog-5663976/> (Finding the ruling BJP party significantly contributed to disinformation in India).

²⁹⁸ These remedies might include civic education, public support to help fund a diverse media ecosystem, or making more transparent the practices of social media platforms. 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).

The regulation of foreign funding of nonprofits is in a state of flux across democracies. In particular, many governments have adopted or strengthened enforcement of foreign influence registration requirements. This article has argued that these new regulations, if not carefully targeted, can unduly burden nonprofits and be used by the government to discredit critical voices. Yet, in many democracies lawmakers and judges have frequently not adequately scrutinized the implications of these laws for democratic self-governance. In laying out a democracy centered approach to this regulation, the article hopes to help refocus the broader debate about this regulation on addressing broader disruptive forces to democracy in a manner that protects the open civil society needed for self-governance.