

## ARTICLE

### THE COUNTER-ASSOCIATIONAL REVOLUTION:

#### THE RISE, SPREAD, AND CONTAGION OF RESTRICTIVE CIVIL SOCIETY LAWS IN THE WORLD'S STRONGEST DEMOCRATIC STATES

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#### ABSTRACT

*In recent years, an increasing number of democratic states, including fully consolidated, long-standing democratic states, have adopted laws that impose new restrictions on the ability of civil society organizations (CSOs) to operate autonomous from government control, a phenomenon that is unsurprising in authoritarian contexts, but perplexing in democratic ones. This Article explores this curious phenomenon, often referred to as the closing space trend, which began in earnest at the turn of the 21st century, and has been gaining momentum and intensity ever since. This trend, which has caught the attention of political scientists, global civil society watchdogs, and scholars of non-governmental organizations (NGOs) has inexplicably gone unnoticed by legal scholars. Moreover, the non-legal scholars and watchdogs who track this phenomenon tend to focus exclusively on the most egregious examples from non-democratic (or weakly democratic) contexts, such as Russia, Egypt, and China. This Article, which falls at the intersection of comparative, international, and not-for-profit law, and draws on democratic theory, international relations*

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*scholarship, and studies of civil society-state relations, attempts to rectify this glaring gap in the legal literature, in addition to documenting an aspect of the broader closing space trend that, until now, has been neglected. It presents novel data and empirical research on all new legal restrictions adopted by the world's strongest democratic states, which this Article carefully defines, from 1990 until 2018. Findings of this Article confirm that the closing space trend is, in fact, a global phenomenon, one that transcends geography, gross domestic product (GDP), development status, and most importantly, one that is not confined only to repressive, non-democratic regimes known for their distrust of civil society.*

ABSTRACT.....	399
I. INTRODUCTION.....	401
II. RESTRICTIVE CIVIL SOCIETY LAWS.....	407
A. Types of Legal Restrictions on CSOs .....	407
B. Examples of Restrictive CSO Laws .....	408
1. Hungary.....	408
2. India .....	409
3. The United States .....	410
4. Poland .....	411
5. Australia.....	411
6. Italy .....	412
7. Austria.....	413
III. THE ASSOCIATIONAL REVOLUTION.....	414
A. The End of the Cold War, Democracy's Victory, and the Rise of CSOs .....	414
B. CSOs' Rising Global Influence, Visibility and Spread.....	416
1. At the Domestic Level .....	416
2. At the International Level .....	417
C. CSOs, Revolutions, Protests, & Mass Uprisings .....	419
D. The Law of Coercive Responsiveness .....	421
IV. THE COUNTER-ASSOCIATIONAL REVOLUTION .....	422
A. Identification of A Global Problem.....	423
1. The International Center for Not-for-Profit Law .....	424

2. Civicus .....	425
B. Existing Explanations Fail to Explain Adoptions by Democratic States.....	427
V. KEY DEFINITIONS & DISTINCTIONS .....	428
A. Strong Democratic State.....	428
B. Restrictive CSO Law.....	430
C. Civil Society Organization.....	434
VI. FINDINGS: THE SPREAD OF RESTRICTIVE CSO LAWS IN STRONG DEMOCRATIC STATES .....	436
VII. WHY DOES IT MATTER THAT NON-GOVERNMENTAL ORGANIZATIONS REMAIN NON-GOVERNMENTAL? .....	444
A. International Human Rights Law, The Freedom of Association & Democratic Theory.....	445
B. The Connection between CSOs' Autonomy and Democracy .....	447
VIII. CONCLUSIONS AND IMPLICATIONS .....	452

### I. INTRODUCTION

Civil society, an amorphous term defined in numerous ways, is primarily composed of organizations established voluntarily by coalitions of individuals to advance certain shared interests, or to address common concerns, which can include virtually anything with the exception of profit-making.<sup>1</sup> Civil society organizations (CSOs), the so-called *third sector* wedged between the state and the market, include advocacy organizations, student groups, cultural and sports clubs, social movements, community associations, philanthropic foundations, religious organizations, professional associations, labor unions, chambers of commerce, and informal voluntary groups, among others.<sup>2</sup> They include Human Rights Watch, Doctors without Borders,

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1. See U.S. DEPARTMENT OF STATE, NON-GOVERNMENTAL ORGANIZATIONS (NGOS) IN THE UNITED STATES (2017); see JONAS WOLFF & ANNIKA E. POPPE, PEACE RESEARCH INSTITUTE FRANKFURT, FROM CLOSING SPACE TO CONTESTED SPACES: RE-ASSESSING CURRENT CONFLICTS OVER INTERNATIONAL CIVIL SOCIETY SUPPORT 5 (2015); see generally FERGUSON, *supra* note 1.

2. Civil Society Organizations (“CSOs”) and Non-Governmental Organizations (“NGOs”) are often used synonymously or interchangeably. However, CSO is a broader, umbrella term, while NGO is more specific: it is just one type among many types of CSOs. This Article’s research intends to focus on this broader category of not-for-profit groups that lie

Parent-Teacher Associations, and community babysitting clubs, in addition to the Ku Klux Klan, the Alt-Right, and the United Aryan Front.<sup>3</sup> Perhaps the only thing that unites this disparate array of organizations is what they are not: they are *non-governmental* and *not-for-profit*.<sup>4</sup> Though their work often overlaps with the state and the market, and their collaboration with both sectors is typical, their autonomy from both spheres, particularly the state, is what makes CSOs distinct.<sup>5</sup>

Yet, in an increasing number of countries around the globe, representing all regime types, in all regions, with all levels of economic and military strength, civil society's autonomy from the state is being slowly chipped, and in some cases entirely stripped, away.<sup>6</sup> While this erosion of civil society's autonomy is accomplished in a variety of ways, many of which are illegal and extralegal in nature, including assaults, murders, stigmatization campaigns, and bureaucratic harassment, an increasingly popular tool used by government actors to restrict CSOs' independence is the law. Through the passage of legislation that imposes new restrictions on the ability of CSOs to

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outside both the government and corporate sectors; as such the Author has chosen to use the term CSO.

3. See Thomas Carothers, *Civil Society: Think Again*, FOREIGN POL'Y, 18, 19-20 (2000).

4. See Audie Klotz, *Transnational Activism and Global Transformations: The Anti-Apartheid and Abolitionist Experiences*, 8 EUR. J. INT'L REL. 49, 50 (2002); RISSE-KAPPEN, THOMAS, ED. BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS 3 (1995).

5. See generally EDUARDO SZAZI, NGOS: LEGITIMATE SUBJECTS OF INTERNATIONAL LAW (2012); INT'L CTR. FOR NOT-FOR-PROFIT LAW & WORLD MOVEMENT FOR DEMOCRACY SECRETARIAT AT THE NAT'L ENDOWMENT FOR DEMOCRACY, DEFENDING CIVIL SOCIETY REPORT n.1 (2012).

6. See GODFREY MUSILA, FREEDOM HOUSE, FREEDOM UNDER THREAT: THE SPREAD OF ANTI-NGO MEASURES IN AFRICA 9 (2019); ANDREW CUNNINGHAM & STEVE TIBBET, INT'L COUNCIL OF VOLUNTARY AGENCIES, SCOPING STUDY ON CIVIL SOCIETY SPACE HUMANITARIAN ACTION 1 (2018); KENDRA DUPUY ET AL., NONPROFIT AND VOLUNTARY SECTOR QUARTERLY, DO DONORS REDUCE BILATERAL AID TO COUNTRIES WITH RESTRICTIVE NGO LAWS? A PANEL STUDY, 1993-2012 100 (2017) [hereinafter DUPUY et al., PANEL STUDY]; 84 KENDRA DUPUY ET AL., WORLD DEVELOPMENT, HANDS OFF MY REGIME! GOV'T'S RESTRICTIONS ON FOREIGN AID TO NON-GOVERNMENTAL ORGS. IN POOR AND MIDDLE-INCOME COUNTRIES 306 (2016) [hereinafter DUPUY et al., HANDS OFF MY REGIME]; Dupuy et al., *Who Survived? Ethiopia's Regulatory Crackdown on Foreign-Funded NGOs*, REV. INT'L POL. ECON., Apr. 10, 2014, at 1 [hereinafter DUPUY et al., WHO SURVIVED]; Douglas Rutzen, *Aid Barriers and the Rise of Philanthropic Protectionism*, 17 INT'L J. OF NOT-FOR-PROFIT L. 1, 6 (2015) [hereinafter Rutzen 2015]; THOMAS CAROTHERS & SASKIA BRECHENMACHER, CARNEGIE ENDOWMENT FOR INT'L PEACE, CLOSING SPACE: DEMOCRACY AND HUMAN RIGHTS SUPPORT UNDER FIRE 1 (2014) [hereinafter CAROTHERS & BRECHENMACHER 2014].

operate free from excessive government scrutiny and control, what this Article refers to as *restrictive CSO laws*, governmental actors are gaining greater control over the non-governmental, not-for-profit sector and in ways that benefit from the veneer of legality. Not only are such laws appearing in countries where they might be expected—Azerbaijan, Burundi, China, Egypt, Ethiopia, Russia, Zimbabwe, and countries throughout the Middle East.<sup>7</sup> Interestingly, they are also appearing in democratic states too, including strong, fully consolidated democratic states that have historically supported a vibrant and independent civil society sector: Canada, India, New Zealand, Spain, Israel, Hungary, Poland, and the United States, just to name a few.<sup>8</sup>

Restrictive CSO laws, which are perhaps unsurprising in authoritarian-leaning states, are puzzling in the context of democratic ones, which have historically been the primary defenders, funders, and champions of a robust and independent civil society.<sup>9</sup> Democracies, by definition, are polities created by and for the citizens that comprise them.<sup>10</sup> To ensure that the people rather than a single party or individual leader control their nation's destiny, democratic states, typically by constitutional design, grant their citizens the rights to freedom of expression, association and assembly, all of which are inherent in the

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7. See INT'L CTR. FOR NOT-FOR-PROFIT LAW, CIVIC FREEDOM MONITOR (2019), <http://www.icnl.org/research/monitor/index.html> [<https://perma.cc/5MM3-LREW>], for reports on these countries which detail the legal frameworks for civil society.

8. See Chrystie Swiney, *Undemocratic Civil Society Laws are Appearing in Democracies*, OPENGLOBALRIGHTS (Mar. 28, 2019), <https://www.openglobalrights.org/undemocratic-civil-society-laws-are-appearing-in-democracies-too/> [<https://perma.cc/EH95-E3X3>]; Chrystie Swiney, *Laws are Chipping Away at Democracy Around the World*, THE CONVERSATION (Apr. 2, 2019), <https://theconversation.com/laws-are-chipping-away-at-democracy-around-the-world-113089> [<https://perma.cc/RW9Y-TJA6>]. Poland adopted a restrictive CSO law in October 2017 and Hungary adopted one in June 2017. Though both could be characterized as *unconsolidating* in recent years, both are characterized as “full” democracies according to the Polity IV project, a highly-respected and frequently cited database relied on by many political scientists. Both countries have received the highest score (a 10) on Polity's scale since 1990 (for Hungary) and 2003 (Poland), which means that qualify as the highest form of democracy, a “full” democracy.

9. See, e.g., Staff of S. Comm. on Foreign Relations, 109th Cong., Rep. on Nongovernmental Organizations and Democracy Promotion: Giving Voice to the People 73 (Comm. Print 2006).

10. See HARVARD UNIV., *DEFINING DEMOCRACY*, <https://sites.hks.harvard.edu/fs/pnorris/Acrobat/Democracy1.pdf> [<https://perma.cc/6BVK-PLX7>]. There are of course many different measures and definitions of democracy, which can alter depending on the particular type of democracy that one is speaking of: constitutional democracy, liberal democracy, representative democracy, etc.

right to form into voluntary non-governmental groups.<sup>11</sup> This ability of individuals to form into independent groups on the basis of shared concerns or interests is essential for the upholding of democracy; such groups are essential to holding elected leaders to account and ensuring that the voices and opinions of the people, especially the marginalized and destitute, are heard.<sup>12</sup> Individuals, acting on their own, are typically powerless and voiceless in the face of the modern nation-state, which holds the monopoly on force and unmatched access to resources.<sup>13</sup> Without the ability for individuals to coalesce together, to unite their voices and resources, a democratic state can easily morph into an authoritarian-like state where the people's will is forgotten.<sup>14</sup> Civil society, the third sector, helps to ensure that the people's will is both heard and taken into account by their leaders, who theoretically and by constitutional design rule on their behalf.<sup>15</sup> In short, a genuinely independent civil society sector is essential to the maintenance and health of any democracy.<sup>16</sup>

For civil society to play its democracy-maintaining role, arguably its core function, it must be independent, as previously stated; this is key. Saudi Arabia, North Korea, Eritrea, and Ethiopia, which are among the world's most authoritarian countries, all claim to have a civil society sector.<sup>17</sup> This might be true, but these sectors are almost entirely without independence and autonomy from the state; if they exist at all, they are under the near exclusive control of the state, leaving them as

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11. United Nations Human Rights, Office of the High Commissioner, Freedom of Peaceful Assembly and Association.

12. See Emily von Sydow, *CIVIL SOCIETY AND DEMOCRACY: THE CITIZEN'S SHORTCUT TO THE EU*, EUROPEAN ECONOMIC AND SOCIAL COMMITTEE 4 (2013) (arguing that "civil society . . . is an essential pillar of democracy.").

13. See generally MAX WEBER, *WEBER'S RATIONALISM AND MODERN SOCIETY* (Tony Waters & Dagmar Waters ed., 2015).

14. This was one of the many claims made by French historian Alexis d' Tocqueville after conducting a study on why democracy in the United States took root and developed so robustly. His conclusion: a strong commitment to free association. His findings and observations are contained in his renown book, *DEMOCRACY IN AMERICA* (1835).

15. Open Society and ICNL, *Defending Civil Society*, 2<sup>nd</sup> Ed. (June 2012), available at [http://www.icnl.org/research/resources/dcs/DCS\\_Report\\_Second\\_Edition\\_English.pdf](http://www.icnl.org/research/resources/dcs/DCS_Report_Second_Edition_English.pdf) [<https://perma.cc/MTT2-F44J>].

16. Maina Kiai, Maina, UN Human Rights Council Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association, A/HRC/20/27 (2012).

17. See Gavin Haines, *Mapped: The World's Most (and Least) Free Countries*, THE TELEGRAPH (Jan. 23, 2018), <https://www.telegraph.co.uk/travel/news/the-worlds-most-authoritarian-destinations/> [<https://perma.cc/6YTV-ADFF>].

mere appendages or mouthpieces of the state's agenda.<sup>18</sup> Without legal guarantees and protections securely in place protecting the independence of the civil society sector, CSOs easily succumb to co-optation, manipulation, or all out eradication by the state, as has happened in a variety of non-democratic states in recent years, such as the Democratic Republic of the Congo, Ethiopia, and in parts of China.<sup>19</sup> Though less restrictive than their counterparts in non-democratic countries, the accelerating appearance of restrictive CSO laws in historically strong democratic states, and in a relatively short period of time, as documented in the empirical results presented below, is a perplexing and growing concern among civil society activists, democracy observers, and a small, but growing number of scholars.<sup>20</sup>

Strangely, this phenomenon, which requires concerned observers and scholars to engage in close textual analysis of specific laws and bills, and understand both comparative law and international human rights law, has largely eluded the legal academy and legal scholarship, until now. Given that this topic falls at the intersection of international, comparative and not-for-profit law, but also relies on theories from international relations and democracy studies, it is crucial that not only political scientists, civil society observers, and democracy theorists be involved in assessing its implications and future trajectory, but perhaps most importantly, legal scholars, who are uniquely equipped with the tools, background, and skills necessary to accurately assess this global trend. This Article is an attempt to rectify this glaring gap in the

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18. Both the International Center for Not-for-Profit Law and CIVICUS track civil society related developments in virtually all countries around the world. Individual reports for each country, between the two of them, can be accessed. These reports can confirm the lack of civil society or the lack of independence pertaining to the civil society sectors in these countries. This is less true of Ethiopia than the other countries cited.

19. See *Democratic Republic of Congo*, HUMAN RIGHTS WATCH (July 2019), <https://www.hrw.org/africa/democratic-republic-congo> [https://perma.cc/KR7A-GHSN]; Carolyn Hsu et al., *The State of NGOs in China Today*, BROOKINGS (Dec. 15, 2016), <https://www.brookings.edu/blog/up-front/2016/12/15/the-state-of-ngos-in-china-today/> [https://perma.cc/X9JV-EHBJ]; Paul Kariuki, *Citizens and Civil Society Must Fight to Protect our Democracy*, MAIL & GUARDIAN (Aug. 5, 2019), <https://mg.co.za/article/2019-08-05-00-citizens-and-civil-society-must-fight-to-protect-our-democracy> [https://perma.cc/4AC2-827J].

20. See Anthony J. DeMattee, *Covenants, Constitutions, and Distinct Law Types: Investigating Governments' Restrictions on CSOs Using an Institutional Approach*, 30 VOLUNTAS: INT'L J. OF VOLUNTARY & NONPROFIT ORGS. 1229-55 (2019); Suparna Chaudhry, *The Assault on Democracy Assistance: Explaining State Repression of NGOs* (Dec. 2016) (unpublished Ph.D. dissertation, Yale University); DUPUY et al., PANEL STUDY, *supra* note 6.

existing legal scholarship on a global *legal* phenomenon with profound consequences for the state of democracy around the world.<sup>21</sup>

More specifically, this Article attempts to fully map and document the spread of restrictive civil society laws in historically strong, consolidated democratic states, which will be carefully defined below. Part II of this Article explores what precisely is meant by *restrictive civil society laws* or *restrictive CSO laws* as they will be referred to throughout this Article,<sup>22</sup> and includes specific examples, as well as a taxonomy for defining the various types of existing restrictive laws. Part III examines the *Associational Revolution* of the 1990s, a time period when CSOs were thought to reach their apex in terms of popularity, funding, and growth, due in large part to their embrace by democratic states, the victors of the Cold War, as trustworthy vessels for spreading and entrenching democratic values around the globe. This earlier revolution is then juxtaposed in Part IV with the *Counter-Associational Revolution*, most commonly referred to as the *Closing Space Trend* by civil society scholars and activists. This trend refers to the reversal of fortunes for CSOs around the world beginning in the early part of the twenty-first century, which is attributed to a variety of factors, including the September 11th terrorist attacks in New York City and the resulting global war against terrorism, the rising number of large scale protest movements that resulted in the overthrow of entrenched regimes (which were blamed on CSOs), and a growing concern that foreigners were undermining and corrupting domestic CSOs.<sup>23</sup> Part V carefully defines the key terms and distinctions that were essential in this Article's empirical analysis (e.g., *restrictive CSO law* and *strong democratic state*), which is presented in Part VI. Part VII tackles the fundamental question of why we should care about CSOs, and the legal frameworks that undergird them, and what role they play in the preservation and health of democratic states. Part VIII

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21. As previously stated, this phenomenon—the stripping away of the autonomy and independence of civil society organizations in democratic states—has applications that are not only legal in nature. In addition to be negatively impacted by the passage of restrictive laws, CSOs suffer from harassment by governmental actors, intimidation and stigmatization campaigns, the withdrawal of privileges, abusive manipulations and distortions of existing laws, and a variety of additional illegal and extralegal mechanisms.

22. This Article's focus is on civil society organizations in particular, which is why the Article focuses on CSO laws specifically. Note, however, that the term *civil society* is, in reality, much broader in scope. It includes individual activists and amorphous movements that have no real organizational presence, such as the #MeToo Movement.

23. See Rutzen 2015, *supra* note 6.



presents the conclusions and implications that can be drawn from the data that is presented, as well as areas in need of additional and further research. This Article fills important and glaring gaps in the existing literature on the spread of legal restrictions on CSOs throughout the globe and, in so doing, introduces a critical topic to legal scholarship that is in dire and immediate need of further examination by legal scholars specifically.

## II. RESTRICTIVE CIVIL SOCIETY LAWS

### A. Types of Legal Restrictions on CSOs

While restrictive CSO laws vary in scope, intensity, and content, they share a common goal at their core: the extension of additional *governmental* control over the *non-governmental* sector. Restrictive CSO laws are defined more by their outcome than their particular labels or precise contents, although specific provisions can be and are a way of identifying them, as further explored below. These laws, however they are labeled or categorized,<sup>24</sup> which widely varies, result in a reduction in the level of independence among the non-governmental, non-profit sector, which as previously discussed is, by definition, intended to be and remain independent.<sup>25</sup> Put another way, restrictive CSO laws transfer additional and new levels of control and oversight over the civil society sector to government actors, though in many cases only certain parts of the overall sector are affected, such as

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24. These laws cannot be located by title, as they widely vary around the globe. In some countries, CSOs are referred to as non-governmental organizations (“NGOs”), but in many, if not most countries, NGOs are only one among a wide variety of CSOs, which is why this Article prefers the much broader, umbrella term *CSOs* over *NGOs*. Many laws are specific to certain types of CSOs, such as charities, foundations, sports clubs, religious organizations, membership-based organizations, etc. Other laws are general in scope and label them all together, under a broad term such as the *non-governmental sector*. This is why determining which laws to include in the Author’s review was, and is, very tricky, and why this Article focuses more on the outcome and intention of these laws than their labels, titles or even specific contents (though again, contents were certainly instrumental to the analysis).

25. Different scholars and practitioners have different ways of labeling restrictive CSO laws. The International Center for Not-for-Profit Law (“ICNL”), for example, which is one of the global leaders in tracking CSO laws, labels and identifies them in one way; while CIVICUS and Freedom House tend to refer to them using slightly different language. Scholars also employ different labels and terms, which can make it difficult to cross-compare research findings and conclusions. As a former contractor for ICNL, the Author tends to adopt their labeling, which the Author also trusts due to ICNL’s depth of experience and knowledge on this topic. The term *lifecycle law* in particular, is borrowed from ICNL’s vocabulary.

environmental organizations, advocacy groups, or non-profit health providers. These new exertions of governmental authority implicate CSOs' ability to freely form, operate, access funding, especially foreign funding, engage in certain activities, and dissolve.<sup>26</sup>

### *B. Examples of Restrictive CSO Laws*

Some recent examples, of what one study referred to as the governmentalizing of non-governmental organizations through the adoption of new types of restrictive CSO laws, will help to elucidate the points made above.<sup>27</sup>

#### 1. Hungary

In June of 2018, Hungary's parliament adopted a package of laws, colloquially referred to as the "Stop Soros laws" due to their specific targeting of philanthropist George Soros, who supported a variety of pro-immigrant NGOs in Hungary at the time.<sup>28</sup> This package of laws imposed a variety of onerous new restrictions on CSOs, including a tax for those organizations suspected of assisting migrants, new criminal penalties for organizations (and individuals) associated with facilitating the entry of asylum seekers, and additional new authorities given to government agencies to register, penalize, and ban organizations who support "illegal immigration," which can include distributing informational materials or helping refugees fill out asylum requests.<sup>29</sup> A multitude of international human rights organizations, migrant groups, multilateral organizations, UN officials, and civil society activists condemned the passage of these "draconian" laws and

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26. See generally Anthony J. DeMattee, *Toward a Coherent Framework: A Typology and Conceptualization of CSO Regulatory Regimes*, 9 NONPROFIT POLICY FORUM, 1-17 (2019) (discussing the existence of restrictive and permissive rules pertaining to the non-profit sector); ANTHONY J. DEMATTEE & CHRYSTIE SWINEY, *CLOSING SPACE OR CHANGING SPACE? THE LEGAL INSTITUTIONS GOVERNING THE STATE-CIVIL SOCIETY RELATIONSHIP* (2020).

27. See DAVID CRAIG & DOUG PORTER, *DEVELOPMENT BEYOND NEOLIBERALISM?: GOVERNANCE, POVERTY REDUCTION AND POLITICAL ECONOMY* 14 (2006).

28. Bill No. T/333 amending certain laws relating to measures to combat illegal immigration. This package of laws includes three laws: The law on the social responsibility of organizations supporting illegal migration; the Law on Immigration Financing Duty; and the Law on Immigration Restraints, all adopted in June 2018.

29. See Reuters in Budapest, *Hungary Passes Anti-Immigrant 'Stop Soros' Laws*, THE GUARDIAN (Jun. 20, 2018), <https://www.theguardian.com/world/2018/jun/20/hungary-passes-anti-immigrant-stop-soros-laws> [https://perma.cc/TPQ7-A3GM].

called for their immediate repeal.<sup>30</sup> Similarly, a year before, in June of 2017, Hungary passed a new law, which many compare to Russia's restrictive 2012 Foreign Agent Law, requiring CSOs that receive approximately \$28,000 or more of their funding from abroad, no matter the source, to label themselves as "funded from abroad" on all publications.<sup>31</sup> This label, in the Hungarian context, is extremely stigmatizing and degrading to the sub-sector of CSOs that it most directly impacts, which include advocacy organizations that focus on exposing government corruption and human and civil rights abuses.<sup>32</sup> Similar laws were passed in Israel in 2016 and India in 2010, the latter of which has had devastating consequences for many CSOs, particularly human rights and environmental CSOs.<sup>33</sup>

## 2. India

In India, the 2010 Foreign Contribution Regulation Act, which was amended to impose additional restrictions in 2015, requires CSOs to apply for and to receive explicit governmental permission before receiving any funds from abroad, whether from governmental or private sources. The government can deny permission for vague and broad reasons such as "activities not conducive to the [country's] national interest." This law has been routinely used to place CSOs on

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30. See *Hungary: Draconian Anti-NGO Law Will be Resisted Every Step of the Way*, AMNESTY INT'L (Jun. 20, 2018), <https://www.amnesty.org/en/latest/news/2018/06/hungary-draconian-anti-ngo-law-will-be-resisted-every-step-of-the-way/> [https://perma.cc/8XSR-AUEE]; Pablo Gorondi, *Council of Europe Experts: Hungary Must Repeal Anti-NGO Law*, ASSOCIATED PRESS (Jun. 22, 2018), <https://apnews.com/c17c31c322e74a12b507ca6e939c66ac/Council-of-Europe-experts:-Hungary-must-repeal-anti-NGO-law> [https://perma.cc/2F4R-MD8Q].

31. Transparency Bill Act (LXXVI of 2017), adopted in June 2017.

32. See generally Yasmeen Serhan, *Hungary's Anti-Foreign NGO Law*, THE ATLANTIC, (June 13, 2017), <http://www.theatlantic.com/news/archive/2017/06/hungarys-anti-foreign-ngo-law/530121/> [https://perma.cc/RR9V-ZE23]; Christian Keszthelyi, President Áder Signs NGO Law into Effect, BUDAPEST BUSINESS JOURNAL, (June 16, 2017), [https://bbj.hu/politics/president-ader-signs-ngo-law-into-effect\\_134436](https://bbj.hu/politics/president-ader-signs-ngo-law-into-effect_134436) [https://perma.cc/2V8P-LHHJ].

33. Melissa Cyrill & Adam Pitman, *FCRA Compliance in India: How 24,000 NGOs Lost Their License*, INDIA BRIEFING NEWS, (September 28, 2017), <https://www.india-briefing.com/news/fcra-compliance-india-how-24000-ngos-lost-their-license-15287.html/> [https://perma.cc/7LHG-MYXK]; Jonathan Lis, *Despite Global Criticism, Israel Approves Contentious 'NGO Law'*, HAARETZ (July 11, 2016), <https://www.haaretz.com/israel-news/israel-passes-contentious-ngo-bill-into-law-1.5408907> [https://perma.cc/36WS-A763]. Since Prime Minister Narendra Modi took office in 2014, the 2010 law has reportedly been used to strip over 24,000 CSOs of their operating licenses, a number that continues to increase.

government watch lists, strip CSOs of their operating licenses, and force them to voluntarily dissolve.<sup>34</sup>

### 3. The United States

In the United States in 2017, a policy was adopted requiring foreign CSOs that provide health care services to women and children to first sign a pledge promising not to perform any abortion-related activities, including those that involve educational opportunities or counseling, in order to receive any amount of US health aid.<sup>35</sup> This requirement has had a significant chilling effect on many NGOs that provide healthcare to impoverished families around the world and are dependent, for their existence, on US foreign aid.<sup>36</sup> According to one affected NGO, this policy, which not only implicates sexual and reproductive health services, including abortion, but also affects the provision of nutrition and maternal health services and the ability to reach a sub-sector of women who are victims of gender-based violence, is “literally killing women.”<sup>37</sup> A study by the Kaiser Family Foundation found that at least 1,275 foreign NGOs and nearly 500 US NGOs have been negatively impacted, and specifically, their speech and activities curtailed, by this US policy.<sup>38</sup>

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34. Cyrill & Pitman, *supra* note 32.

35. See generally HUMAN RIGHTS WATCH, *Trump’s ‘Mexico City Policy’ or ‘Global Gag Rule’: Questions and Answers* (2018), [<https://perma.cc/LTG5-S4AQ>]. Under the expanded Mexico City Policy, described as the “global gag rule” passed by previous republican administrations but this time “on steroids,” adopted by President Trump in January of 2017, foreign CSOs wishing to receive any amount of global US health funding, must first sign a pledge promising to not engage in any abortion-related activities whatsoever, including counseling or education.

36. See generally Vanessa Rios, *Crisis in Care: Year Two Impact of Trump’s Global Gag Rule*, INT. WOMEN’S HEALTH COALITION (2019).

37. Amy Lieberman, *Two Years in, Report Finds ‘global Gag Rule’ Cuts Access to Health Care*, DEVEX, (June 5, 2019), [<https://www.devex.com/news/two-years-in-report-finds-global-gag-rule-cuts-access-to-health-care-95046>] [<https://perma.cc/S7WF-9CLE>].

38. See generally Kellie Moss & Jennifer Kates, “How Many Foreign NGOs Are Subject to the Expanded Mexico City Policy?” KAISER FAMILY FOUNDATION (2017), [<https://www.kff.org/global-health-policy/issue-brief/how-many-foreign-ngos-are-subject-to-the-expanded-mexico-city-policy/>] [<https://perma.cc/YV4S-MXSS>]. In addition to the expanded Mexico City Policy, thirty-five US states have proposed or adopted 100 laws imposing new restrictions on individuals’ and CSOs’ ability to protest in the past three years. See the US PROTEST LAW TRACKER, *International Center for Not-for-Profit*, available at [<http://www.icnl.org/usprotestlawtracker/>] [<https://perma.cc/TM7Z-LAZ6>] (last accessed June 6, 2019).

#### 4. Poland

In October of 2017, the Polish parliament approved a law that consolidates all power over CSO funding into the hands of a single individual appointed by the Prime Minister. This government appointee, the Director of the National Institute of Freedom, now holds vast decision-making power over the distribution of CSO funding.<sup>39</sup> Under the new law, government actors now dictate which CSOs receive funding, and at what levels, effectively giving them the ultimate power over which CSOs survive, thrive, or dissolve.<sup>40</sup> Many fear that this is transforming the previously independent civil society sector in Poland into a passive and fearful appendage of the Polish Government that only parrots the government's agenda in an attempt to secure state funding, which is essential for their organizational existence.<sup>41</sup>

#### 5. Australia

In 2014, civil society organizations (“CSOs”) caring for refugees in Australia, including Save the Children and the Red Cross, were asked by the Australian Government to pay multimillion-dollar bonds, or “performance securities,” to continue their work.<sup>42</sup> These CSOs

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39. See generally *State Department Urged to Press Duda to Veto Harmful Legislation, Protect Polish NGOs*, HUMAN RIGHTS FIRST (Oct. 5, 2017), <https://www.humanrightsfirst.org/press-release/state-dept-urged-press-poland-judicial-reform-law-0> [https://perma.cc/8LWL-GUDQ]. While some CSOs, particularly certain types of CSOs such as human rights and other advocacy organizations operating in countries inhospitable to the causes they are advocating, have historically relied on government funding for their existence, and while this implicates a debate about the genuine independence of such organizations, what this Article focused on here are not government funds, which a CSO can voluntarily choose to apply for and receive, but laws that attempt to control the distribution of funding to CSOs altogether (including from non-governmental sources) and that require all or certain kinds of funds meant for CSOs, such as foreign funds, to first flow through the government, which then gets to decide which CSOs get access to the funding and by how much. This type of law would constitute a “restrictive CSO law” for this purposes, rather than a law dictating how a CSO could apply for and receive government funding, which in the Author’s view, preserves and maintains a CSO’s autonomy.

40. Jonathan Day, *Poland Seizes Control of Civil Society Funding*, LIBERTIES (Dec. 13, 2017), <https://www.liberties.eu/en/news/poland-ngo-law-funding/13783> [https://perma.cc/AM9Q-2ZED].

41. See generally Goran Buldioski, *EU Must Confront Poland and Hungary*, EU OBSERVER (Nov. 21, 2017), <https://euobserver.com/opinion/139942> [https://perma.cc/ZUJ9-GQQB].

42. Adam Morton, *Buying Silence? Immigration Asked Charities for Multimillion-Dollar Bond*, SYDNEY MORNING HERALD (Oct. 30, 2015), <https://www.smh.com.au/politics/federal/buying-silence-immigration-asked-charities-for-multimillion-dollar-bond-20151030-gkmspv.html> [https://perma.cc/SHB8-686N].

were then warned that if they publically spoke out against the government's immigration policies without first seeking approval, their bonds could be forfeited, effectively buying their silence.<sup>43</sup> Save the Children refused to pay the bond, arguing that it was effectively a gag order, which is illegal under Australia law.<sup>44</sup> As a result, they lost their government contract and were eventually forced to end their work on the island of Nauru, where Australia houses its refugees under controversial conditions.<sup>45</sup> Upon their departure, the head of Save the Children remarked that "[i]ncreasingly, what we've seen both here in Australia and around the world is what I would describe as a significant diminishing of civil society's ability to speak" and act in ways that were acceptable in the past.<sup>46</sup>

Also in Australia, in June of 2018, the Australian parliament passed the Foreign Influence Transparency Scheme Bill, which bans donations from foreign sources not only for political parties, but also for those classified as political campaigners.<sup>47</sup> Charities and unions were exempted from this provision after a spirited campaign and the onslaught of domestic and international criticism that the law received, but other types of CSOs not registered as either a charity or a union are theoretically still covered by this new restrictive law. Australian CSOs are extremely worried about this unpopular bill, which has been described as "startling" in scope and as expected to have an "adverse impact on many organizations."<sup>48</sup>

## 6. Italy

In Italy, after a restrictive law was adopted by the government in 2018, various humanitarian CSOs dedicated to rescuing migrants trying to traverse the Mediterranean Sea without adequate protection

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43. *Id.*

44. *Id.*

45. Soon thereafter, a for-profit entity, Transfield Services, signed a contract with the government, taking over the roles previously performed by Save the Children, after agreeing to the government's "gag clause" and paying the associated bond. The head of Save the Children announced, upon their departure from Nauru, that "[i]ncreasingly, what we've seen both here in Australia and around the world is what I would describe as a significant diminishing of civil society's ability to speak out" *Id.*

46. *Id.*

47. Paul Karp, *Coalition Bill to Ban Foreign Political Donations Passes Senate*, THE GUARDIAN (Nov. 15, 2018), <https://www.theguardian.com/australia-news/2018/nov/15/coalition-bill-to-ban-foreign-political-donations-passes-senate> [https://perma.cc/DY7J-WGEM].

48. *Id.*

along the Italian coast had their rescue vessels impounded, their staffs investigated for human trafficking, and their assets frozen after attempting to help undocumented immigrants safely come to shore.<sup>49</sup> Under the new law, broad additional new powers are transferred to the interior ministry, which is empowered to confiscate CSO owned and operated boats involved in search and rescue operations and to fine their captains up to one million dollars in penalty fees.<sup>50</sup> The UN, and other human rights observers, have warned that this new law threatens to criminalize and stigmatize life-saving humanitarian work.<sup>51</sup>

## 7. Austria

A 2015 law in Austria bans Islamic organizations and only Islamic organizations—from accessing any foreign funds whatsoever, from engaging in any fundraising efforts outside the country, from using any version of the Quran other than the state-approved version, which is in German, and from espousing any opinions that contradict “a positive fundamental view towards [Austria’s] state and society.”<sup>52</sup> In June 2018, Austria’s right-wing government, which came to power in December 2017, announced its plans to shut down seven mosques and expel up to 60 imams for violating the restrictive and vague provisions of this bill.<sup>53</sup>

These are just a few of the many examples of restrictive CSO laws adopted in historically strong democratic states in recent years, as further discussed below in Part VI. Specifically, Section VI presents the findings of the Author’s in-depth empirical review of the legal frameworks for CSOs in each of the world’s fifty-nine highest-ranking

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49. Lysa John, *Government Attacks on Humanitarian Organizations and Human Rights Rising*, DEVEX (June 6, 2019), <https://www.devex.com/news/opinion-government-attacks-on-humanitarian-organizations-and-human-rights-rising-94961> [https://perma.cc/W8SG-GJV4].

50. See Angela Giuffrida, *Italian Government Approves Salvini Bill Targeting Migrants*, THE GUARDIAN, (Sept. 24, 2018), <https://www.theguardian.com/world/2018/sep/24/italian-government-approves-bill-anti-migrant-measures-matteo-salvini> [https://perma.cc/H6HG-H453].

51. Emma R., *UN Warns Italy Over Tough Rescue Ship Law, Demanding ‘Humanitarian Work’ Not Be Criminalized or Stigmatized*, VOICE OF EUROPE, (Aug. 8, 2019), <https://voiceofeurope.com/2019/08/un-warns-italy-over-tough-rescue-ship-law-demanding-humanitarian-work-not-be-criminalized-or-stigmatized/> [https://perma.cc/EW92-BKMR].

52. Amendment to the 1912 Law on Islam.

53. *Austria to Shut Down Mosques, Expel Foreign-funded Imams*, REUTERS, (June 8, 2018), <https://www.reuters.com/article/us-austria-politics-islam/austria-to-shut-down-mosques-expel-foreign-funded-imams-idUSKCN1J40X1> [https://perma.cc/RJU8-EN8J].

democracies.<sup>54</sup> As will be revealed, the Author's findings confirm that the closing space trend is, in fact, a global phenomenon, one that transcends geography, wealth, and development status, and most importantly, one that is not confined only to repressive, non-democratic regimes, as is typically assumed.

### III. THE ASSOCIATIONAL REVOLUTION

#### A. *The End of the Cold War, Democracy's Victory, and the Rise of CSOs*

The seemingly contagious global phenomenon, whereby one state after another adopts legislation (which is often similar in content) restricting the autonomy of the non-profit sector while transferring additional oversight powers to the government, began in earnest following the turn of the twenty-first century and has been gaining momentum and intensity ever since.<sup>55</sup> This evolving phenomenon seems to be a direct response to the "associational revolution" of the 1990s, which saw CSOs' numbers, influence, and ability to shape international and domestic politics escalate to new heights.<sup>56</sup> The end of the Cold War unleashed a surge of interest and support, and therefore resources, toward CSOs, which were viewed by the democracy-touting victors of the Cold War as trustworthy vehicles for proselytizing and institutionalizing the virtues of democracy worldwide.<sup>57</sup> The global rise and spread of CSOs, along with the Internet, the defeat of communism, the rise of political and economic liberalization, and advancements in communication and information technology, were together hailed as ushering in a hopeful new "era of civic empowerment," whereby private citizens, acting in coalition outside of the state apparatus, would

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54. For the full list of countries examined, see Appendix 1.

55. See generally Maria Stephan, *Responding to the Global Threat of Closing Civic Space: Policy Options*, US INST. OF PEACE (2017); See generally ALEX TIERSKY & EMILY RENARD, CONGRESSIONAL RESEARCH SERVICES, *CLOSING SPACE: RESTRICTIONS ON CIVIL SOCIETY AROUND THE WORLD AND U.S. RESPONSES* (2016); See generally WOLFF & POPPE, *supra* note 1.

56. See generally THE POWER AND LIMITS OF NGOS (Sarah Mendelson & John Glenn, eds., 2002); See Jessica T. Mathews, *Power Shift*, FOREIGN AFFAIRS, Jan./Feb. 1997, at 50–66.

57. See generally RICHARD LUGAR, NONGOVERNMENTAL ORGANIZATIONS AND DEMOCRACY PROMOTION: GIVING VOICE TO THE PEOPLE, A REPORT TO MEMBERS OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE 109TH CONGRESS, 2ND SESSION (2006).



be able to participate alongside governmental and for-profit actors in shaping their destinies in the new millennium.<sup>58</sup>

CSOs fully seized this hopeful moment in their history: they proliferated domestically and internationally, successfully fought for involvement in traditionally state-based international organizations, and inserted themselves at all levels of global and domestic politics.<sup>59</sup> As the twenty-first century completed its first decade, the number of domestic CSOs had increased over 500 percent in over fifty countries, and in many countries, this number reflected a twenty-fold increase.<sup>60</sup> The number of international CSOs similarly escalated exponentially,<sup>61</sup> as did their level of participation alongside states in global UN conferences and other typically state-led events.<sup>62</sup> By 2016, the growth of new international CSOs (by sheer numbers) was significantly outpacing that of formal state-led international organizations and coalitions whose growth and productivity stagnated.<sup>63</sup> The extraordinary rise in the number and visibility of CSOs around the

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58. See generally Douglas Rutzen, *Aid Barriers and the Rise of Philanthropic Protectionism*, 17 INT. J. FOR NOT-FOR-PROFIT LAW 2 (2015) [hereinafter Rutzen Not-for-Profit].

59. See generally Sudarsana Kundu, *Women's Rights Struggle as Restrictions Deepen Globally*, DIPLOMATIC COURIER (Sept. 20, 2017), <https://www.diplomaticcourier.com/posts/womens-rights-struggle-restrictions-deepen-globally> [https://perma.cc/4B8M-3JYR]. See generally Charli Carpenter, *Vetting the Advocacy Agenda: Network Centrality and the Paradox of Weapons Norms*, 65 INT. ORG. 69–102 (2011); See Brian Greenhill, *The Company You Keep: International Socialization and the Diffusion of Human Rights Norms*, 54 INT. STUD. Q. 127–45 (2010).

60. AMANDA MURDIE, *HELP OR HARM: THE HUMAN SECURITY EFFECTS OF INTERNATIONAL NGOS* 5 (2014).

61. SZAZI, *supra* note 5, at 27.

62. See Ann Marie Clark, Elisabeth J. Friedman, & Kathryn Hochstetler, *The Sovereign Limits of Global Civil Society: A Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights, and Women*, 51 WORLD POL. 1–35 (1998). Based on Article 71 of the UN Charter, NGOs are permitted to apply for consultative status within the UN's Economic and Social Council (ECOSOC). In the first year that the accreditation system was operational, in 1948, only four NGOs were accredited; in 1993, this number rose to 418; and today, over 4,500 NGOs are accredited (see the UN's *NGO Branch* website: <http://csonet.org/?menu=100> [https://perma.cc/5ME3-94WM]). One can also trace the rising influence of NGOs in international politics by examining the number of NGOs permitted to participate in the UN's global conferences. In 1975, the number of accredited NGOs permitted to participate in the Women's was 114; in 1985, it was 163; and by 1995, it reached 3,000 (Clark, Friedman, & Hochstetler 1998). According to the UN Commission on the Status of women: "NGOs have been influential in shaping the current global policy framework on women's empowerment and gender equality: the Beijing Declaration and Platform for Action" (UN Commission on the Status of Women 2017).

63. Kenneth W. Abbott, Jessica F. Green & Robert O. Keohane, *Organizational Ecology and Institutional Change in Global Governance*, 70 INT'L ORG. 247, 249–50 (2016).

globe lead certain political scientists to notice “a dramatic shift in the institutional landscape” of global politics, with non-state actors, notably including CSOs, playing larger and more consequential roles in shaping the international political agenda.<sup>64</sup> In the heyday of the associational revolution, some even referred to CSOs as rising non-state “second superpowers,”<sup>65</sup> which were ushering in a significant “power shift” in global politics whereby the “steady concentration of power in the hands [of states that] began with the Peace of Westphalia, is over, at least for a while.”<sup>66</sup>

### *B. CSOs’ Rising Global Influence, Visibility and Spread*

#### 1. At the Domestic Level

CSOs’ numerical growth has indeed translated into increased influence and power at both the domestic and international levels. At the domestic level, CSOs have proven capable of compelling states to make important policy and legal changes—to institutionalize domestic watchdog institutions,<sup>67</sup> adopt certain policies,<sup>68</sup> enact and rescind specific laws,<sup>69</sup> and amend long-standing constitutional provisions<sup>70</sup>—and inspiring large-scale social movements that lead to radical shifts in deeply-entrenched political and cultural norms.<sup>71</sup> They have held

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64. *Id.* at 4.

65. James F. Moore, *The Second Superpower Rears Its Beautiful Head*, in *EXTREME DEMOCRACY* 37, 37 (Jon Lebkowsky & Mitch Ratcliffe eds., 2005), at 37, available at <http://www.extremedemocracy.com/chapters/Chapter%20Two-Moore.pdf> [<https://perma.cc/HR7H-AT7E>].

66. Mathews, *supra* note 54, at 50.

67. See Kim Dongwook, *International Nongovernmental Organizations and the Global Diffusion of National Human Rights Institutions*, 67 INT’L ORG. 505, 506 (2013).

68. See Amanda Murdie & Alexander Hicks, *Can International Nongovernmental Organizations Boost Government Services? The Case of Health*, 67 INT’L ORG. 541, 545-47 (2013) [hereinafter Murdie & Hicks 2013].

69. See Benjamin Brake & Peter J. Katzenstein, *Lost in Translation? Nonstate Actors and the Transnational Movement of Procedural Law*, 67 INT’L ORG. 725, 732 (2013).

70. See DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* Part 1 on “Marriage Equality,” Chapters 1-6 (2016).

71. The United States alone provides many examples. Environmental CSOs in the United States sparked the environmental movement in the 1980s, and CSOs were also instrumental in catalyzing and leading the campaign to franchise women, the civil rights movement, and the marriage equality campaign, among others. Although arguably not as successful, the Black Lives Matter campaign has led to many legal and regulatory changes that have increased oversight and accountability of police officers, such as requirements for video camera installation in police cars. According to Lester Salamon, who wrote a landmark article on the rise of the non-profit sector in *Foreign Affairs* in 1994, “[v]irtually all of America’s major social movements, for

governments to account when citizens acting on their own, treaty commitments, foreign states, and international organizations did not or could not,<sup>72</sup> and they have repeatedly named and shamed states into making important policy and political changes, such as withdrawing from colonial territories,<sup>73</sup> replacing long-standing incumbents,<sup>74</sup> ending the institution of slavery,<sup>75</sup> and even abandoning powerful weapon systems.<sup>76</sup>

## 2. At the International Level

On the global level, as the twenty-first century dawned, CSOs had become essential to accomplishing international development goals,<sup>77</sup> instigators of norm creation and change,<sup>78</sup> agents of socialization,<sup>79</sup> key

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example, whether civil rights, environmental, consumer, women's or conservative, have had their roots in the nonprofit sector." Lester Salamon, *The Rise of the Nonprofit Sector*, FOREIGN AFFAIRS, 109 (July 1, 1994), <https://www.foreignaffairs.com/articles/1994-07-01/rise-nonprofit-sector> [<https://perma.cc/DV74-MNEV>]. Globally, one can point to the abolitionist movement, the campaign to end Apartheid, the bans on landmines and wars of aggression within international law, the movement to end the proliferation of nuclear weapons, and most recently, the #MeToo movement as examples of successful CSO-led advocacy campaigns. See Klotz, *supra* note 4, at 50; Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Land Mines*, 52 INT'L ORG. 613, 613-15 (1998).

72. See Emilie Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT'L ORG. 689, 689-91 (2008).

73. Algeria is just one example: here, coalitions of citizens banded together to form groups that fought their French colonial masters in the late 1950s- early 1960s, which eventually forced the French to withdraw and led to Algeria's independence in 1962.

74. See Danielle Meltz, *Civil Society in the Arab Spring: Tunisia, Egypt, and Libya* (Mar. 29, 2016) (unpublished Undergraduate Honors thesis, University of Colorado) (on file with the Honors Program at CU Scholar, University of Colorado).

75. See Joel Quirk, *The Anti-Slavery Project: From the Slave Trade to Human Trafficking*, in PENNSYLVANIA STUDIES IN HUMAN RIGHTS 54-81 (2011); Price, *supra* note 62, at 639; Michael Horowitz & Julia Macdonald, *Will Killer Robots Be Banned? Lessons from Past Civil Society Campaigns*, LAWFARE, (Nov. 5, 2017, 10:00 AM), <https://www.lawfareblog.com/will-killer-robots-be-banned-lessons-past-civil-society-campaigns> [<https://perma.cc/WA6F-TRG5>].

76. Jody Williams, *The History of the International Campaigns to Ban Landmines*, NOBEL PRIZE (1997), <https://www.nobelprize.org/prizes/peace/1997/icbl/history/> [<https://perma.cc/7BZU-R5MH>].

77. See Sudarsana Kundu, *Women's Rights Struggle as Restrictions Deepen Globally*, DIPLOMATIC COURIER, (Sept. 20, 2017), <https://www.diplomaticcourier.com/posts/womens-rights-struggle-restrictions-deepen-globally> [<https://perma.cc/TKL9-EZBJ>].

78. See Ann Towns, *Norms and Social Hierarchies: Understanding International Policy Diffusion "From Below"*, 66 INT'L ORG. 179, 189-91 (2012).

79. Brian Greenhill, *The Company You Keep: International Socialization and the Diffusion of Human Rights Norms*, 54 INT'L STUD. Q. 127, 127 (2010).

diffusers of global human rights norms,<sup>80</sup> recognized actors within international law,<sup>81</sup> and catalysts of transformational shifts in global politics.<sup>82</sup> They were key actors in the global effort to end Apartheid in South Africa;<sup>83</sup> they led the movements to ban wars of aggression, landmines, and nuclear weapons within international law;<sup>84</sup> and they launched global campaigns to raise awareness of violence against women, with the most recent manifestation of this being the #MeToo Movement, which many view as an enormous success with respect to consciousness-raising.<sup>85</sup> In 2017, two influential civil society actors, the International Campaign to Abolish Nuclear Weapons and the #MeToo Movement, became two more in a long list of CSOs to be awarded the Nobel Peace Prize and Time Magazine's *Person of the Year*, respectively.<sup>86</sup> In short, the associational revolution of the 1990s, which was inspired by the perception that democracy had defeated communism as the dominant political ideology, seemed to position CSOs as rising global superstars that now stood alongside states and their intergovernmental organizations as influential independent actors in both national and international politics.

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80. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 79-120 (1998).

81. See generally SZAZI, *supra* note 5.

82. See generally OONA HATHAWAY & SCOTT SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017) [hereinafter HATHAWAY AND SHAPIRO 2017].

83. See Klotz, *supra* note 4, at 57.

84. See Price, *supra* note 62, at 619; Alexanrda Zavis & Tracy Wilkinson, *Anti-Nuclear Weapons Group Wins Nobel Peace Prize*, LOS ANGELES TIMES (Oct. 6, 2017) <https://www.latimes.com/world/europe/la-fg-nobel-peace-prize-20171006-story.html> [https://perma.cc/G3U2-8DNN]; see generally THE INTERNATIONAL CAMPAIGN TO BAN LANDMINES (last visited Dec. 6, 2019), <http://www.icbl.org/en-gb/home.aspx> [https://perma.cc/6YSA-26WX].

85. Mala Htun & S. Laurel Weldon, *The Civic Origins of Progressive Policy Change: Combating Violence against Women in Global Perspective, 1975-2005*, 106 AM. POL. SCI. REV. 548, 548-49 (2012); Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/> [https://perma.cc/C4UE-3DJR]. Meaning, there is an enormous success in bringing visibility and awareness to the issue of sexual assault and violence against women, not unfortunately, in solving the problem.

86. Bill Chappel, *#MeToo is Person of the Year, 'Time' says*, NPR (Dec. 6, 2017), <https://www.npr.org/sections/thetwo-way/2017/12/06/568773208/-metoo-movement-is-person-of-the-year-time-says> [https://perma.cc/KKV6-EW5C]; Jon Henley, *Nobel Peace Prize 2017: International Campaign to Abolish Nuclear Weapons Wins Award- As It Turns Out*, THE GUARDIAN (Oct. 6, 2017), <https://www.theguardian.com/world/live/2017/oct/06/nobel-peace-prize-2017-winner-live> [https://perma.cc/3G9W-WYTS].

*C. CSOs, Revolutions, Protests, & Mass Uprisings*

Empowered by their elevated status, many achievements, and increasing resources, CSOs began to feel more and more emboldened to challenge the state's authority, including at the highest echelons of power. By mobilizing mass crowds, starting and organizing opposition movements, and publicly highlighting the weaknesses and ineptitude of existing regimes, CSOs stood at the forefront of many citizen-led revolutions that resulted in the toppling of many long-standing incumbents in the early part of the current century.<sup>87</sup> The color revolutions that swept the former Soviet states from 2003 to 2005, and later the Arab Spring uprisings that domino-ed their way through the Middle East and North Africa beginning in 2010, all led to dramatic shifts in the political status quo, and each, in various ways and to different extents, were led and organized by, and therefore blamed on (by the affected governments), CSOs.<sup>88</sup>

In the aftermath of both series of revolutions (the Color Revolutions and the Arab Spring uprisings), there was a significant uptick in the number of restrictive CSO laws adopted around the globe and, in many cases, fear of similar revolutions was openly voiced as a justification for those laws' passage.<sup>89</sup> According to civil society expert Thomas Carothers, a "backlash" against international NGOs and foreign funding for local groups began in earnest following the "color revolutions" in Georgia, Ukraine, and Kyrgyzstan.<sup>90</sup> Carothers, puzzled by the sudden uptick in restrictive CSO legislation in the aftermath of these uprisings asked, "[a]re [these governments] generally afraid that relatively modest Western democracy-training programs and financial aid for often weak civic and political groups will undermine their hold on power, or is this fear just a convenient justification for repressive measures they would take anyway?"<sup>91</sup>

According to this possible explanation for the rapid spread of restrictive CSO laws following 2010, the revolutions of the early part

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87. See COLE, *supra* note 68; Brake & Katzenstein, *supra* note 67; Murdie & Hicks 2013, *supra* note 66, at 546; Joseph Wright & Abel Escribà-Folch, *Are Dictators Immune to Human Rights Shaming?* 3 (IBEL, Working Paper No. 25, 2009), <http://ssrn.com/abstract=1483607> [<https://perma.cc/Z68C-8F4J>].

88. See generally Rutzen Not-for-Profit, *supra* note 56.

89. *Id.* at 5.

90. Thomas Carothers, *The Backlash Against Democracy Promotion*, FOREIGN AFFAIRS (Mar./ Apr. 2006), <https://www.foreignaffairs.com/articles/2006-03-01/backlash-against-democracy-promotion> [<https://perma.cc/G49Y-9LVR>].

91. *Id.* at 62.

of the twenty-first century, which in most cases were in fact organized, led or supported by CSOs, revealed the full extent of the power and influence achieved by civil society, particularly those backed by foreign support.<sup>92</sup> Incumbents, fearful of the ability of foreigners to manipulate domestic politics via foreign-funded CSOs, and specifically to inspire, fund and push them to rise up in protest, began cracking down on the latter's ability to operate and, notably, receive foreign support.<sup>93</sup> Advocates of this explanation can point to two powerful empirical facts: in the six years following the color revolutions, between 2004 and 2010, more than fifty countries enacted or considered measures restricting civil society; and in the aftermath of the Arab Spring uprisings, between 2012 and 2015, more than ninety such laws were proposed or enacted, as previously discussed.<sup>94</sup>

Existing research on protest activity and state-civil society relations suggests that states are not irrational in fearing the potential of CSOs to catalyze domestic unrest.<sup>95</sup> Indeed, the presence and density of NGOs both within a state and in the geographic neighborhood of a state are linked to increases in the occurrence of domestic non-violent, anti-government protest movements, while the presence of international human rights organizations in a country increases the level of *both* non-violent and violent protests within that state.<sup>96</sup> Interestingly, this body of research also finds that the presence of human rights organizations in neighboring states can increase the level of non-violent protest activity within another state.<sup>97</sup>

By 2017, one scholar of global protest started referring to our current era as the “age of rage,” in which protest movements have become more numerous and geographically widespread.<sup>98</sup> Existing

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92. See SUPARNA CHAUDHRY, *THE ASSAULT ON DEMOCRACY ASSISTANCE: EXPLAINING STATE REPRESSION OF NGOS* 252 (2016) [hereinafter CHAUDHRY 2016].

93. Rutzen Not-for-Profit, *supra* note 56, at 7.

94. *Id.* at 7.

95. See KURT SCHOCK, *UNARMED INSURRECTIONS: PEOPLE POWER MOVEMENTS IN NONDEMOCRACIES* 83-117 (2005); Amanda Murdie & Tavishi Bhasin, *Aiding and Abetting: Human Rights INGOs and Domestic Protest*, 55 J. CONFLICT RESOL. 163, 163-64 (2010) [hereinafter Murdie and Bhasin 2010].

96. See Murdie & Bhasin 2006, *supra* note 93, at 168.

97. See *id.* at 167; see also Herbert H. Haines, *Dangerous Issues and Public Identities: The Negotiation of Controversy in Two Movement Organizations*, 76 SOCIOLOGICAL INQUIRY 2, 231-63 (2006).

98. See Richard Youngs, *We live in an 'age of rage'- and it's entering a new phase*, CONVERSATION (July 19, 2017, 3:47 AM), <https://theconversation.com/we-live-in-a-global-age-of-rage-and-its-entering-a-new-phase-80173> [https://perma.cc/2HQR-FQ2F] [hereinafter

data points indicate a spike in global protest activity in the 2011-2012 period, followed by a lull, and then a renewed intensification in 2015. According to political scientist and protest expert Richard Youngs (2017):

While much debate among [IR] experts has focused on the shift in power away from the West to rising economies, equally significant is the nascent era of witnessed bouts of protest. Today's wave of protests is relatively unique, however, in effecting all regions of the world, with similar patterns of revolt spanning diverse national and cultural contexts. The ubiquity and frequency of large-scale mobilizations is sufficient to denote a structural shift in how citizens confront power and in how global civil society organizes in pursuing its concerns.<sup>99</sup>

#### D. *The Law of Coercive Responsiveness*

The literature on state repression, while broad and divided on many fronts, agrees on the existence of one consistently steadfast law, namely “the law of coercive responsiveness.”<sup>100</sup> This law, whose consistency is “astonishing in a discipline where very few relationships withstand close scrutiny,” holds that state authorities always employ some form of repressive action to counter or eliminate challenges to the status quo.<sup>101</sup> Since 2016 in the United States, for example, in the wake of various waves of large scale protest—from the Occupy Movement, to Black Lives Matter, to the Women’s March, to the Dakota Access Pipeline protests, and others—at least eighteen sub-national states have introduced or voted on legislation that places additional restrictions on the ability of individuals and groups to protest and increasing the penalties for violations.<sup>102</sup>

While the law of coercive responsiveness seems to apply to regimes of all types, most studies in this body of literature also support the “fact of democratic peace,” a theory, which holds that state

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Youngs 2017]. Richard Youngs is a Professor of International and European Politics at the University of Warwick, and a leading scholar of protest.

99. *See id.*

100. Christian Davenport, *State Repression and Political Order*, 10 ANN. REV. OF POL. SCI. 1, 1–23 (2007).

101. *See Id.*

102. ICNL has been tracking US laws, proposed and adopted, that narrow the scope of permissible protest activities through their “US Protest Law Tracker.” *See, e.g., US Protest Law Tracker*, ICNL (Oct. 15, 2019), <http://www.icnl.org/usprotestlawtracker> [https://perma.cc/NPK2-N5NB].

repression is less likely in democratic states given their different cost-benefit analyses and value systems.<sup>103</sup> Interestingly, however, this body of literature does not consider the use of law as a more subtle, sophisticated, and modern response to challenges to the status quo. Regardless, the fascinating literature, which seems ripe for an updated and expanded definition of state repression, inspires interesting hypotheses about the linkage between protest activity and the adoption of restrictive CSO laws, an increasingly common tactic used by states to, in theory, curb future protest activity.

#### IV. THE COUNTER-ASSOCIATIONAL REVOLUTION

The rising power of CSOs, especially their ability to cause consequential political disruptions, did not escape the attention of states, including states far beyond the borders where such uprisings occurred. Indeed, this recognition seemed to unleash a powerful state-led counter-trend, the so-called “associational counter-revolution,” whereby states started to contain and minimize the influence that CSOs had achieved throughout the associational revolution of the 1990s.<sup>104</sup> While a variety of methods were and are used to accomplish this goal, including violence, harassment, and cooptation, an increasingly popular tactic of choice by many states is to use the law, a less costly, even if more time consuming and complicated strategy that could significantly weaken and defang their civil society sector, or the parts that are viewed as threatening to the status quo, but with less risk of international outcry.<sup>105</sup> Beginning roughly in 2005, a cascade of new

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103. BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD* 3 (1993).

104. See Douglas Rutzen & Cathy Shea, *The Associational Counter-Revolution*, ALLIANCE (Sept. 1, 2015), <https://www.alliancemagazine.org/analysis/the-associational-counter-revolution/> [<https://perma.cc/24DF-RMZE>].

105. See *State of Civil Society Report 2018*, CIVICUS (Mar. 6, 2018) <https://monitor.civicus.org/SOCS2018/> [<https://perma.cc/3CLV-48DW>]. The violent assault against CSOs is an enormous problem worldwide. Certain groups, such as Global Witness, which focuses on environmental civil society actors, as well as Civicus, track incidents of violence and other crimes inflicted on civil society actors, including targeted murder of CSO leaders, violent attacks, disappearances of activists, unlawful detentions, public vilification, forcible closures of CSOs, and other illegal acts. Recent research by Civicus confirms in its “Anatomy of the Global Crackdown” on civil society that activists being detained, protest disruption, and excessive force are still the predominate ways in which this crackdown is done. See their visual of this here: <https://monitor.civicus.org/globalfindings0417/>. The Author acknowledges the enormity of this problem, but it is not the focus of this Article, which is specifically focused on the use of the *law* to restrict the autonomy of CSOs. The Author hopes,



restrictive CSO laws began to appear in one state after another, a phenomenon so alarming in scope and spread that it was named by civil society activists and human rights attorneys for the effects it was having on CSOs: the *closing space* trend, referring to the elimination of safe and available spaces for civil society actors to freely operate.<sup>106</sup>

#### A. Identification of A Global Problem

First identified as a systematic and global problem in 2006,<sup>107</sup> the spreading closing space trend reached “crisis” proportions by 2014,<sup>108</sup> and “emergency” status by 2017,<sup>109</sup> according to civil society experts and observers. Human rights defenders and civil society activists have described this global phenomenon in apocalyptic, even hysteric, terms: as an “alarming”<sup>110</sup> “existential threat” to civil society;<sup>111</sup> a global “contagion” with unstoppable and incurable force,<sup>112</sup> an all-out “global war” on CSOs;<sup>113</sup> and an attempt to “choke out” global civil society

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in future research, to broaden their inquiry to include these other tactics used by states to repress the work of CSOs.

106. See Maria Stephan, *Responding to the Global Threat of Closing Civic Space: Policy Options*, UNITED STATES INSTITUTE OF PEACE (Mar. 21, 2017), <https://www.usip.org/publications/2017/03/responding-global-threat-closing-civic-space-policy-options> [<https://perma.cc/W3KD-RCLP>]; see also Alex Tiersky & Emily Renard, *Closing Space: Restrictions on Civil Society Around the World and U.S. Responses*, CONGRESSIONAL RESEARCH SERVICE (2016), <https://fas.org/sgp/crs/misc/R44458.pdf> [<https://perma.cc/CH47-BGBK>].

107. See Carl Gershman & Michael Allen, *New Threats to Freedom: The Assault on Democracy Assistance*, 17 J. DEMOCRACY no. 2, 36, 36-37 (2006), <https://www.journalofdemocracy.org/wp-content/uploads/2012/04/Gershman-17-2.pdf> [<https://perma.cc/7V9R-F4CH>]; see also Carothers, *supra* note 88.

108. See CAROTHERS & BRECHENMACHER 2014, *supra* note 6 at 25.

109. See *Worldmap*, CIVICUS, <https://monitor.civicus.org/> [<https://perma.cc/7JLA-MAPF>] [hereinafter *Worldmap* 2019].

110. M. Kiai, 2013, “Civil Society’s Right to Seek, Receive and Use Resources- Human, Material and Financial.” UN Special Rapporteur on Peaceful Assembly and Association A/HRC/23/39. Human Rights Council Report, at 9.

111. See Maina Kai (Special Rapporteur on the Rights of Freedom of Peaceful Assembly and of Association), Lex Rieffel, *Institutions are Under Existential Threat, Globally*, BROOKINGS, June 28, 2018, available at <https://www.brookings.edu/blog/up-front/2018/06/28/global-institutions-are-under-existential-threat/> [<https://perma.cc/7B3W-QZRG>].

112. Sarah Mendelson, *Why Governments Target Civil Society and What Can Be Done in Response: A New Agenda*, CSIS (Apr. 30, 2015), <https://www.csis.org/analysis/why-governments-target-civil-society-and-what-can-be-done-response> [<https://perma.cc/9E5R-SNWQ>].

113. See Washington Post Editorial Team, *The Global War against NGOs*, WASHINGTON POST (December 10, 2015), <https://www.washingtonpost.com/opinions/the-war->

altogether.<sup>114</sup> Hyperbole aside, a concerted attempt by an increasing number of states, including democratic states, to stem or reverse civil society's fortunes achieved in the 1990s—and specifically through the passage of laws—was indeed well underway, and gaining momentum by the end of the first decade of the new millennium.<sup>115</sup>

### 1. The International Center for Not-for-Profit Law

The small handful of watchdog organizations that closely track legal developments pertaining to CSOs have confirmed this trend, though their findings tend to be a bit scattered and piecemeal. The International Center for Not-for-Profit Law (ICNL), a global leader in civil society laws around the world, documented more than fifty countries that either enacted or considered legal measures restricting civil society between 2004 and 2010.<sup>116</sup> Between 2012 and 2015, ICNL reported that an additional ninety restrictive CSO laws were proposed or enacted; and by May 2018, they were reporting on the existence of some 144 laws and regulations that had either been proposed or enacted by seventy-two countries.<sup>117</sup> An article published by ICNL's founder and president, Douglas Rutzen, in 2015 stated that the number of restrictive legal initiatives proposed or adopted started to double each year beginning in 2012;<sup>118</sup> and an internal ICNL document, which tracks a broader array of legal instruments, reveals even higher numbers of restrictive legal initiatives: over 400 state-led legal or

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against-ngos/2015/12/10/2ce59002-992b-11e5-b499-76cbe161973\_story.html [https://perma.cc/DT2F-TWD4].

114. Kenneth Roth, *The Great Civil Society Choke Out*, FOREIGN POLICY, (Jan. 27, 2016) <https://foreignpolicy.com/2016/01/27/the-great-civil-society-choke-out-human-rights-democracy-india-russia-china-kenya/> [https://perma.cc/KC9A-KLJE].

115. See Rutzen 2015, *supra* note 6 at 2; see also CHAUDHRY 2016, *supra* note 90 at 85.

116. See Rutzen 2015, *supra* note 6, at 3. The Author also worked as a contracting human rights attorney for the ICNL since 2007.

117. See INTERNATIONAL CENTER FOR NOT PROFIT LAW, EFFECTIVE DONOR RESPONSES TO THE CHALLENGE OF CLOSING CIVIC SPACE 9 (2018), <http://www.icnl.org/news/2018/Effective%20donor%20responses%20FINAL%201%20May%202018.pdf> [https://perma.cc/8ZJL-HGME]. The distinction between a “proposed” and “enacted” law is a crucial one, as this Article addresses in the “key definitions” Section below (located in the broader Research Design section). This Article’s research will focus on adopted laws, though the Author is attempting to gather information on proposed laws (and proposal dates) as well. If the Author is able to collect enough data on these proposals, the Author hopes to expand the inquiry to include both. Also discussed below in the “key definitions” Section is what precisely the Author mean by “laws,” which is expanded to include anything that carries the force of law, such as certain policy pronouncements and executive decrees.

118. See Rutzen 2015, *supra* note 6 at 4.

policy instruments (including laws, decrees, regulations, key policies, and the like) imposing new restrictions on CSOs proposed or adopted since 2012 were contained in this document.<sup>119</sup> ICNL's vice president for legal affairs, David Moore, an internationally renowned expert of civil society laws, describes the recent spate of restrictive CSO laws around the world as "a paradigm shift" for global civil society, which has seen its freedom to operate over the past twenty years significantly diminish.<sup>120</sup>

## 2. Civicus

Civicus, another organization that closely tracks developments affecting global civil society, maintains a constantly-updated virtual map visually depicting the ever-expanding closing space phenomenon. A cursory glance of this map reveals that those countries with "narrow" or "open" environments for CSOs, the least restrictive labels a country can receive, constitute a slim minority, while those countries with "closed," "repressed," or "obstructed" environments comprise the vast majority.<sup>121</sup> According to Civicus, only four percent of the human population currently lives in a country where civil society is able to freely operate, and in 111 countries, well over half of all nations, CSOs are under "serious attack."<sup>122</sup> Though Civicus tracks all types of challenges faced by CSOs—legal, illegal, and extralegal—their research similarly confirms the "viral-like spread of new laws" snaking their way around the globe that attempt to minimize the autonomy and increase government oversight of CSOs.<sup>123</sup> According to their 2017

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119. These mostly include adopted laws (including amendments to existing laws), but also include proposed laws, official policy statements, official regulations, and executive decrees, a broader category of legal initiatives than those captured in the other lower figures.

120. Michael Schuman, *An Increasingly Uncivil World*, US NEWS (July 31, 2017), <https://www.usnews.com/news/best-countries/articles/2017-07-31/growing-number-of-countries-are-clamping-down-on-civil-society-groups> [https://perma.cc/JS4X-VKMN] [hereinafter Schuman 2017].

121. See Worldmap 2019, *supra* note 107. See also CIVICUS, "How it Works," section on "Ratings," available at <https://monitor.civicus.org/Ratings/> [https://perma.cc/EGN7-6746] (explaining the various labels given to each country).

122. Rebecca Ratcliffe, *Civil Rights 'Under Serious Attack' Across the Globe*, GUARDIAN (Nov. 27, 2018), <https://www.theguardian.com/global-development/2018/nov/27/civil-rights-under-serious-attack-across-the-globe> [https://perma.cc/AN4C-WQL8].

123. See Harriet Sherwood, *Human Rights Groups Face Global Crackdown 'Not Seen in a Generation'*, GUARDIAN (Aug. 26, 2015), <https://www.theguardian.com/law/2015/aug/26/ngos-face-restrictions-laws-human-rights->

report, “when it comes to the freedom of association [the cornerstone freedom underlying the existence of CSOs] far more disabling laws and policies than enabling ones are being introduced.”<sup>124</sup>

The few scholars who have examined the closing space phenomenon not only confirm the rise in restrictive CSO laws around the globe, but also their negative, and in some cases devastating, consequences.<sup>125</sup> A variety of reports suggest that the percentage of states that have adopted restrictive CSO laws, notably including laws that restrict CSOs’ ability to access foreign funding, has risen sharply since 2013,<sup>126</sup> and a mounting body of evidence suggests the dire consequences they are having on CSOs, which in some contexts is leading to the collapse of entire sectors of civil society.<sup>127</sup> A 2013 study, which examined the spread of restrictive foreign funding laws, found that at least twenty-six percent of the UN’s current 193 member states either prohibit or restrict CSOs’ access to foreign funding.<sup>128</sup> Another 2017 study, building on this earlier study, found that the adoption of restrictive CSO foreign funding laws not only negatively impacts CSOs but the adopting states too; indeed, adopting this type of law was associated with a thirty-two percent decline in bilateral aid inflows to the state in subsequent years.<sup>129</sup>

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generation [<https://perma.cc/4CTH-DLT4>]; see also CAROTHERS & BRECHENMACHER 2014, *supra* note 6, at 1.

124. Civicus, *State Of Civil Society Report 2017*, at 7. “Disabling” is a term often used by civil society activists to describe laws, and other instruments, that create an environment not conducive to a robust, independent civil society sector. For CSOs to flourish and reach their full potential, according to civil society activists, states should create an “enabling environment” conducive to their success, which would include a legal and regulatory framework that encourages and permits their independence and growth.

125. See DUPUY et al., *WHO SURVIVED*, *supra* note 6 at 13-16.

126. See Samantha Laufer, *A Difference in Approach: Comparing the US Foreign Agents Registration Act with Other Laws Targeting Internationally Funded Civil Society*, 19 INT’L J. NOT-FOR-PROFIT L. 5, 27 (2017).

127. See Kristen Chick, *Egypt’s Civil Society Is on Life Support*, FOREIGN POL’Y, (Dec. 13, 2017), <https://foreignpolicy.com/2017/12/13/egypts-civil-society-is-on-life-support/> [<https://perma.cc/7TTK-88QJ>]; Charles Digges, ‘Foreign Agent’ Law Has Put 33 Percent of Russia’s NGOs out of Business, BELLONA, (Oct. 20 2015), <https://bellona.org/news/russian-human-rights-issues/russian-ngo-law/2015-10-foreign-agent-law-has-put-33-percent-of-russias-ngos-out-of-business> [<https://perma.cc/62NV-ZBF3>] [hereinafter Digges 2015].

128. Darin Christensen & Jeremy M. Weinstein, *Defunding Dissent: Restrictions on Aid to NGOs*, 24 J. OF DEMOCRACY 77, 80 (2013).

129. DUPUY et al., *PANEL STUDY*, *supra* note 6, at 99.

*B. Existing Explanations Fail to Explain Adoptions by Democratic States*

The variety of explanations often given or implied in discussions of the closing space phenomenon make intuitive sense when applied to non-democratic states. Of course, non-democratic states would feel threatened by foreign-funded democracy-promoting, and/or watchdog type, non-governmental organizations that threaten to upset the status quo. This intuition is, in fact, backed up by existing empirical data reflected in the literature on human rights organizations, which confirms that repressive, authoritarian states, which lack transparency and accountability, fear the ability of CSOs to expose their human rights violations, corruption, and malfeasance, and therefore, seek to restrict their influence. The literature on human rights organizations confirms that repressive states often catch the attention of these watchdog organizations, which are often eager to publicize the state's wrongdoing, particularly when it involves egregious violations involving physical integrity rights, such as torture and execution.<sup>130</sup> Rather than end these violations, human rights-violating states instead often seek to silence those who monitor and report such violations, particularly human rights and other watchdog organizations who are often well-placed and well-networked to make their voices heard not only domestically but internationally as well.<sup>131</sup>

Yet, the human rights literature often assumes that "those governments that do not use repression, or have little or nothing to hide, have no incentive to restrict monitoring by civil society."<sup>132</sup> As such, the focus tends to remain, perhaps understandably, on the most abhorrent human rights violations and the most repressive states. As a result of this fixation, this body of literature (among others), and even certain HROs themselves, have failed to notice the large and ever-growing number of human rights abiding states, or non-repressive states, that are similarly starting to reign in the influence and independence of their CSO sectors, albeit in subtler and less egregious ways. A recent study concluded that the "unintended consequence" of state ratification of international human rights treaties is that civil

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130. See Matthew Krain, *J'accuse! Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?: Naming and Shaming Perpetrator*, 56 INT'L STUDIES QUARTERLY 574, 578 (2012).

131. MARGARET E. KECK & KATHRYN SIKKINK, *supra* note 78, at 1-37.

132. Kristen Bakke, Neil Mitchell & Hannah Smidt, *When States Crack Down on Human Rights Defenders*, at 7 (2019) (unpublished manuscript) (on file with the author).

society is placed at “higher risk of facing restrictions from repressive governments with abuses to hide.”<sup>133</sup> In assuming that only “repressive governments” restrict civil society, they failed to assess whether a similar conclusion could potentially be reached about non-repressive, democratic governments as well.

While often anecdotally noted in the course of discussing the broader closing space trend, to my knowledge there are no systematic scholarly attempts to explain why the legal backlash against CSOs is specifically occurring in democratic states, and in increasing numbers. This, at least to the Author, is the most puzzling aspect of the broader closing space trend. While other aspects of the Author’s research agenda examine the explanatory portion of this perplexing, consequential, and to date, still largely unexplained global phenomenon, this Article is largely descriptive and focuses primarily on mapping the global landscape of restrictive CSO laws in strong democratic states, to which the Author now turns.

#### *V. KEY DEFINITIONS & DISTINCTIONS*

In order to map the rise and spread of restrictive CSO laws in historically strong democratic states, the Author carefully reviewed and documented the CSO legal frameworks for the world’s strongest democratic countries, as defined below. The review spanned a nearly thirty year time frame, from 1990 to 2018, which includes what is often considered the golden era for CSOs in the 1990s,<sup>134</sup> followed by what is referred to as “the associational counter-revolution,” as previously discussed.<sup>135</sup> Before fully exploring the Author’s research findings, a few key definitions are first in order.

##### *A. Strong Democratic State*

First, *Strong Democratic State*. The Author’s research captures only the most well established and consolidated democracies in the world, which as you will see from the complete list, includes some

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133. *Id.* at 9.

134. Catherine Agg, *Trends in Government Support for Non-Governmental Organizations: Is the Golden Age of NGOs Behind Us?*, UNRISD Program Paper Number 23, 1,1 (June 2006), [http://www.unrisd.org/unrisd/website/document.nsf/\(httpPublications\)/E8BC05C1E4B8AD6FC12571D1002C4F0B?OpenDocument](http://www.unrisd.org/unrisd/website/document.nsf/(httpPublications)/E8BC05C1E4B8AD6FC12571D1002C4F0B?OpenDocument) [https://perma.cc/X375-F4RS].

135. Rutzen & Shea 2015, *supra* note 102.

states that are arguably starting to fall outside the parameters of this definition, such as Hungary and Poland, whose democratic credentials have come into question in recent years.<sup>136</sup> To identify the strongest democracies in the world, the Author relied on the Regime Trends Dataset, which is part of the Polity V project conducted by the Center for Systemic Peace.<sup>137</sup> This is a highly regarded and often relied upon database, especially among political scientists. Based on Polity's twenty-one point scale, which ranges from -10 to +10, a *democratic* state is one that receives a score of six or higher; a perfect ten corresponds to a *full* democracy.<sup>138</sup> The Polity scheme consists of six component measures designed to capture the key qualities that comprise a democratic system of governance, which include method of executive recruitment (how the executive comes to power), constraints on executive authority, and political competition.<sup>139</sup> Usefully, neither the autonomy of the civil society sector nor respect for the freedom of association are specifically included in Polity's definition of democracy; one or both typically feature in other democracy measures, such as the one established by Freedom House.<sup>140</sup> This is fortunate, and one of the primary reasons the Author relied on Polity, as their exclusion of respect for the freedom of association in their definition of democracy eliminates the potential for spurious findings. Polity's user manual explicitly states, "we do not include coded data on civil liberties."<sup>141</sup>

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136. Note, however, that the Polity V project, which the Author depended up for democracy scores, continues to rate Hungary and Poland as "full" democracies, which means they have received the highest score, a 10. Hungary has received a 10 since 1990, and Poland since 1992. See FREEDOM HOUSE, *FREEDOM IN THE WORLD 2019* (2019) <http://www.systemicpeace.org/polity/polity4x.htm> [<https://perma.cc/Z6B8-52RD>]; see also MONTY MARSHALL, CTR FOR SYSTEMIC PEACE, *POLITY IV PROJECT: USER MANUAL POLITY IV PROJECT*, 11 (2017) [https://freedomhouse.org/sites/default/files/Feb2019\\_FH\\_FITW\\_2019\\_Report\\_ForWeb-compressed.pdf](https://freedomhouse.org/sites/default/files/Feb2019_FH_FITW_2019_Report_ForWeb-compressed.pdf) [<https://perma.cc/4UKQ-3ASZ>] [hereinafter Marshall 2017].

137. See Monty Marshall, *Individual Country Regime Trends*, POLITY IV PROJECT 1946-2013 (June 6, 2014), <http://systemicpeace.org/polity/polity4.htm> [<https://perma.cc/C2BP-RHW6>].

138. This Article excludes laws passed by *democratic* states during times of martial law or in the aftermath of coups, such as occurred in Turkey and Thailand in recent years (despite maintaining their democracy status according to Polity).

139. Marshall 2017, *supra* note 134, at 15.

140. *Freedom in the World Report 2018, Methodology*, FREEDOM HOUSE, <https://freedomhouse.org/report/methodology-freedom-world-2018> [<https://perma.cc/9VUF-524P>] (last visited June 6, 2019).

141. Marshall 2017, *supra* note 134, at 14.

The Polity IV Regime Trends dataset includes all “major, independent states in the global system,” defined as states having a population greater than 500,000; this includes 167 nations. For each of these 167 states, an *annual polity* score is given for the years spanning 1800-2017, allowing me to clearly identify whether a particular country was a *strong democracy* in the years leading up to (and following) the adoption of a particular CSO law.<sup>142</sup> The Author confined their review to the years spanning 1990-2018, which includes the decade known as CSOs’ golden age, the 1990s, followed by the eighteen years comprising the new millennium, when the golden age ended and began reversing course.<sup>143</sup> To narrow my scope to the world’s leading democracies, the Author identified all countries that obtained a score of at least 9 (so either a 9 or a 10, the two highest scores) for at least five consecutive years between 1990 and 2018. This list, which came to fifty-nine countries, comprises my population of designated *strong democratic states*.<sup>144</sup>

For each of these fifty-nine *strong democratic states*, the Author carefully researched and documented their CSO legal frameworks, collecting *all* relevant CSO laws (proposed, adopted, and withdrawn/rejected) that could be located, including laws that appeared permissive, restrictive, and neutral on their face. Following this review, the Author coded each law as either permissive or restrictive, as further defined below. Neutral laws were coded as permissive, as neutrality raises no issues from an international legal perspective.

### *B. Restrictive CSO Law*

The next term in need of definition is *restrictive CSO law*. To be labeled as *restrictive*, a law had to impose an additional *new* restriction on the CSO sector (or one sector of CSOs), or it had to in some way reduce its previous levels of operational, financial and/or legal autonomy in some meaningful way. Examples of *restrictive laws* include laws that impose new constraints on CSOs’ ability to access domestic or foreign funding; laws that require CSOs to obtain specific government permission before engaging in certain activities; laws that

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142. The Author has emailed with the research center that created the Polity IV project, the Center for Systemic Peace, and inquired about updated regime scores for the years after 2013. The Author is still awaiting their response. Their website indicates that they are working on an updated version, Polity V, but does not specify when it will be released.

143. See Salamon, *supra* note 69; Rutzen 2015, *supra* note 6 at 2.

144. See Appendix 1 for the full list.



complicate the ability of CSOs to form by imposing additional new barriers to registering; laws that impose onerous new reporting obligations; and laws that restrict the ability of CSOs to engage in public demonstrations. Unfortunately, the Author cannot claim to have gathered every law conceivably relevant to CSOs, which no doubt includes a much broader universe of laws than the ones located. Instead, the Author attempted to locate and isolate those laws that most directly address and impact CSOs and the things that stand at the core of their existence: their ability to form, operate, receive funding, and assemble. The Author did not include laws that only indirectly implicate, but do not directly address, CSOs, such as freedom of information, media, or criminal laws, which can impact the work of many CSOs, oftentimes in significant ways, but typically does not address them specifically and directly.

The Author examined four types of laws in particular: (1) lifecycle or framework CSO laws; (2) assembly laws; (3) foreign and domestic funding laws; and (4) counterterrorism laws. Lifecycle laws, which are the primary laws governing the existence and operations of CSOs, include laws outlining the general formation, operation, domestic funding, and dissolution of CSOs; they also typically include reporting and auditing obligations, penalties for noncompliance, and detail the acceptable scope of activities that CSOs can engage in. Assembly laws include laws impacting the ability of CSOs to hold public demonstrations and events, including protests and rallies. Funding laws govern how and under what conditions a CSO can receive funding, whether foreign or domestic, and how they can access other sources of support, such as through fundraising, philanthropy, and donations. Finally, counterterrorism laws, as the name implies, govern how CSOs must comport with new measures designed to prevent terrorism, money laundering, and terrorism financing. The latter category was the trickiest one of all, as it threatened to overwhelm my research and overprove my point. Nearly every state in the world passed new counterterrorism legislation in the post-9/11 era; indeed, doing so was mandated by at least two different UN Security Council resolutions.<sup>145</sup>

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145. These include Security Council Resolution 1373 (2001), which urged countries to implement a number of measures intended to enhance their legal and institutional ability to counter terrorist activities at home, in their regions and around the world and Security Council Resolution 1624 (2005), calling on states to prevent incitement to commit terrorism. See S.C. Res. 1373, ¶ 4 (Sept. 28, 2001); *see also* S.C. Res. 1624, ¶ 1 (Sept. 14, 2005). For more

Many of these new laws impose new restrictions on CSOs, a topic unto itself to be sure.<sup>146</sup> For my purposes, and the purposes of this Article however, the Author wanted to look at a broader phenomenon and, as such, was very careful when including counter-terrorism laws in my review. Only those that imposed meaningful new restrictions (or subtracted significantly from previous levels of autonomy), and that went beyond those restrictions considered legitimate under human rights laws were included in my review. Many new restrictions imposed by the new counterterrorism laws do not qualify as illegitimate under a human rights legal perspective.

By broadly defining *restrictive CSO legislation*, the Author overcomes a key criticism of the existing literature on the closing space phenomenon, namely that it heavily focuses on foreign funding laws to the exclusion of all others. Focusing on only one specific type of law offers only a small and potentially misleading snapshot of the broader reality and the broader legal environment for CSOs, which are shaped and affected by many different types of law.<sup>147</sup> Despite that most of the scholarship on the closing space trend seems to focus on the passage of restrictive foreign funding laws, a recent study published in 2018 found that foreign funding laws constitute only twenty-eight percent of the laws being passed that impose new restrictions on CSOs.<sup>148</sup> In contrast, the more foundational *lifecycle* laws constitute forty-seven percent of such laws, and another twenty-five percent impact the ability of CSOs to exercise their right to freedom of assembly, so-called “assembly laws.”<sup>149</sup> As shown below, the Author’s findings discovered a similar breakdown in the types of laws being passed that impact CSOs, with foreign funding laws constituting only one, and a minority at that, of the types of laws being adopted that constrain the autonomy of CSOs.

The Author not only includes formal *laws* in my review, but policy pronouncements, executive orders, and other official decrees that carry *the force* of law as well. As such, this Article’s definition of law is wider in scope than formal legislation adopted by a legislative branch according to the typical legislative rules. For example, a

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information, see *About the Counter-Terrorism Committee*, UNITED NATIONS SEC. COUNS., <https://www.un.org/sc/ctc/about-us/> [<https://perma.cc/7P3V-D2BL>] (last visited Oct. 31, 2019).

146. See generally BEN HAYES, *THE IMPACT OF INTERNATIONAL COUNTER-TERRORISM ON CIVIL SOCIETY ORGANIZATIONS* (Maïke Lukow & Christine Meissler eds. 2017).

147. See Rutzen 2015, *supra* note 6, at 4-6.

148. See International Center for Not-for-Profit Law 2018, *supra* note 115, at 10.

149. *Id.*

restrictive policy framework adopted in 2012 in Slovakia, a *full democracy* according to Polity, directly led to the de-registration of over 4000 *noncompliant* NGOs. This policy framework, which directly addresses CSOs, has the effect of law, and thus, is treated as equivalent to a *restrictive CSO law* in my analysis. For a policy to be included, however, the impact on CSOs had to be obvious and direct, as in the previous example; in other words, it had to directly address CSOs *and* directly affect their behavior or organizational existence without the need for further implementing legislation. An official announcement of a policy that, for example, asserts a need for greater oversight over the civil society sector, but does not require or trigger any specific actions in furtherance of that announcement, would not go far enough to be included as equivalent to a *law* in the Author's review.

In most cases, whether a pronouncement carries the force of law or not is obvious, such as in Spain, which issues legally binding royal decrees, and in the United States, which issues legally binding executive orders, both of which are well known. In other countries, however, this proved a bit more difficult to ascertain. In situations where the Author had any insecurity about whether to include the instrument/pronouncement in her review, she aired on the side of not including it. The Author also excluded local and state-level laws from the scope of analysis and focused only on laws adopted at the federal/national level. State and local laws, which impact fewer CSOs, potentially open the door to a different and more parochial set of motivating factors not always relevant to, or just different from, those experienced by national governments, which face heightened international audience costs and different domestic pressures than those experienced by non-federal officials who are accountable to smaller constituencies. To be sure, this forced the Author to exclude certain highly relevant laws from my scope of analysis, such as the spate of recent laws proposed and adopted in US states that impose new restrictions on protest activities,<sup>150</sup> and the similar string of restrictive protest measures adopted in certain Australian states.<sup>151</sup> Yet, scoping

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150. See Int'l Ctr. For Not for Profit Law, *Protest Law Tracker 2019* (Oct. 24, 2019), <http://www.icnl.org/usprotestlawtracker/> [<https://perma.cc/TM7Z-LAZ6>].

151. See Matt Ford, *The New Legislation Targeting Protesters*, ATLANTIC, (Feb. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/02/anti-protest-bills/518004/> [<https://perma.cc/5KS9-XKN6>]; see also Kristen Alexander, *Australian State Bans Right to Protest*, DAILY BEAST, (Mar. 13, 2014), <https://www.thedailybeast.com/australian-state-bans-right-to-protest> [<https://perma.cc/MH5Z-TFKW>].

the project was necessary for both practical and conceptual reasons: searching for all sub-federal laws is an infeasible project for one researcher working alone, and conceptually, as stated above, the Author's sense is that different factors contribute to the passage of sub-federal and federal laws. There is one upshot to this (and other exclusions), however. Because the Author was very conservative when choosing which laws went into the database for analysis, it can safely be said that, if anything, they understate the conclusion they reach below, namely, that strong democratic states, like their authoritarian counterparts, are also adopting restrictive CSO legislation and in surprisingly large numbers.

### *C. Civil Society Organization*

The Author's third, and final, definition is for *Civil Society Organization* ("CSO"). By CSO, the Article refers broadly to non-governmental organizations, both domestic and transnational, which are entities formed voluntarily by individuals to pursue shared concerns or interests, which do not include profit-making and are not accomplished through violence. This inclusive definition includes a wide variety of organizations, beyond just the more typically referenced NGOs, which are in fact only one type of CSO (which is why the Author prefers CSO over NGO). My definition does, however, exclude government created NGOs ("GONGOs"), as well as terrorist organizations and other criminal syndicates. The Author also excludes the media, which many consider part of civil society, as well as political parties; in both cases, the Author believes that different, and frankly more restrictive, rules should apply than those applied to the broader body of civil society organizations. For example, political parties should be prohibited from accessing foreign donations and their funding should be 100 percent transparent; but these rules should not apply to CSOs (as defined here), at least not as strictly, as doing so would violate human rights law and specifically, the ability of individuals to freely associate.

While a multitude of definitions have been proposed for CSOs, this Article's definition focuses on the three most common features that tend to unite them.<sup>152</sup> A CSO, in the Author's view, must be non-governmental (not formed or operated by or on behalf of a government

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152. US DEP'T STATE, *supra* note 1; see FERGUSON, *supra* note 1, at 15–16; see also WOLFF & POPPE 2015, *supra* note 1, at 5; see also KECK & SIKKINK, *supra* note 78, at 92.

entity), non-profit (the primary purpose for forming and existing is not profit-making), and voluntary (founded by individuals who, on their own accord and through no compulsion or government-imposed mandate, effectuated its creation in order to pursue shared interests or concerns). Some definitions include an additional element having to do with pursuing a “public good,”<sup>153</sup> but the Author has disposed of this element, in favor of a more expansive and inclusive definition of CSO that includes organizations formed for any lawful purpose with the exception of only those purposes enumerated above (governmental, profit-driven, violence).

As such, the Author’s definition of CSO encompasses NGOs, voluntary organizations, professional associations, sports clubs, religious groups, unions, foundations, charities, and philanthropic organizations, among others.<sup>154</sup> The scope of this inquiry includes CSOs that are registered and work exclusively in one country (domestic CSOs) and those that work across borders (international or transnational CSOs),<sup>155</sup> and the Author remains agnostic as to their substantive focus. The CSOs that are included in this analysis can have any focus or purpose, and exist for any reason whatsoever, so long as their reason for existing is not profit-making and their goals are not carried out through criminal or violent means.

As previously discussed, the Author began her search in 1990, a year that marks the start of a new era in international politics, particularly for CSOs, as it corresponds with the dawning of the *associational revolution* when CSOs proliferated globally, established themselves as legitimate non-state actors, and began to wield

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153. See Dan Cardinali, *The Adaptive Challenge of Restoring Trust in Civil Society*, STANFORD SOCIAL INNOVATION REVIEW (June 2018), [https://ssir.org/articles/entry/the\\_adaptive\\_challenge\\_of\\_restoring\\_trust\\_in\\_civil\\_society](https://ssir.org/articles/entry/the_adaptive_challenge_of_restoring_trust_in_civil_society) [https://perma.cc/6XS2-TFHS].

154. Different countries use different words for their CSOs (for example the United States defines “nonprofit organizations” as including charitable or religious organizations, social welfare organizations, labor and agricultural organizations, business leagues, and veterans’ organizations). The Author has chosen to use CSO because, in the Author’s opinion, it is the most general word that exists to define the civil society sector as a whole; it is an umbrella term. Others have used NGO instead, but to follow this more standard practice would complicate this analysis as many countries distinguish between NGOs, charitable organizations, foundations, and other organizations within the law; an NGO will be its own distinct category with, at times, its own distinct law. By using the term CSO, this Article can allow these distinctions to exist.

155. By *transnational CSO*, this Article refers to a CSO that is based in one country but regularly carries out its activities in another country or countries (for example, Amnesty International and Human Rights Watch); a domestic CSO was founded in, and is based and exclusively operates in, a single country (such as most community groups).

significant influence over the course of international and domestic affairs.<sup>156</sup> By starting the review in 1990, which also roughly corresponds with the end of the third wave of democracy, the Author was able to gather nearly thirty years of data, which allowed for variation and temporal patterns to appear, including key moments of particularly intense legislative activity. This time frame also allowed the Author to examine if certain key events in international politics potentially influenced passage of restrictive CSO laws, as has been suggested in other reports on the closing space trend, such as the 9/11 attacks, the color revolutions that swept Eastern Europe in the early 2000s, the Arab Spring that erupted throughout the Middle East in the years after 2010, or the passage of certain high-profile restrictive CSO laws elsewhere, such as India's 2010 restrictive foreign funding or Russia's 2012 foreign agents law.<sup>157</sup>

#### *VI. FINDINGS: THE SPREAD OF RESTRICTIVE CSO LAWS IN STRONG DEMOCRATIC STATES*

The Author collected and reviewed the CSO legal frameworks for the world's strongest democracies, a list of states that, until now has been almost entirely overlooked by those who have examined the broader closing space trend. This is perhaps understandable. After all, each of the *strong democratic countries* included in this analysis has ratified the International Covenant on Civil and Political Rights ("ICCPR"), which codifies the freedom of association and is considered binding international law, nearly all are also signatories to a regional human rights treaty that similarly protects this right, and with rare exception, such as in Australia, each nation the Author reviewed recognizes this fundamental right in their national constitution.<sup>158</sup> Yet, the findings confirm that this trend is not isolated to repressive, authoritarian leaning countries, or to countries known for egregious human rights violations, or to countries with weak economies, as was

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156. See Salamon, *supra* note 69.

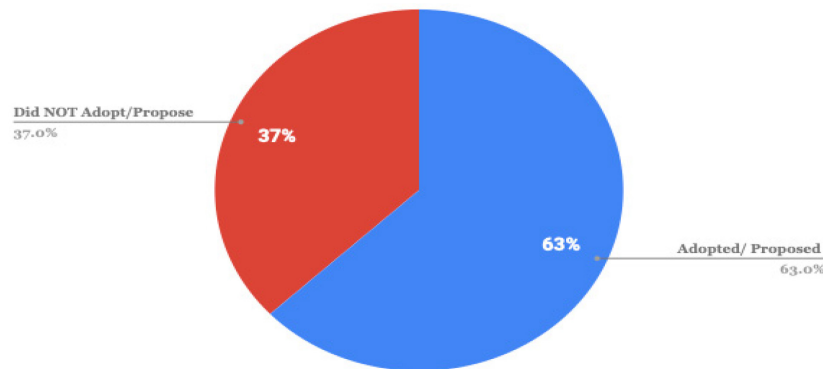
157. It is possible that the Author will determine, in the course of this review, that going further back in history would provide additional context and insight; but for now, the Author plans to begin at 1990 and to end with 2017.

158. The United States is another exception. The right to association, though not explicitly in the US Constitution (unlike most other states in the world), was recognized as implicit in the US Constitution by the US Supreme Court in the case of *Roberts v. United States Jaycees* 468 US 609 (1984). See the official UN ratification table for the ICCPR here: <http://indicators.ohchr.org/> [<https://perma.cc/FC9Q-PBED>].

previously assumed.<sup>159</sup> Moreover, the Author's findings confirm that this trend does not implicate only one type of law, namely foreign funding laws, or one category of CSO (human rights and other advocacy organizations), but instead, that it involves a broader array of laws and CSOs. Most fundamentally, my findings confirm that the closing space trend is a truly global phenomenon, one that transcends geography, GDP, regime type, development status, and most importantly, one that is not confined only to repressive, non-democratic regimes with histories of overt persecution and vocal condemnation of civil society actors.

Quite to the contrary, the Author's findings reveal that the world's strongest democracies, in surprisingly high numbers, are—like their authoritarian counterparts—adopting restrictive CSO legislation.<sup>160</sup> Indeed, thirty-four out of the fifty-nine democratic countries, well over half (fifty-eight percent), have adopted at least one restrictive CSO law since 1990. When proposed laws are added to this list, the total comes to thirty-eight states, or over sixty-three percent, of all “strong democratic states” (see Figure 1).

**Figure 1: % of Strong Democratic States to Adopt/Propose a Restrictive CSO Law, 1990-2018**

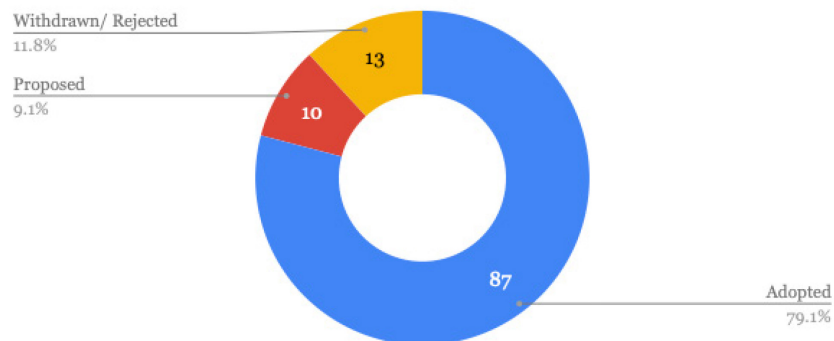


159. See, e.g., Bakke, Mitchell, & Smidt, *supra* note 130, at 2-3.

160. See Chrystie Flournoy Swiney, *Undemocratic Civil Society Laws Are Appearing in Democracies*, OPENGLOBALRIGHTS (Mar. 28, 2019), <https://www.openglobalrights.org/undemocratic-civil-society-laws-are-appearing-in-democracies-too/> [https://perma.cc/H6DZ-6CND]. Cf. Swiney, *Laws Are Chipping Away at Democracy Around the World*, CONVERSATION (Apr. 2, 2019), <https://theconversation.com/laws-are-chipping-away-at-democracy-around-the-world-113089> [https://perma.cc/9PSS-6C7H].

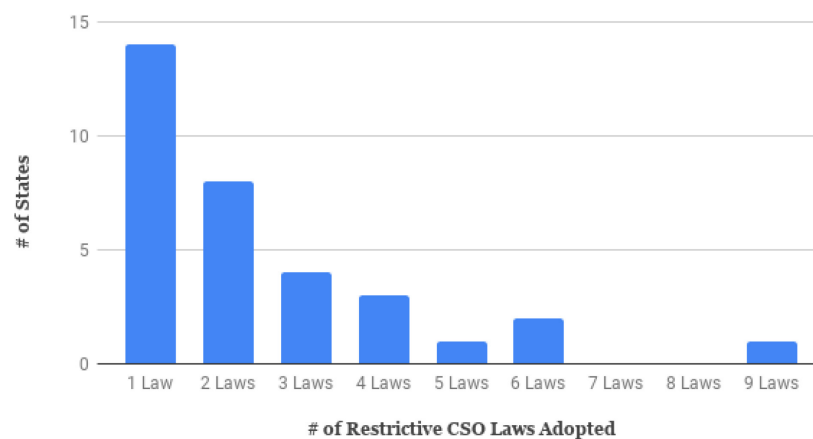
In total, the Author uncovered eighty-seven enacted laws, ten laws still under consideration, and thirteen restrictive CSO laws that have been either withdrawn or rejected (see Figure 2).

**Figure 2: Number of Adopted, Proposed & Rejected Restrictive CSO Laws in Strong Democratic States,**



Among those states that have adopted a restrictive CSO law, nearly sixty-seven percent (twenty-two of thirty-three) have adopted two or more restrictive CSOs laws, and over a third of them (thirty-six percent, or twelve of thirty-three) have adopted three or more (see Figure 3).

**Figure 3: No. of Restrictive CSO Laws Adopted**

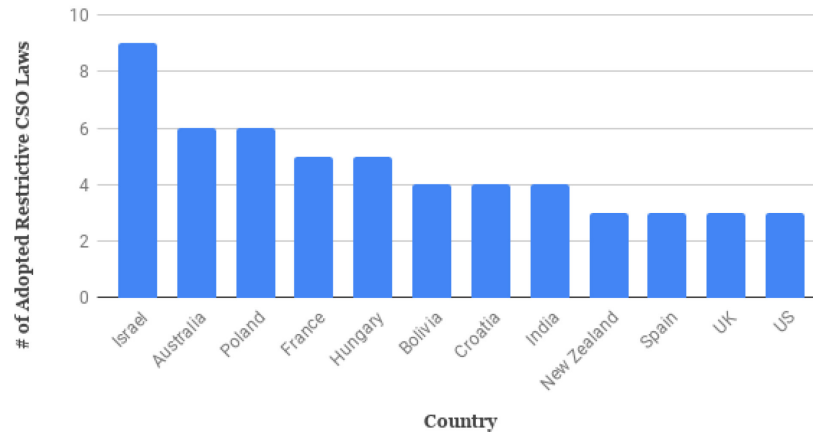


One state, Israel, has adopted a stunning nine such laws; while both Australia and Poland have adopted six, and France, five. Bolivia,



Croatia, and India have enacted four; and Hungary, New Zealand, Spain, the United Kingdom, and the United States closely follow: each has adopted three (see Figure 4).

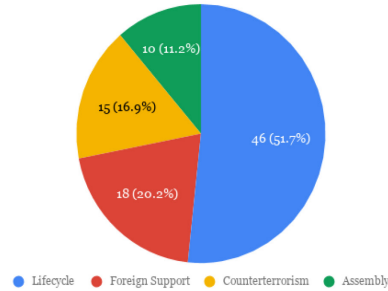
**Figure 4: Adopters of Multiple Restrictive CSO Laws**



Such patterns suggest that restrictive CSO laws come in clusters, or perhaps that the passage of one incentivizes passage of additional restrictions. In Hungary and India, for example, and in certain non-democracies, such as Russia, this has certainly been the case, with one law leading to additional laws, which oftentimes have the effect of stiffening the penalties associated with, or further constraining, the earlier law.

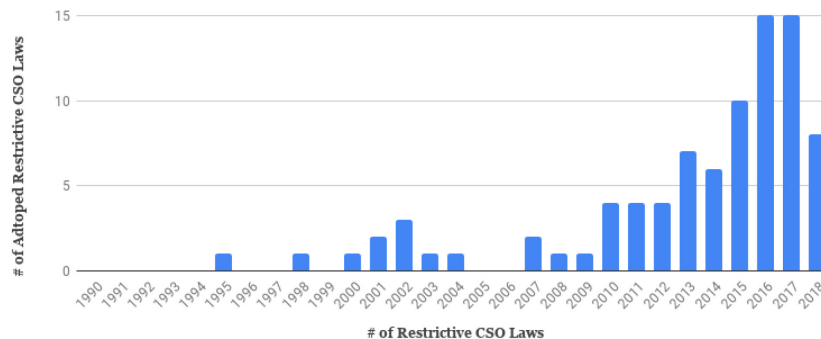
Of the adopted eighty-seven restrictive CSO laws the Author located, forty-six of them, the majority, involve lifecycle or framework CSO laws, which as defined above are the primary laws governing the existence, operations, domestic funding, and dissolution of CSOs. An additional eighteen laws pertain to CSOs' ability to access foreign funding, hire foreign employees, or form foreign affiliations. Finally, fifteen of the restrictive CSO laws are counterterrorism laws, and additional ten of them involve assembly laws (see Figure 5).

Figure 5: Types of Restrictive CSO Laws Adopted in Strong Democratic States, 1990-2018



In terms of timing, the trend line is very clear and consistent: the proposal and passage of restrictive CSO laws in strong democratic states is a recent phenomenon; it is not just a twenty-first-century trend, but an even more recent (roughly) post-2010 trend (see Figure 6).

Figure 6: # of Restrictive CSO Laws Adopted Each Year Since 1990

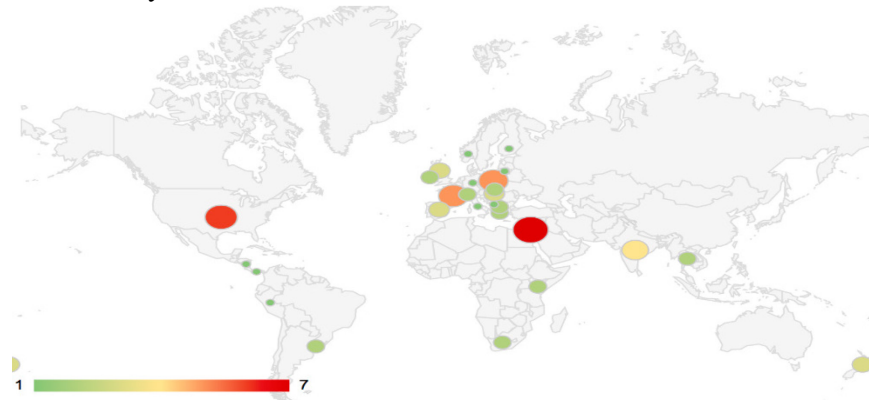


The vast majority of the restrictive CSO laws adopted, sixty-two of the eighty-seven adopted laws, were passed from 2013 to 2018; and all eleven of the current proposals were proposed in 2017 or later, with the exception of one proposed in 2016. The years 2016 and 2017 saw the highest number of adoptions and proposals: fifteen separate laws were adopted in each year, and eight were proposed (and remain proposals) in the two years combined. Tracing the temporal arc of passage and proposals, one can also confirm that this trend is accelerating and gaining momentum within strong democratic states, as other reports on the closing space trend reveal with respect to non-

democratic states.<sup>161</sup> The 1990s saw very few new legislative restrictions placed on CSOs. In fact, in the entire decade, the Author was able to locate only three laws that imposed new restrictions on CSOs or subtracted from their previous level of autonomy, strongly suggesting that the 1990s were indeed a *golden age* for CSOs, at least with respect to their autonomy from state control in strong democratic states.

The trend line revealed by the above figure confirms the relative newness and recent momentum behind the spread of restrictive CSO laws into democratic countries. The sudden decline in 2018 perhaps suggests that this trend has peaked or reached a saturation point. Once laws are in place, after all, there is normally no need for passage of new or additional laws that accomplish the same goal. As such, the decline in adoption rates in 2018 does not necessarily suggest anything about the reversal of this trend, but instead, that this trend is well entrenched in most democratic countries and that the passage of additional new laws is no longer viewed as necessary.

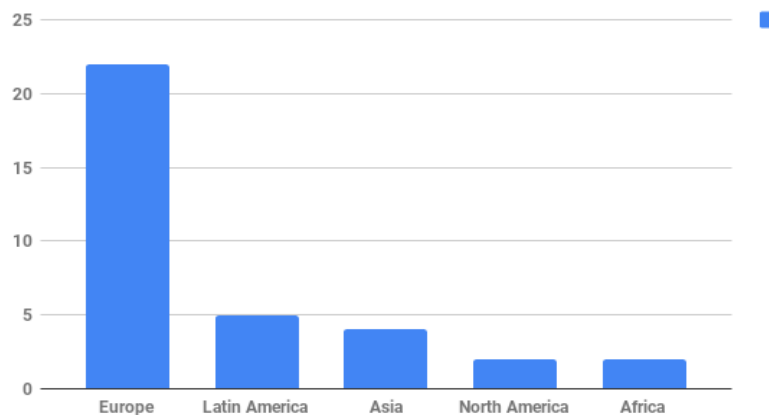
In terms of geographic spread, all regions and continents of the world have been impacted by the spread of restrictive CSO laws in recent years, as previous reports confirm. And democracies are no exception. Among the world's strongest democratic countries, European countries adopted the highest number of restrictive CSO laws: twenty-two of the thirty-three democracies in Europe that made my list, or two-thirds, have adopted a restrictive CSO law since 1990. All combined, these European laws total forty-six. The fewest restrictive civil society laws were passed in African democracies; indeed, only two of the six, or one-third, of the African democracies to



161. See generally CAROTHERS & BRECHENMACHER 2014, *supra* note 6.

qualify as a *strong democratic state* have adopted a restrictive CSO law. Falling in the middle between these two were Asian countries—four (of seven) Asian democracies have adopted fifteen restrictive CSO laws—and Latin American democracies—five of the nine Latin American states that made the cut have adopted nine such laws. The two countries from North America that made the list, the United States and Canada, have both adopted restrictive CSO laws (eight laws in total). And finally, the only country from the Middle East to qualify as a *strong democratic state*, Israel, adopted nine restrictive laws in the time period under review, the highest passage rate of any of the countries under review (see Figures 7 and 8).

**Figure 8: Restrictive CSO Laws (adopted) by Region**

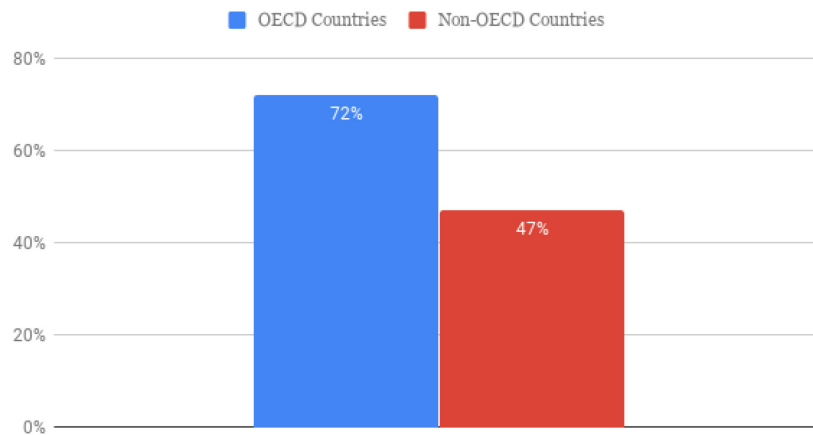


Twenty-eight of the nearly sixty states that the Author reviewed are members of the Organisation for Economic Co-operation and Development (“OECD”), an intergovernmental organization focused on stimulating economic progress and world trade founded in 1961 composed of thirty-five member states. Many consider the members of the OECD, which is focused on stimulating economic progress and world trade, to be among the world’s wealthiest, strongest, and most developed democracies in the world.<sup>162</sup> Yet, twenty-one of the twenty-

162. The reason why not all OECD states appear in this Article’s list of fifty-nine strong democratic states is due to the fact that OECD membership is voluntary and because it is focused on countries with strong economies. This Article’s rubric was entirely focused on regime type or political system (democracy) and nothing more, unlike the OECD, which abides by a different membership criterion.

eight OECD states that made my list, nearly seventy-two percent, have adopted at least one restrictive CSO law (See Figure 9).

**Figure 9: OECD Countries vs Non-OECD Countries**



Among the remaining thirty-two states that are not members of the OECD, only fifteen of these states, nearly forty-seven percent, have adopted at least one restrictive CSO law, making the *top tier* OECD democracies (in my case selection) even more likely than the *lower tier* group to adopt a restrictive CSO law. This Article's findings contradict, or cast doubt on, existing studies on the OECD countries that tend to assume that this elite club of states has uniformly strong and permissive CSO legal frameworks in place.<sup>163</sup>

Moreover, many of the countries typically included or cited as the highest performers with respect to the freedom of association or the robustness of their civil society sectors, appear on my list of those democratic countries that have adopted restrictive CSO laws. A recent survey found Norway, Sweden, Switzerland, Latvia, Estonia and Slovenia to be among the top ten percent of performers on their respect and protection for the freedoms of association and assembly; and Denmark, Norway, Sweden, Finland, Germany, Switzerland, Ireland, Belgium, Greece and Slovenia to be among the very top performers on

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163. See e.g. Elizabeth Bloodgood, Joannie Tremblay-Boire, & Aseem Prakash, *National Styles of NGO Regulation*, 43 *NONPROFIT & VOLUNTARY SECTOR Q.*, 716 (2014).

a measurement of Civil Society Participation.<sup>164</sup> Such top performers consistently appear in other civil society indexes and measurements as well.<sup>165</sup> Yet, at least eight of these high-ranked and highly regarded countries have adopted at least one law imposing new restrictions on CSOs since the turn of the twenty-first century, with most of these laws being enacted in or after 2015. Only three of these highly-ranked states have not imposed new legal restrictions on their civil society sector: Sweden, Slovenia, and Estonia.<sup>166</sup> Moreover, as previously stated, each of the countries the Author reviewed is a signatory of the key human rights treaty codifying the freedom of association, the ICCPR, which constitutes binding international law. Yet, in keeping with recent research, treaty ratification status does not, on its own, appear to influence a state's willingness to infringe on the freedom of association by proposing or adopting a restrictive CSO law.<sup>167</sup>

#### VII. WHY DOES IT MATTER THAT NON-GOVERNMENTAL ORGANIZATIONS REMAIN NON-GOVERNMENTAL?

Having reviewed the data and determining that well over half—a shocking sixty-three percent—of the world's strongest democratic states have proposed or adopted a restrictive CSO law since 1990, with the vast majority being adopted in the last five years, we must ask the question: so why do restrictions imposed on CSOs' autonomy even matter, and are they all uniformly inappropriate? The answer to the second question is simple: no. A certain level of government oversight over the CSO sector is appropriate and typical. CSOs wanting to enjoy certain state benefits, such as the right to open a bank account or use the court system to resolve disputes in its organizational name, to obtain tax benefits and exemptions, or to apply for federal grants should, in exchange for receiving these benefits, submit to a system of

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164. Silva-Leande, Annika, & Noonan, *Is the Space for Civil Society Shrinking?* INT'L IDEA (July 17, 2018), <https://www.idea.int/news-media/news/space-civil-society-really-shrinking> [https://perma.cc/Z6SH-Y7EW].

165. *E.g.*, Worldmap 2019, *supra* note 107.

166. Note that the Author did not include Latvia in this review of “strong democratic states.”

167. See generally DEMATTEE, *supra* note 16; Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935 (2002) [hereinafter Hathaway 2002]. PhD Candidate Anthony DeMattee found, in a recent study, that ratification of human rights treaties does not prevent the adoption of laws infringing on the freedom of association without constitutional rules specifically making treaties equivalent to ordinary legislation, meaning that they become automatically binding upon ratification.

minimal state oversight. For example, a CSO wishing to obtain a specific tax exemption applicable to nonprofit organizations engaged in poverty reduction work should have to submit to annual audits to confirm that they are legitimately engaged in this type of work. CSOs wishing to receive state benefits should be expected to go through a formal registration process, which enters their name and basic information into a centralized database, which is publically accessible.<sup>168</sup> Yet, this process should be minimal, affordable or ideally free of charge, fast, and simple to complete; it should not impose onerous requirements, hefty fees, long waiting times, or allow for denials except in only extreme and identifiable situations, and if denials are permitted, a right to appeal the decision to a neutral arbiter, or ideally an independent judicial court, should be afforded.<sup>169</sup> The CSO registration process should, in effect, be a notification system designed more to facilitate the public's knowledge of the existing pool of CSOs that are receiving taxpayer dollars, than to create a vehicle for government oversight and control. If a CSO does not wish to receive state benefits, registration with the state should be voluntary and the government should have almost little to no involvement in their affairs, naturally barring criminal or otherwise unlawful activity.

*A. International Human Rights Law, The Freedom of Association & Democratic Theory*

The first question posed above is harder to answer and implicates both international human rights law and democratic theory. First, the right for CSOs to form and operate free from government restrictions is rooted in the freedom of association, a fundamental human right enshrined in a variety of international legal instruments, including: Article 20 of the *Universal Declaration of Human Rights*, Article 22 of the ICCPR, Article 24 of *The Arab Charter on Human Rights*, Article 10 of the *African Charter on Human and Peoples' Rights*, Article 16 of the *American Convention on Human Rights*, and Article 11 of the *European Convention on Human rights*, among others.<sup>170</sup> According to

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168. See Guidelines for Laws Affecting Civic Organizations (Leon E. Irish, Robert Kushen, & Karla W. Simon eds., 2004).

169. See UN Human Rights Council, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, Maina Kiai, U.N. Doc. A/HRC/20/27 (May 21, 2012).

170. This right is also recognized in various International Labor Organization conventions, as well as the founding charters and constitutions of nations around the world, such

the ICCPR, a foundational international human rights treaty ratified by 167 countries around the world,

Everyone shall have the right to freedom of association with others . . . No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others . . . .<sup>171</sup>

According to human rights attorneys, restrictions on the freedom to associate are presumptively impermissible under international law unless the restriction fulfills three strict conditions, namely that the restriction is: (1) prescribed by law; (2) considered necessary in a democratic society; and (3) adopted in furtherance of one of four permissible justifications, which include: national security/public safety; public order; protection of public health or morals; or protection of others' rights and freedoms. The freedom of association has been further interpreted by international human rights law as requiring states to issue "convincing and compelling reasons" any time a restriction, however small, is placed on the right to associate, and that the restriction is strictly "proportionate to the legitimate aim pursued."<sup>172</sup> Moreover, in determining whether a restriction is permissible, "it is important to consider whether or not there are less intrusive means available to accomplish the desired end."<sup>173</sup> Theoretically, every restriction placed on the freedom of association by a state actor, which includes any new law or regulation that imposes a new requirement or that subtracts from their previous level of autonomy, should first go through this legal analysis in order to determine its permissibility under international law.

The reality, of course, is that states often do not go through this legal analysis and instead, ignore their obligations under international human rights law. Many studies by both legal scholars and political scientists confirm that states do not take their human rights obligations

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as Article 2 of the Canadian Charter of Rights and Freedoms which identifies the right to association as a "fundamental freedom".

171. See International Covenant on Civil and Political Rights, art. 19, G.A. Res. 2200A, U.N. Doc A/6316 (Dec. 16, 1966) (entered into force Mar. 23, 1976), available at <http://www.cirp.org/library/ethics/UN-covenant/> [<https://perma.cc/SL8M-ZE98>] [hereinafter ICCPR].

172. *Case of Sidiropoulos and Others v. Greece*, 4 Eur. Ct. H.R. 500 at 40 (1998).

173. *E.g., Id.* at 24-25.



seriously and that ratifying a human rights treaty has little to no effect on their behavior.<sup>174</sup> Indeed, some studies go further, suggesting that ratifications can lead states to engage in worse behavior than before, and more relevant to this Article's inquiry, that they can compel states to impose additional restrictions on their civil society sectors, particularly their human rights and advocacy organizations, as to prevent them from publicizing their human rights violations.<sup>175</sup> More often, however, at least in my own experience as a human rights attorney and in my research for this project, states harness the language of human rights law to justify their preferred restrictions on CSOs. For example, when passing a law that imposes new funding restrictions or that limits the scope of activities that CSOs can engage in, the proposer of the new law typically justifies the law's passage in the name of *national security* or some version of *public order*, such as the need for increased transparency and accountability.

*B. The Connection between CSOs' Autonomy and Democracy*

It is well established that civil society and civic engagement are prerequisites for a well-functioning democracy.<sup>176</sup> Scholars and theorists of democracy, including perhaps the most famous of all democracy observers, the French political historian Alexis de Tocqueville, have long noticed that where democracy flourishes, so too does an autonomous civil society sector.<sup>177</sup> In Tocqueville's attempt to understand the sources of America's strong democratic values and institutions he pointed first and foremost to one thing: America's unmatched network of non-governmental associations. According to Tocqueville, nothing is "more deserving of our attention" than understanding the "art" of civic associations, the "mother of science," the explanation for "the most democratic country on the face of the earth," and the foundation upon which "the progress of all the rest depends."<sup>178</sup> For Tocqueville, independent civic associations were the source of democracy's strength, the spark that led to its existence and the fuel that kept it running; they were both an essential precursor to

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174. See Hathaway 2002, *supra* note 164, at 1976-88; Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, J. CON. RES. 49(6), 925-53 (2005).

175. E.g., Bakke, Mitchell, & Smidt 2018, *supra* note 130.

176. E.g., ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1840) [hereinafter TOCQUEVILLE 1840].

177. *Id.*

178. *Id.* Vol. 1, at 195.

democracy's taking root and the essential ingredient for its continuation. Without a robust and diversified network of nongovernmental civic associations, democracy, in Tocqueville's view, would wither, fade, and eventually implode upon itself; it would fall prey, in his words, to "the despotism of faction,"<sup>179</sup> "the arbitrary power of a prince,"<sup>180</sup> and in time, "the most galling tyranny."<sup>181</sup>

While perhaps no one has ever spoken with as much elegance about the necessary linkage between CSOs' autonomy and democracy than Tocqueville, other theorists and renown political figures have spoken with equal conviction on the topic. Robert Dahl, for example, considered by many to be the father of modern political science and whose widely cited definition of democracy (or what he referred to as *polyarchy*) established him as a towering voice on this topic, designated the freedom of association as one of the key institutional requisites for an electoral democracy; without this freedom, he claimed, elections risked becoming mere charades.<sup>182</sup> For Dahl, one of the "procedural minimum" requirements for a country to qualify as a political democracy is that its citizens "have the right to form relatively independent associations or organizations . . . ," a contention that numerous other scholars have agreed with.<sup>183</sup> In later publications, Dahl became even more insistent on the need for CSOs to have "associational autonomy," which he viewed as essential to a well-functioning democracy.<sup>184</sup> Without granting the right of civic associations the freedom to operate free from government interference or control, they cannot perform their core job, which they alone are uniquely poised to do, namely to hold elected officials accountable, or put another way, to operate as independent and autonomous watchdogs over the political system.

American political scientist Robert Putnam, in his well-known bestseller *Bowling Alone*, similarly connects the robustness of a state's civil society sector with the strength of that state's democracy.<sup>185</sup>

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179. *Id.* Chapter XIV.

180. *Id.* Chapter XII.

181. *Id.*

182. ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 130-31 (1989) [hereinafter DAHL 1989].

183. *E.g.*, Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is . . . and Is Not*, 2 J. DEM. 75, 81 (1991) [hereinafter Schmitter & Karl 1991].

184. DAHL 1989, *supra* note 179, at 130-31.

185. *See generally* ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

Focusing on the US context specifically, he connects the sharp decrease in the number of American civic associations over the years with declines in American democracy, a connection made more broadly by British historian Niall Ferguson, who contends that history's greatest nations were built on the backs of civil society associations, and conversely, that these nations' downfalls can be explained by the diminishment and weakening of those associations.<sup>186</sup> The literature on democratic transitions similarly confirms the powerful role played by civil society in the emergence of new democracies; indeed, this extensive body of literature reveals that a mobilized civil society sector is often the "critical actor" in a country's "breakthrough to democracy."<sup>187</sup>

Political scientists coming from an entirely different perspective as Putnam and Ferguson, namely from a constructivist point of view which focuses more on the power of ideas and non-state actors in shaping world politics, have reached similar conclusions. Constructivists Martha Finnemore and Michael Barnett, for example, have argued for the importance of international organizations to have autonomy from state control, and author Fareed Zakaria, whose eclectic ideas make him difficult to categorize, describes civil society associations as "essential" to the "maintenance of a liberal democracy."<sup>188</sup> Economists have reached this conclusion as well, though their attention has been more focused on ascertaining what factors make a country wealthy, long-lasting, and strong. Massachusetts Institute of Technology-based economist Daron Acemoglu and his co-author, political scientist James Robinson, in their 2012 book *Why Nations Fail* marshal an extraordinary volume of historical evidence from medieval to modern times to make an institutionalist argument that the rise and fall of nations is determined by whether a nation has a network of "inclusive institutions," which ensure that the state is taking into account the opinions of its citizens.<sup>189</sup>

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186. See generally NIALL FERGUSON, *supra* note 1.

187. E.g., Michael Bernhard & Ekrem Karakoc, *Civil Society and the Legacies of Dictatorship*, 59 WORLD POL. 539, 542 (2007).

188. Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699, 699-732 (1999); Sean Illing, *Fareed Zakaria Made a Scary Prediction about Democracy in 1997 — and It's Coming True*, VOX (Jan. 18, 2017), <https://www.vox.com/conversations/2017/1/18/14250364/democracy-liberalism-donald-trump-populism-fareed-zakaria-europe-fascism> [<https://perma.cc/W767-42CV>].

189. Daron Acemoglu & James Robinson, *What Are Institutions*, WHY NATIONS FAIL (Oct. 29, 2013), <http://whynationsfail.com/blog/2013/10/29/what-are-institutions.html>

Empirical studies also make implicit, but obvious, connections between the strength of a democracy and the autonomy of its civil society sector. In a study examining the state of democracy worldwide from 1971 to 2017, the authors found that in countries where democratic institutions were de-consolidating, the freedom of association was weak and restricted by the state.<sup>190</sup>

Democracy theorists conclude that the presence of an autonomous civil society sector is what makes elections, the most visible and, some argue, among the most essential elements of a democracy, meaningful.<sup>191</sup> In states where elections are held but civil society is weak, which some refer to as an “illiberal democracy,” elected officials with authoritarian leanings tend to entrench themselves in power and rule autocratically, such as in Russia, Malaysia, and Cambodia.<sup>192</sup> CSOs, when allowed to operate independently and autonomous from government control, give voice to the voiceless, advocate issues of public concern, hold elected and campaigning officials to account, help to mobilize voters, and create platforms for shared grievances. To be sure, elements of civil society are not always progressive, helpful, or indeed even ‘civil’ in their rhetoric; indeed, under my definition, which excludes organizations or groups that engage in violence but does not exclude groups on the basis of their agendas, the birther movement in the United States, neo-Nazis, elements of the far-right, and groups that form to fight the teaching of evolution in schools are just as much a part of ‘civil society’ as parent-teacher associations, Green Peace, the American Civil Liberties Union, the Girl Scouts, and local garden clubs.<sup>193</sup>

The ability to form into groups of whatever variety, based on the wishes, concerns or shared ideals of its members, is, like free speech, a right that should generally be permitted irrespective of the substantive

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[<https://perma.cc/B4QF-JB7A>]; see generally DARON ACEMOGLU & JAMES ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY AND POVERTY* (2012).

190. Anna Lührmann et. al. *State of the World 2017: Autocratization and Exclusion?* 25 J. DEMOCRATIZATION 8 (2018).

191. Robert Dahl, *The Past and Future of Democracy*, CENTER FOR STUDY POL. CHANGE, 11 (1999), available at [http://www.circap.org/uploads/1/8/1/6/18163511/occ\\_5.pdf](http://www.circap.org/uploads/1/8/1/6/18163511/occ_5.pdf) [<https://perma.cc/FAL5-WHBT>].

192. Fareed Zakaria, *The Rise of Illiberal Democracy*, FOREIGN AFFAIRS (Nov./Dec. 1997), <https://www.foreignaffairs.com/articles/1997-11-01/rise-illiberal-democracy> [<https://perma.cc/3UB4-FUU5>].

193. Thomas Carothers, *Civil Society: Think Again*, Foreign Policy, Winter 1999-2000, at 20 (stating that “[r]ecognizing that people in any society associate and work together to advance nefarious as well as worth ends is critical to demystifying the concept of civil society.”).

content or focus of any individual group. So long as the group does not engage in criminal activity and is otherwise law-abiding, they should, in theory, be permitted to operate no matter their mission or cause. Analogizing once again to free speech, while the right to associate is not and should not be unlimited,<sup>194</sup> allowing individuals to coalesce on the basis of shared goals, no matter what those goals are, is essential because allowing otherwise could be a slippery slope toward government censorship.<sup>195</sup> Just as many individuals, particularly in the American context, would be uncomfortable with the idea of the government determining the content of their public expressions, so too, are there legitimate concerns about the government deciding which CSOs should and should not be permitted to exist. Moreover, like free speech, allowing individuals to form into groups for whatever reason provides them with a non-violent way to vent and express their views, which if contained or repressed, could simmer and then explode into acts of violence. Most importantly of all perhaps, allowing groups to form for any purpose absent violence or criminality, is an expression of democracy in its purest sense of the term: it allows citizens to express and enact their personal views, no matter those views, in order to shape their own polity in the ways they wish. CSOs create a bridge between citizens and their elected officials; they operate as a middle-man, transmitting concerns and messages louder and with greater effect than any individual could ever hope to do on their own. As such, when their autonomy to form and operate is constrained, civil society is not able to perform this democracy promoting and maintaining purpose, arguably its most critical function in a democratic state.

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194. In the US context, where the right to free speech is considered to be the most protected in the world, there are still exceptions. Individuals are not permitted to incited actions that would harm others (*Schenck v. United States*, 249 U.S. 47, 51 (1919)), to make or distribute obscene materials (*Roth v. United States*, 354 US 476, 483 (1957)), to burn draft cards as an anti-war protest (*United States v. O'Brien*, 391 US 367, 371 (1968)), and a variety of other exceptions. As with free speech, the right to associate and form into groups is not unlimited, it can properly be constrained in a variety of contexts, which tend to parallel those areas where speech can appropriately be restricted.

195. Note that there are opponents, including liberal opponents, to the view that speech should be generally permitted no matter its substance. See, e.g., Nathan J. Robinson, *Thinking Strategically about Freed Speech and Violence*, CURRENT AFFAIRS (Aug. 20, 2017), <https://www.currentaffairs.org/2017/08/thinking-strategically-about-free-speech-and-violence> [<https://perma.cc/5VQV-7H72>]. Robinson, like others, argues that free speech when allowed unrestrained only increases the likelihood of violence. Some argue, for example, that the Antifa movement in the United States, due to its radicalized anti-right language,

*VIII. CONCLUSIONS AND IMPLICATIONS*

The Author's research findings confirm a claim that has routinely been alleged by civil society activists, human rights attorneys and a small handful of political scientists, but until now, never empirically confirmed or explored.<sup>196</sup> As such, the research and activist communities can now rightfully assert, and with full and documented proof, that the closing space trend has indeed spread into democratic states, including the world's strongest democratic states, just as it has done in authoritarian-leaning states and states with mixed regime types.<sup>197</sup> Moreover, the Author's findings confirm that this spread is a very recent twenty-first-century phenomenon that seems to have taken off after 2005, gained momentum in 2010, and then reached its peak in 2016-2017. Though it is still too early to tell whether these trend lines will continue in the coming years, and if the remaining twenty-five strong democracies that have not yet imposed a new restrictive CSO law will so do in the near term, what is clear is that the rate at which such laws are being adopted or proposed in democratic states (sixty-three percent to date) is keeping pace with, or according to some estimates, even rising above the percentages seen in less democratic states.<sup>198</sup>

The implications of this Article's findings are potentially profound if the effects of restrictive CSO laws in non-democratic states are any guide. In Ethiopia, for example, domestic human rights CSOs all but vanished in the years following passage of an extremely restrictive CSO law, the Charities and Societies Proclamation of 2009.<sup>199</sup> In Azerbaijan, following passage of a series of restrictive CSO regulations in 2013-2014, which imposed additional administrative barriers and burdens on CSOs and their funders, most independent advocacy CSOs scaled down, discontinued their work, or left the country altogether.<sup>200</sup> In Russia, following passage of the Foreign Agents Law in 2012, which requires CSOs that receive any foreign

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196. Michelle Reddy, *Do Good Fences Make Good Neighbours? Neighbourhood Effects of Foreign Funding Restrictions to NGOs*, 13 ST. ANTHONY'S INT'L REV. 109-41 (2018).

197. *Id.*

198. DUPUY et al., HANDS OFF MY REGIME, *supra* note 6 at 7-8; Christensen & Weinstein 2013, *supra* note 123 79-83.

199. DUPUY et al., HANDS OFF MY REGIME, *supra* note 6.

200. Durna Safarova, *Azerbaijan: Suffocation of NGOs Raises Questions About Donor Strategy*, EURASIANET, (Oct. 10, 2017), <https://eurasianet.org/azerbaijan-suffocation-of-ngos-raises-questions-about-donor-strategy> [<https://perma.cc/C5LB-LK3V>].

donations and are engaged in vaguely defined “political” be labeled as “foreign agents,” a label akin to foreign espionage in the Russian context,<sup>201</sup> has led many CSOs, particularly those engaged in human rights and government accountability, to self-censor, limit their scope of activities, or voluntarily dissolve.<sup>202</sup> Recent reports suggest that over a third of Russia’s CSOs have stopped operating, with many choosing to voluntarily dissolve rather than face the stigma associated with the foreign *agent* label or the costs associated with challenging the label in court.<sup>203</sup> In Bangladesh, recent reports suggest that in the wake of the 2016 Foreign Donations (Voluntary Activities) Regulation Bill’s passage, a restrictive CSO law that places tight constraints on CSOs’ ability to receive foreign funds, many CSOs, particularly smaller ones, have been forced to shut down due to insufficient funding, while the registration rates of new CSOs have dramatically declined.<sup>204</sup> These are just a few of the many examples. And these examples are not irrelevant to democratic states; multiple reports have suggested linkages or similarities between restrictive CSO laws passed in India, Hungary and elsewhere with Russia’s foreign agent law.<sup>205</sup>

Though we know less about the impact of restrictive CSO laws in democratic states, an emerging body of empirical evidence suggests that such laws are having similar, even if less severe, consequences in democracies too. In India, for example, recent reports confirm that more than 24,000 CSOs lost their operating licenses following adoption of new, more restrictive amendments to the Foreign Contributions

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201. Helen Simpson, *Russia’s Foreign Agent Law: An HPR Explainer*, HARV. POL. REV., (Nov. 30, 2017), <https://harvardpolitics.com/world/russias-foreign-agent-law-an-hpr-explainer/> [<https://perma.cc/4TG6-KCTM>].

202. Nils Muižnieks, *The Shrinking Space for Human Rights Organisations*, Commissioner for Human Rights, Council of Europe, Apr. 4, 2017.

203. Charles Digges, *‘Foreign Agent’ Law Has Put 33 Percent of Russia’s NGOs out of Business*, BELLONA (Oct. 20, 2015), <https://bellona.org/news/russian-human-rights-issues/russian-ngo-law/2015-10-foreign-agent-law-has-put-33-percent-of-russias-ngos-out-of-business> [<https://perma.cc/Z8KJ-D485>]; Alexei Kozlov, *Russia’s ‘Foreign Agents’ Law Is Bankrupting Campaigners and Activists*, OPENDEMOCRACY (Nov. 10, 2017), <https://www.opendemocracy.net/en/odr/russias-foreign-agents-law/> [<https://perma.cc/AT9A-4DUD>].

204. Islam Shariful, *Screws Tighten on NGOs*, CITIZENS PLATFORM FOR SDGs (Oct. 26, 2017), <https://bdplatform4sdgs.net/screws-tighten-ngos/> [<https://perma.cc/9EJA-WCT9>].

205. Yasmeen Serhan, *Hungary’s Anti-Foreign NGO Law*, ATLANTIC (June 13, 2017), <https://www.theatlantic.com/news/archive/2017/06/hungarys-anti-foreign-ngo-law/530121/> [<https://perma.cc/G3C9-PBQP>]; *Foreign Funding of NGOs: Donors: Keep Out*, ECONOMIST (Sept. 12, 2014), <https://www.economist.com/international/2014/09/12/donors-keep-out> [<https://perma.cc/HV2R-WCNK>].

Regulation Act in 2010 and 2011.<sup>206</sup> The new amendments prohibit any organizations of “a political nature” from receiving external assistance and grant the government broad authority in prohibiting any CSO from receiving foreign contributions when deemed “detrimental to the national interest.”<sup>207</sup> In Turkey, which is perhaps an unfair example because of the current political context, a series of executive decrees following the failed coup in 2016 granted the government broad authority to dissolve and control the actions of CSOs. Under these decrees, more than 1,400 CSOs were involuntarily shut down by government order.<sup>208</sup>

CSOs are not the only ones affected by restrictive CSO legislation. Also at stake is global democracy. Recent research suggests that democracy is on the wane around the globe. For thirteen straight years, Freedom House catalogued declines in global freedoms in its 2019 report, with established democracies dominating the list of countries reflecting setbacks. Countries labeled *free* accounted for a larger share of the declines than at any time in the past decade, and nearly one-quarter of the countries experiencing declines were in Europe. This stands in stark juxtaposition to earlier times; from 1975 to 2005, Freedom House recorded nearly thirty years of constant gains. The Economist’s Democracy Index, while a bit more optimistic, found evidence in their most recent report of ongoing and deepening disillusionment with democracy and dwindling numbers of people living under some form of democratic governance. Indeed, it found that only four and half percent of the human population lives in a full democracy. Although disputed by some, these findings are supported by a growing body of scholars and policy analysts focused on democratic decay around the globe. Better understanding of when and why democratic states impose additional restraints on their civil society sectors might also be critical to the preservation of democracy around the world. Recent research suggests that democracy is on the wane around the globe. For thirteen straight years in a row, Freedom House

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206. Melissa Cyrill & Adam Pitman, *FCRA Compliance in India: How 24,000 NGOs Lost Their License*, INDIA BRIEFING, (Sept. 28, 2017), <https://www.india-briefing.com/news/fcra-compliance-india-how-24000-ngos-lost-their-license-15287.html> [<https://perma.cc/L86B-NUUB>].

207. WOLFF & POPPE 2015, *supra* note 1, at 19; CHAUDHRY 2016, *supra* note 90, at 62–63.

208. William Armstrong, *Interview: Max Hoffman on Turkish Civil Society under Siege*, HÜRRİYET DAILY NEWS (Aug. 4, 2017), <http://www.hurriyetdailynews.com/interview-max-hoffman-on-turkish-civil-society-under-siege-116322> [<https://perma.cc/88N3-93RR>].



catalogued declines in global freedoms in its 2019 report, with established democracies dominating the list of countries reflecting setbacks.<sup>209</sup> Countries labeled *free* accounted for a larger share of the declines than at any time in the past decade, and nearly one-quarter of the countries experiencing declines were in Europe. This new reality stands in stark juxtaposition to earlier times; from 1975 to 2005, Freedom House recorded nearly thirty years of constant gains.<sup>210</sup> The Economist's Democracy Index, while a bit more optimistic, found evidence in their most recent report of ongoing and deepening disillusionment with democracy and dwindling numbers of people living under some form of democratic governance; indeed, it found that only four and a half percent of the human population lives in a *full democracy*.<sup>211</sup> Though disputed by some,<sup>212</sup> these findings are supported by a growing body of scholars and policy analysts focused on democratic decay around the globe.<sup>213</sup>

Perhaps the closing space trend, and specifically its spread into strong democratic states, is partly what is fueling this decline in global democracy, or perhaps, the decline in global democracy is fueling the closing space trend. Multiple scholars who support the democratic decay thesis have decried the lack of conceptual tools necessary for identifying the "early warning signs" that such decay is underway, as well as the lack of understanding of "the series of discrete and interconnected events and actions that often proceed undetected, of democratic backsliding."<sup>214</sup> At least one such scholar has pointed to the adoption of "ever-more expansive laws empowering the state to maintain law and order" as one such early warning sign.<sup>215</sup>

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209. Freedom House 2019.

210. Mark Goldberg, *When Soft Power Salutes Despots*, AMERICAN PROSPECT (Nov. 14, 2017), <https://prospect.org/power/soft-power-salutes-despots/> [<https://perma.cc/DL9P-3ZJ8>].

211. The United States, as just one example, is no longer characterized as a "full democracy." It was downgraded from its status as a "full" to a "flawed" democracy for the first time in the Index's history in 2016. The EIU Democracy Index 2018, World Democracy Report, available at <https://www.eiu.com/topic/democracy-index> [<https://perma.cc/7NSY-QYYD>].

212. Nancy Bermeo, *On Democratic Backsliding*, J. DEMOCRACY 5–19 (Jan. 2016), <https://www.journalofdemocracy.org/articles/on-democratic-backsliding/> [<https://perma.cc/5VVE-YADV>].

213. See generally Tom Daly, *Diagnosing Democratic Decay*, Comparative Constitutional Law Roundtable, Gilbert & Tobin Centre of Public Law, UNSW SYDNEY; Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78 (2018).

214. Horowitz & Macdonald, *supra* note 73; Daly, *supra* note 209.

215. Horowitz & Macdonald, *supra* note 73.

The Author's findings offer the possibility of doing both: identifying an early warning sign that democratic decay is indeed underway and identifying one of the typically undetected interconnected events that is fueling democratic backsliding. Future research building upon the findings presented in this Article, particularly by legal scholars who have the skills and tools necessary to engage in the detailed and nuanced textual legal analysis required in tracking this trend, will, the Author hopes, help to further demystify this puzzling and consequential twenty-first century global phenomenon. Given that this phenomenon threatens to reverse the post-Cold war optimism in the power and spread of democracy, and with it, the power and spread of civil society's associational revolution, the stakes are high and the need for further and deeper understanding is urgent.

Appendix 1: List of *Strong Democratic Countries*

Albania	Ecuador	*Lithuania	*Portugal
*Australia	Estonia	*Luxembourg	Romania
*Austria	*Finland	Macedonia	*Slovakia
*Belgium	France	Madagascar	*Slovenia
Bolivia	*Germany	*Mauritius	South Africa
Bulgaria	Greece	Moldova	*Spain
*Canada	*Hungary	*Mongolia	*Sweden
*Cape Verde	*Iceland	Montenegro	*Switzerland
*Chile	India	*Netherlands	*Taiwan
Comoros	*Ireland	*New Zealand	Thailand
*Costa Rica	*Israel	Nicaragua	*Trinidad & Tobago
Croatia	*Italy	*Norway	*United Kingdom
*Cyprus	Jamaica	Panama	*United States
*Czech Republic	*Japan	Peru	*Uruguay
*Denmark	Kenya	*Poland	

\*Designates membership in the OECD, which are regarded as the most economically and politically powerful countries in the world.