

BOOK REVIEW

**Organizational Rights in Times of Crisis**

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*How Constitutional Rights Matter*

Adam Chilton & Mila Versteeg. Oxford, 2020. 396 pages.

INTRODUCTION

As populist leaders gain power around the world, democratic governments retreat, and authoritarian states gain power in the international system,<sup>1</sup> it is critical to find levers of resistance. Professors Adam Chilton and Mila Versteeg's masterful volume, *How Constitutional Rights Matter*, offers a timely and provocative answer: let's look to organizations as potential defenders of rights in challenging times.<sup>2</sup> In a world in which human rights are widely understood as individual rights, it is high time to theorize about how organizations can help vindicate these individual protections.

The specific thesis Chilton and Versteeg promote is that "some rights, once constitutionalized, are harder to violate than others."<sup>3</sup> Specifically, freedom of religion, the right to unionize,

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<sup>1</sup> See, e.g., Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT'L L. 221, 251 (2020) (describing how "a growing authoritarian role in the international arena may affect the normative content of international law"); see also Katerina Linos, *Introduction to the Symposium on Authoritarian International Law: Is Authoritarian International Law Inevitable?*, 114 AJIL UNBOUND 217, 219 (2020) (echoing Professor Ginsburg's assertion that "the character of interstate relations will change as authoritarian states gain increasing influence and seek to subvert international efforts at democracy").

<sup>2</sup> ADAM CHILTON & MILA VERSTEEG, *HOW CONSTITUTIONAL RIGHTS MATTER* 7 (2020).

<sup>3</sup> *Id.*

and the right to form political parties are more likely to survive challenges.<sup>4</sup> This is because these rights, which Chilton and Versteeg term “organizational,” have built-in advocates—religious groups, trade unions, and political parties—available to enforce them.<sup>5</sup> In contrast, “individual” rights—which include both civil rights such as freedom from torture and social rights such as the right to education—have no built-in advocates, and are thus harder to protect.

Chilton and Versteeg test this theory empirically, with data from hundreds of countries over decades. Their data analysis is a model of transparency. For each right, they compare, in easy-to-read figures, countries that have the right to countries that don’t, and then countries before and after adoption. They then present, in figures, more sophisticated, stacked event-study specifications with extensive controls.<sup>6</sup> This transparent quantitative analysis is supplemented by gripping case studies and an extensive discussion of alternative theories. We learn about President Vladimir Putin’s Russia, President Recep Tayyip Erdogan’s Turkey, and recently deposed State Counsellor Aung San Suu Kyi’s Myanmar, and about the (relative) success of some organized groups at protecting core rights where others failed, even under harsh authoritarian rule.

Chilton and Versteeg have generated foundational questions about whether, for instance, it is even possible to classify rights as entailing greater or lesser organizational support. They have also paved the way toward answering, rather than avoiding, fundamental empirical questions when the data, like the real world, is imperfect. In this Book Review, I will first summarize and critique this book on its own terms—as a major theoretical and empirical contribution to the debate on when and how constitutions matter. There are, of course, many ways in which one can debate and question the specifics of Chilton and Versteeg’s theory (and some, but fewer ways, to question their empirics), so it is worth pointing to these.

But at the time of a pandemic, when fundamental liberties are curtailed around the world, the book’s core thesis about the importance of organizations in protecting rights could not be timelier. Around the world, scores of restrictions have been put into place—hundreds of countries, for example, have curtailed

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<sup>4</sup> *See id.*

<sup>5</sup> *See id.*

<sup>6</sup> *See id.* at 106, 110.

freedom of movement.<sup>7</sup> And other rights have been curtailed through government inaction. The UN Anti-Torture mechanisms, for example, report that tens of thousands of prisoners are known to have contracted COVID-19,<sup>8</sup> while UNESCO reports that in recent months over 60% of students globally have seen fundamental rights to education curtailed due to school closures.<sup>9</sup> And the willingness of authoritarian (and democratic) leaders to use the pandemic to expand their powers and implement unrelated laws and restrictions is terrifying. The pandemic offers a hard test of Chilton and Versteeg's theory that some rights will fare better than others under pressure. It is to this discussion that I devote the last part of this Book Review.

But is it the case, as Chilton and Versteeg's theory would predict, that some resistance has been possible? Is it the case that one type of rights—organizational rights—has been less compromised than others? This is a hard question to answer, as early on in a pandemic it is hard to know what is temporary and what is here to stay. That said, I believe there are strong indications that Chilton and Versteeg's theory about the greater resilience of organizational rights is proving prescient. Some organizational rights—notably freedom of religion and the right to unionize, and to a much lesser extent the right to form political parties—seem to be, for now, somewhat less threatened than individual rights, such as the right to free movement or the right to education. In the pages that follow, I first explore how Chilton and Versteeg's book presents the pre-COVID-19 world. I then present some useful extensions to their theory for a post-COVID-19 universe, full of significant rights restrictions.

#### I. WHEN DO CONSTITUTIONS MATTER? STATE, CONSTITUTION, AND RIGHTS CHARACTERISTICS

Adam Chilton and Mila Versteeg, along with many other constitutional law scholars, have long wondered whether the guarantee of rights in a constitution actually influences the government's protection of those rights. The likely answer is "It depends." But what does it depend on? Chilton and Versteeg

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<sup>7</sup> See Amy Slipowitz, *How COVID-19 Restrictions Have Deepened Existing Inequality*, FREEDOM HOUSE (June 8, 2020), <https://perma.cc/NH2W-J82Y>.

<sup>8</sup> *COVID-19 Exacerbates the Risk of Ill-Treatment and Torture Worldwide — UN Experts*, OFF. HIGH COMM'R, COMM. HUM. RTS. (June 26, 2020), <https://perma.cc/34V6-J8PM>.

<sup>9</sup> See *Education: From Disruption to Recovery*, UNESCO, <https://perma.cc/SPL6-KU8Y> [hereinafter UNESCO].

argue that it depends on the nature of the rights themselves. To better situate Chilton and Versteeg's theoretical contribution, I first discuss two other variables emphasized in the literature: characteristics of states and characteristics of constitutions.

#### A. Characteristics of States

The relationship between constitutions on paper and constitutions in action likely depends on state characteristics. For example, democratic and wealthy states with independent judiciaries, are more likely to respect constitutional (and all other types of) rules. For instance, Versteeg and coauthor Professor David S. Law examine the extent to which constitutions are mere "parchment barriers" and identify regime type and civil conflict as critical predictors of whether a constitution will be a sham constitution, or a functional guardian of rights.<sup>10</sup> In a related significant contribution, Professor Beth Simmons reports that it is neither in stable autocracies nor in stable democracies that human rights treaties make the greatest difference, but instead, in transition states.<sup>11</sup> In contrast, in this book, Chilton and Versteeg argue that their "basic story—of religious groups, trade unions, and political parties using the constitution to protect their rights—does not necessarily depend on whether countries are democratic or have independent courts."<sup>12</sup> This finding is very powerful and provocative.

#### B. Characteristics of Constitutions

In addition, the form of constitutions could matter, including their scope and the number of rights they enumerate.<sup>13</sup> In *Constitutions Unentrenched*, Versteeg and Professor Emily Zackin explore the question of which constitutional design mechanisms enable citizens to effectively control their government.<sup>14</sup> The authors compare two competing models of constitutional design. The first model—and the one that currently dominates constitutional theory literature—is entrenchment.<sup>15</sup> Constitutions that are

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<sup>10</sup> See David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863, 867, 919–22 (2013).

<sup>11</sup> See BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 153 (2009).

<sup>12</sup> CHILTON & VERSTEEG, *supra* note 2, at 10.

<sup>13</sup> See Law & Versteeg, *supra* note 10, at 898.

<sup>14</sup> See generally Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657 (2016).

<sup>15</sup> See *id.* at 659–60.

entrenched tend to be difficult to amend and contain vague principles rather than specific, comprehensive policies.<sup>16</sup> Entrenched constitutions are generally narrow in scope and describe only the basic structures of government and the rights it cannot violate.<sup>17</sup>

The second model—which is developed by Versteeg and Zackin as an alternative, competing version of constitutionalism—is un-entrenchment, or specificity. Un-entrenched constitutions are easy to amend, textually flexible, and contain highly detailed policies.<sup>18</sup> As such, un-entrenched constitutions are broad in scope and frequently updated so as to adapt to social, political, and economic changes.<sup>19</sup> Contrary to a large literature that assumes that entrenched constitutions, like the U.S. Constitution, are superior, Versteeg and Zackin show that un-entrenched constitutions are becoming much more common, which could allow citizens to more effectively control governmental behavior.<sup>20</sup>

### C. Characteristics of Rights

The main theoretical innovation of *How Constitutions Matter* is to develop a theory about which rights are more likely to be enforced, even in states that are not advanced democracies with stable protections.

In an earlier work, Law and Versteeg find that globally, on average, socioeconomic and group rights are less likely to be upheld than personal integrity rights and civil and political freedoms.<sup>21</sup> In a related work on human rights treaties, Simmons mentions in passing that rights to religion are more likely to be enforced than rights to fair trials because the constituency for fair trials is likely to be small and powerless.<sup>22</sup> But these works constitute exceptions to a general pattern in the literature—namely

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<sup>16</sup> See *id.* at 659.

<sup>17</sup> See *id.*

<sup>18</sup> See Katerina Linos & Tom Pegram, *The Language of Compromise in International Agreements*, 70 INT'L ORG. 587, 613 (2016) [hereinafter Linos & Pegram, *Language of Compromise*] (explaining why highly precise international templates are significantly more likely to be effective in influencing national human rights practices as compared to more flexible templates). See generally Katerina Linos & Tom Pegram, *Architects of Their Own Making: National Human Rights Institutions and the United Nations*, 38 HUM. RTS. Q. 1109 (2016); Katerina Linos & Tom Pegram, *What Works in Human Rights Institutions?*, 111 AM. J. INT'L L. 628 (2017).

<sup>19</sup> See Versteeg & Zackin, *supra* note 14, at 660–61.

<sup>20</sup> See *id.* at 660.

<sup>21</sup> Law & Versteeg, *supra* note 10, at 916–17.

<sup>22</sup> SIMMONS, *supra* note 11, at 357.

that there is very little systematic study of whether constitutions can help protect some rights, but not others.

In this book, Chilton and Versteeg adopt a novel theory—they argue that some rights, rights that are more organizational, are more likely to be respected because they create organizations with the incentives and means to protect the underlying right.<sup>23</sup> Thus, for example, labor rights are more likely to be protected once established in a constitution because unions are likely to develop to protect these rights.<sup>24</sup> In contrast, freedom from torture doesn't have an organized, natural constituency that can easily monitor and address violations.<sup>25</sup> These claims are important, novel, and provocative, but they are not all this book offers. Chilton and Versteeg don't merely propose hypotheses, or propose hypotheses and then test them, as important empirical scholarship does. Instead, they build a theory from the ground up, stating key assumptions and deriving from these particular hypotheses. In the next Section, I outline (and also question) their key moves.

## II. HOW ORGANIZATIONAL RIGHTS WORK: THE THEORETICAL CONTRIBUTION

Chilton and Versteeg's contribution is significant because it is a true theory. It is a series of logically interconnected propositions, rather than a set of tangentially related or unrelated hunches and hypotheses. This form of deductive reasoning, in which assumptions are clearly stated, is critical. It also facilitates empirical testing and the scientific process more generally.<sup>26</sup> In this deductive process, Chilton and Versteeg first explain what constitutional rights have the potential to do in general, and then

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<sup>23</sup> See CHILTON & VERSTEEG, *supra* note 2, at 27. See also generally Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 AM. J. POL. SCI. 575 (2016) [hereinafter Chilton & Versteeg, *Do Constitutional Rights Make a Difference?*]. Cf. Adam Chilton & Mila Versteeg, *The Failure of Constitutional Torture Prohibitions*, 44 J. LEGAL STUD. 417, 429 (2015) [hereinafter Chilton & Versteeg, *Torture Prohibitions*] (describing data that revealed a cursory increase in the respect for the prohibition of torture ten years after a nation's addition of a constitutional prohibition against torture, suggesting that the prohibition against torture is not an organizational right and therefore is less easily protected).

<sup>24</sup> See CHILTON & VERSTEEG, *supra* note 2, at 291.

<sup>25</sup> See *id.* at 138.

<sup>26</sup> See Katerina Linos & Melissa Carlson, *Qualitative Methods for Law Review Writing*, 84 U. CHI. L. REV. 213, 231–35 (2017); Katerina Linos, *How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics*, 109 AM. J. INT'L L. 475, 480 (2015).

move on to the second step, to explain the added value of organizations.

#### A. The Work Constitutional Rights Do

Chilton and Versteeg envision constitutional rights not as tight knots, binding Ulysses to the mast, but as speed bumps.<sup>27</sup> They quote Henry Kissinger, who allegedly said, “[T]he illegal we do immediately, the unconstitutional takes a little longer.”<sup>28</sup> I very much like this focus on the ease with which a leader can act to suspend a protection or implement a new initiative. While speedbumps sometimes only lead to short delays in policy implementation, at other times, a temporary change in focus permanently derails a project.

More specifically, according to Chilton and Versteeg, constitutional rights facilitate “coordination” and “collective action.” “Coordination” is a slightly awkward term for an important concept: helping individuals understand what to think about a conflict and how to assess who is behaving correctly and who is at fault.<sup>29</sup> More specifically, when there is an allegation that a right has been violated, is the government or the aggrieved party to blame? If a community wants to protest or pray or party, and the state shuts down these efforts, “framing grievances as rights violations” can in some contexts shift the balance of power toward the aggrieved community.<sup>30</sup> Chilton and Versteeg term this clarifying power of the language of rights “coordination” by analogy to the game theoretic literature on the importance of clear rules about which side of the road to drive on.<sup>31</sup> Clear rules establish which activities are permitted, from driving on the left side of the road to practicing particular religious rites, facilitating coordination between parties in the process.

Their terminology is a bit awkward, because a key feature of coordination games is that they have only minor distributional consequences. At the end of the day, it doesn’t matter whether the right or the left side of the road is chosen, as long as there is no uncertainty. In contrast, distributional conflict is central to any discussion about rights. We very much care about which

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<sup>27</sup> See CHILTON & VERSTEEG, *supra* note 2, at 12, 58.

<sup>28</sup> See *id.* at 6 (quoting Memorandum of Conversation, *Aid Cut-Off: Cyprus*, WIKILEAKS: PUB. LIB. OF U.S. DIPL. (Mar. 10, 1975), <https://perma.cc/9EHD-BPMN>).

<sup>29</sup> See *id.* at 29–30.

<sup>30</sup> *Id.* at 33.

<sup>31</sup> *Id.* at 28.

community will see its rights protected and which behaviors the government will suppress. That said, any lawyer, and many nonlawyers, would agree that clearly written and highly precise rules specifically permitting or even requiring certain behaviors help shift the balance of power toward the party advantaged by the precise formulation.<sup>32</sup> This is analogous to the concept of focal points in coordination and other types of formal games. So this is an important, and very plausible, first theoretical step in a model about why constitutional rights matter.

“Collective action” is the second important task rights help facilitate, according to Chilton and Versteeg. States can crush individuals however precisely their rights are enumerated—the power asymmetry is too large. Indeed, as Chilton and Versteeg put it, “[g]overnments are not rattled by small groups of protesters; it is large crowds that make them wary.”<sup>33</sup> They cite research by Professor Erica Chenoweth and Dr. Maria J. Stephan that a protest event turnout reaching or exceeding 3.5% of the population is especially worrisome to governments.<sup>34</sup> Collective action is essential for the protection of all rights but is much more likely to accompany certain types of rights, according to Chilton and Versteeg. Their core contribution, which I turn to shortly, is that organizational rights come with organizations that facilitate coordination and collective action, whereas individual rights do not.

But first, some important caveats about the theory of coordination and collective action that Chilton and Versteeg put forward: First, it’s a *general* theory, not *dependent* on particular institutional structures. An alternative theory of why constitutional rights matter, for instance, might be that constitutional rights are enforced by courts and police forces, and parties behave in the shadow of powerful and efficient state institutions. Second, it is a *static* theory. An alternative, *dynamic* theory of the influence of rights might be a one-way ratchet. For example, the first generation of leaders may simply parrot rights language because that’s what’s expected in polite society of international fora, but a second generation of leaders then grows up with rights discourse everywhere and genuinely believes in human rights, having

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<sup>32</sup> For related empirical work on the importance of precise wording in the human rights context, see generally Linos & Pegram, *Language of Compromise*, *supra* note 18.

<sup>33</sup> CHILTON & VERSTEEG, *supra* note 2, at 32.

<sup>34</sup> See ERICA CHENOWETH & MARIA J. STEPHAN, WHY CIVIL RESISTANCE WORKS: THE STRATEGIC LOGIC OF NONVIOLENT CONFLICT 39–41 (2011).

internalized this new system of moral values.<sup>35</sup> Third, there may be some missing, implicit assumptions about *constitutional*, as opposed to *statutory* or *administrative*, protections. On the one hand, constitutional protections typically have higher status than protections enshrined in ordinary laws or administrative actions. At the same time, constitutional protections are often far less precise than other types of rules. Is a vague formulation of very high status sufficient to allow for what Chilton and Versteeg term “coordination”? Would a vague rule like “always drive on the side of the road which maximizes safety” or “everyone has a right to free speech” significantly help an aggrieved party in establishing she was in the right? I bracket these questions for now, in order to dive deeper into the key theoretical contribution Chilton and Versteeg offer: the concept of organizational rights.

## B. Organizational Versus Individual Rights

Chilton and Versteeg argue that some rights are automatically more likely to be supported by organizations than others.<sup>36</sup> Churches, synagogues, mosques, temples, and other religious organizations have built-in reasons and built-in mechanisms to support religious freedoms.<sup>37</sup> Unions are designed in order to protect labor rights and may have the tools for this. Political parties are similarly motivated to protect their continued existence.<sup>38</sup>

What about the individual rights that organizations help protect? Don't organizations also spring up around individual rights such as free speech and freedom from torture? Chilton and Versteeg are very concrete in their response: they propose that while media organizations often defend the right to free speech, schools often advocate for the right to education, and hospitals often defend the right to health, these three rights are not organizational.<sup>39</sup> Why not? What exactly does an organizational right entail? And why does the category of organizational rights include both rights traditionally classified as individual rights and rights traditionally classified as social rights?

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<sup>35</sup> See THOMAS RISSE, STEPHEN C. ROPP & KATHRYN SIKKINK, *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 34 (1999).

<sup>36</sup> See CHILTON & VERSTEEG, *supra* note 2, at 53–56.

<sup>37</sup> See *id.* at 54.

<sup>38</sup> See *id.* at 36–37.

<sup>39</sup> See *id.* at 53–56 (explaining that certain groups lack the member bases, means, or incentives to defend what the authors define as organizational rights).

According to Chilton and Versteeg, selective benefits are key to the protection of organizational rights.<sup>40</sup> Trade unions, religious organizations, and political parties offer substantial concrete benefits primarily to their members. In contrast, the ACLU and other advocacy organizations that protect free speech lack this built-in mechanism for developing and sustaining a powerful constituency. Amnesty International and other organizations that seek to limit unjust imprisonment and torture similarly have no natural constituency. The thank-you note, the address labels, and occasional invitation to an event that advocacy organizations offer to their donors each pale in comparison to the very regular interactions and material benefits members of unions, political parties, and religious organizations enjoy.<sup>41</sup>

They emphasize that organizations have legal personality, and, to the extent this legal personality is respected without question from states eager to suppress particular activity, this is a major advantage. As Chilton and Versteeg write:

A group that lacks legal personality has to rely on individual members to engage in basic transactions such as opening a bank account, signing a lease, and being able to sue or be sued, which can expose members to excessive individual liability. Such groups also lack perpetual succession, meaning that it is difficult for leadership to turn over. They further cannot conceal members' identities to shield them from government retaliation.<sup>42</sup>

Another important insight about organizations is that long-established organizations are much better at protecting rights than newly formed protest groups created to resist a particular aggression. As Chilton and Versteeg's Polish case study in Chapter 6 illustrates, when an authoritarian government started suppressing dissent, newly formed protest groups weren't able to resist the incursion.<sup>43</sup> I return to this concern in the last part of this Book Review to speculate about why established groups may be much better able to handle the challenges of the pandemic than newly formed coalitions.

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<sup>40</sup> *See id.* at 273–74.

<sup>41</sup> For examples of these benefits rendered by organizations, see CHILTON & VERSTEEG, *supra* note 3, at 36–37, 54.

<sup>42</sup> *Id.* at 42.

<sup>43</sup> *See id.* at 128–29.

Certainly, there are ways to critique this argument about organizations. For example, in emphasizing the selective benefits that only some types of organizations can offer, Chilton and Versteeg prioritize the material and concrete over the spiritual and intangible. Religious organizations, for instance, often promise both gains in this life and in the other life, and other types of movements to protect (or suppress) rights similarly seek to attract the “righteous.” Religious movements, human rights advocates, and ethnonationalist groups differ in key ways, but share in their goal to create organizations in which people can find belonging, purpose, and connectedness, in addition to material advantages. At the end of the day, however, and despite this and many other potential caveats, I agree with Chilton and Versteeg that it might be that certain rights are much easier to organize around than others. As their argument is not only a theoretical one, but also one deeply grounded in empirics, persons more skeptical about the plausibility of their thesis can dig deep in their data to see what support they find.<sup>44</sup>

### III. *HOW CONSTITUTIONAL RIGHTS MATTER*: THE EMPIRICAL CONTRIBUTION

Chilton and Versteeg use a mixed-method approach—an approach that combines the breadth of quantitative research with the depth of qualitative case studies—to probe their claim. While mixed methods are strongly preferred over other techniques in many social sciences these days,<sup>45</sup> carrying them out well remains very challenging. Chilton and Versteeg’s quantitative analysis represents a model of transparency, while their well-chosen and gripping case studies give context and color and mechanisms.

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<sup>44</sup> See *id.* at 339–68 (providing regression results summarizing four comparisons used to assess the relationship between de jure constitutional rights and de facto respect for those rights; and reporting the results of a series of nine additional regressions, with complex model specifications, that explore the robustness of the authors’ primary results for each right).

<sup>45</sup> See generally James D. Fearon & David D. Laitin, *Integrating Qualitative and Quantitative Method*, in *THE OXFORD HANDBOOK OF POLITICAL METHODOLOGY* 758 (Janet M. Box-Steffensmeier et al. eds., 2008) (noting the importance of mixed methods in the field of social science research). See also JOHN W. CRESWELL, *RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES* 43–44 (4th ed. 2014) (discussing the strengths of mixed method studies).

### A. Quantitative Contribution

Quantitative research, while not always deep, is often broad. Breadth is a major contribution when little is known about foreign legal systems, and when we suspect that the countries we know best are systematically different than those on which little sunlight shines. Simply put, authoritarian states, and states with limited capacity, are both less likely to protect rights and less likely to be transparent to outsiders. When we look for our keys under the light post—and this light shines on a handful of wealthy democracies—our conclusions are very likely to be biased. In a very surprising and counterintuitive finding, for example, Chilton and Versteeg report that democracy and judicial institutions are not always linked to greater respect for rights—this comes as a big surprise to those of us who are less familiar with authoritarian regimes.<sup>46</sup>

To start, by creating a careful dataset on constitutions from around the world, validating it against other similar projects, and making it accessible to researchers online, the authors have already made a huge contribution to the field.<sup>47</sup> In this project, Chilton and Versteeg then use a cutting-edge empirical strategy to estimate how enforcement varies depending on the right in question. For every right, they present both simple cuts of the data (before/after, presence/absence) and sophisticated stacked event studies.<sup>48</sup> This approach is a model of transparency, letting critics easily access their data and identify any limitations.

There are many reasons for which Chilton and Versteeg's empirical strategy serves as a model of transparency. To start, much of it is simple. While complicated adjustments are often necessary to sort through complex, multicausal processes, starting off with presence/absence and before/after charts very much helps situate the reader. It also limits the extent to which unstated empirical assumptions hidden in complex regression specifications can drive the results. Second, the technique the authors use is consistent. Showing the same four figures for multiple rights again imposes major constraints on the authors' ability to fit the data to their theory, while also making it easier for the reader to make comparisons across rights discussed in different book chapters.

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<sup>46</sup> See CHILTON & VERSTEEG, *supra* note 2, at 49–50.

<sup>47</sup> Data for this project is available at [www.constitutions.org](http://www.constitutions.org). A parallel contribution, *The Comparative Constitutions Project Dataset*, pioneered by Professors Zachary Elkins, Tom Ginsburg, and James Melton, is available at [www.comparativeconstitutionsproject.org](http://www.comparativeconstitutionsproject.org).

<sup>48</sup> See CHILTON & VERSTEEG, *supra* note 2, at 106–07.

Third, these simple analyses are robust to alternative formulations. Notably, Chilton and Versteeg used stacked event studies for their book and related articles analyzing the same data.<sup>49</sup> Stacked event studies allow for the inclusion of multiple control variables.<sup>50</sup> The use of many variables helps ensure that the actual comparability of subjects—rather than idiosyncratic regression model assumptions—drives the results.<sup>51</sup> Fourth, the analyses are visually appealing. Placing many figures and maps in the book itself, and reserving regression tables for the appendices, represents best practice.

Even though this book represents the best that is currently possible in cross-country quantitative analysis, it is still subject to limitations inherent to the genre, which Chilton and Versteeg readily acknowledge.<sup>52</sup> Notably, we simply lack high-quality, consistent data about many features of the world that we care about; this data challenge is compounded when we seek to compare across all countries of the world, and when we seek to go back to the time when constitutions were introduced or amended. This is a challenge that international organizations have been fighting for some time and are now further prioritizing. To take one example, the 2018 Global Compact for Migration lists as its very first objective to “[c]ollect and utilize accurate and disaggregated data as a basis for evidence-based policies.”<sup>53</sup> Policy makers around the world are now coming to the conclusion that data collection must be prioritized to address urgent international challenges, and investing the resources necessary for this work.

An important way to make sense of the world while we still lack consistent, high-quality data is to supplement cross-national quantitative comparisons with in-depth, qualitative case studies, so I turn to this next.

## B. Qualitative Analyses

There has been very extensive progress on the qualitative methods front, and fields that were once criticized as being merely

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<sup>49</sup> See *id.* at 106–12; Chilton & Versteeg, *Do Constitutional Rights Make a Difference?*, *supra* note 23, at 580; Chilton & Versteeg, *Torture Prohibitions*, *supra* note 23, at 424–31.

<sup>50</sup> See CHILTON & VERSTEEG, *supra* note 2, at 106–10.

<sup>51</sup> See *id.*

<sup>52</sup> See *id.* at 100–13.

<sup>53</sup> Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration, *Global Compact for Safe, Orderly and Regular Migration*, at 6, U.N. Doc. A/CONF.231/3 (July 30, 2018).

descriptive—failing to identify concrete causal mechanisms—now have succeeded in persuading hard-edged quantitative scholars about why mixed methods are often essential in the study of diverse human institutions.<sup>54</sup> This is especially important in cross-national comparison. To start, the unit of analysis, be it the state or the minority group or the particular right at issue, is far from homogeneous. To continue, there is so much that can be done with case studies, not only to accurately describe but also to assess causal claims.

Chilton and Versteeg do exactly this: they conduct multiple case studies—and use within-case analysis—to develop an account of how organizational rights operate in practice.<sup>55</sup> To identify causal-process observations, the authors go far beyond the constitutional text, employing a wide variety of primary and secondary sources. By weighing available evidence against specific propositions, Chilton and Versteeg effectively support their general claim that organizations are critical to the realization of rights, and their specific thesis that organizational rights are different from other rights. They show us how legal scholars can develop temporally linked propositions with distinctive empirical signatures, and how evaluating these propositions against available evidence can substantially increase their persuasiveness.

Good case study scholarship starts with careful case selection.<sup>56</sup> Chilton and Versteeg do this masterfully. For example, in Chapter 7, which focuses on social rights, the focus is helpfully on Colombia.<sup>57</sup> This follows the principles of most difficult case design—meaning the authors have selected cases where their hypothesis is most likely to fail.<sup>58</sup> Colombia presents a difficult case for Chilton and Versteeg’s theory that social rights are not easily enforced because the Colombian judiciary actively enforces social

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<sup>54</sup> See Linos & Carlson, *supra* note 26, at 214–15 (describing the pitfalls of legal scholars relying too heavily on qualitative methodology or on doctrinal analysis tools that lead to overreliance on groundbreaking yet “idiosyncratic” cases; and advocating for a mix of these and quantitative methods); Linos, *supra* note 26, at 484 (arguing similarly that “[w]hile case selection principles . . . are useful starting points, they are unlikely to fully confirm or disconfirm a causal claim involving cross-country comparisons”).

<sup>55</sup> See CHILTON & VERSTEEG, *supra* note 2, at 115–19.

<sup>56</sup> See Linos & Carlson, *supra* note 26, at 217–19 (discussing qualitative techniques for selecting desirable cases). See generally Linos, *supra* note 26 (detailing methodologies for case selection to achieve various ends, such as case selection to establish causation or case selection to establish generality).

<sup>57</sup> See CHILTON & VERSTEEG, *supra* note 2, at 192–206.

<sup>58</sup> See Linos & Carlson, *supra* note 26, at 225–26.

rights.<sup>59</sup> Famously, in *The Hollow Hope*, Professor Gerald N. Rosenberg argued that the U.S. Supreme Court was far less influential in bringing about social change than commonly believed.<sup>60</sup> He made a huge stir in the academy and beyond, even though he discussed just two cases. These two cases, *Brown v. Board of Education*,<sup>61</sup> establishing a constitutional right to desegregated schools, and *Roe v. Wade*,<sup>62</sup> establishing a constitutional right to abortion, were not only highly significant, but they were the two most difficult cases for his argument about the Supreme Court's limited relevance.<sup>63</sup>

Similarly, Chilton and Versteeg, in arguing that social and economic rights, and the right to health in particular, are not well protected by constitutions, pick an example of a country with a particularly activist judiciary engaged in enforcing and developing health care rights. By focusing on a constitutional court celebrated for its health care jurisprudence—and flagging the important limitations of this court—Chilton and Versteeg build on their argument that enforcement of the right to health care is particularly challenging.

The second, equally critical step to excellent qualitative work is within-case analysis.<sup>64</sup> A detective does not rely on statistical generalizations of the type “crime is often committed by young men, therefore this old woman cannot be guilty,” but instead, she relies on a series of theories with testable propositions and, ideally, distinctive, fingerprint-like (or DNA-like) empirical signatures. Likewise, the careful qualitative scholar seeks to identify motive and opportunity and track down very different types of evidence for each individual case. Action is just as important as inaction. For instance, Chilton and Versteeg point to the dog that didn't bark because its rights were not threatened: they discuss how for many years, the Russian Orthodox Church never even had to assert its rights, because even as President Vladimir Putin sought total control of the state, this organization was too

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<sup>59</sup> See CHILTON & VERSTEEG, *supra* note 2, at 172.

<sup>60</sup> See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

<sup>61</sup> 347 U.S. 483 (1954).

<sup>62</sup> 410 U.S. 113 (1973).

<sup>63</sup> See ROSENBERG, *supra* note 60, at 340.

<sup>64</sup> See GARY GOERTZ & JAMES MAHONEY, *A TALE OF TWO CULTURES: QUALITATIVE AND QUANTITATIVE RESEARCH IN THE SOCIAL SCIENCES* 87–90 (2012) (explaining that within-case analysis is beneficial for qualitative studies because it allows researchers to explain particular outcomes of individual cases with authority).

powerful to challenge.<sup>65</sup> This case presents a convincing example of when organizational rights may be uniquely protected through the power of the organization.

As the world changes radically around us, and the rise of authoritarianism is compounded by a pandemic that gives cover to leaders of all stripes to implement their preferred policies, historical and comparative work becomes essential. As Professor Martha Minow puts it, “[t]o be able to imagine how the world could be different from the way it is, this is what study of history, comparative law and even science fiction can offer.”<sup>66</sup> In the last part of this Book Review, I therefore turn to insights we can draw from *How Constitutional Rights Matter* to better understand our current predicament.

#### IV. RIGHTS IN CRISES: HAVE ORGANIZATIONAL RIGHTS FARED BETTER THAN OTHER RIGHTS IN THE PANDEMIC?

Jean Monnet, a founding father of the European Union, argued that “Europe would be built through crises, and that it would be the sum of their solutions.”<sup>67</sup> More recently, at the beginning of the Great Recession, then–White House Chief of Staff Rahm Emanuel emphasized, “You never want a serious crisis to go to waste. And what I mean by that is an opportunity to do things that you think you could not do before.”<sup>68</sup> And as the United States started pandemic lockdowns, comedian Trevor Noah emphasized that while many Americans took the opportunity to start baking, President Donald Trump also pursued his favorite hobby: the implementation of immigration restrictions.<sup>69</sup> Politicians have been using crises as opportunities for long enough that the “garbage can” model of politics is now widely taught. As Professor John Kingdon explains, activists, think tanks, lobbyists,

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<sup>65</sup> See CHILTON & VERSTEEG, *supra* note 2, at 231–33, 243–44, 332–33.

<sup>66</sup> Emily Newburger, ‘What Justice Demands of Us, No One Person Can Do Alone.’ *Looking Back and Ahead with Martha Minow*, HARV. L. BULL. (May 17, 2017), <https://perma.cc/N3DY-AUQB>.

<sup>67</sup> JEAN MONNET, MEMOIRS 417 (1978).

<sup>68</sup> Viveca Novak, *Bum Rap for Rahm*, FACTCHECK.ORG (Jan. 13, 2011), <https://perma.cc/Y7ZE-6J3N>.

<sup>69</sup> See Trish Bendix, *Some Bake During Lockdown. Trump Bans Immigrants, Trevor Noah Notes.*, N.Y. TIMES (Apr. 22, 2020), <https://perma.cc/7REQ-8EGA>; see also Caitlin Dickerson & Michael D. Shear, *Before COVID-19, Trump Aide Sought to Use Disease to Close Borders*, N.Y. TIMES (May 3, 2020), <https://perma.cc/GMG9-QC8Y> (indicating that long before COVID-19 started, top President Trump aide Stephen Miller sought to try to restrict immigration on public health grounds).

and politicians work on their ideas for decades, and only when the right opportunity arises and a crisis or other event opens up a “policy window” do such ideas get translated into policy.<sup>70</sup>

#### A. The Pandemic

The global pandemic is an extraordinary policy window, and leaders around the world have used it to put in place previously unimaginable reforms. Prime Minister Viktor Orban of Hungary first used COVID-19 as cover to start ruling by decree,<sup>71</sup> and then started to restrict a wide variety of rights, including transgender rights, in ways entirely unrelated to the pandemic.<sup>72</sup> Hungary was not alone: elections were delayed in Bolivia, courts were closed in Israel, and journalists were intimidated in Thailand and Jordan, to name but a few examples.<sup>73</sup> In contrast, Chancellor Angela Merkel of Germany has used the COVID-19 crisis to push forward unprecedented reforms in the direction of further EU integration and North-South solidarity.<sup>74</sup> This involves an \$857 billion stimulus package, in which the poorer southern EU countries benefit both from the issuance of collective debt, backed by their northern neighbors, and by receiving much of this assistance in the form of grants, not loans.<sup>75</sup> Jointly issued debt was discussed a decade earlier in the course of the Great Recession but was considered extraordinarily radical. In short: the pandemic has provided unprecedented opportunities for politicians of diverse ideologies to implement policy reforms that were previously considered beyond the realm of possibility.

The pandemic also constitutes a hard test of the Chilton and Versteeg thesis. Amidst a global emergency that has led many countries to implement widespread rights restrictions, are organizational rights more likely to prove robust to threats than individual rights? In answering this question, it is helpful to distinguish between rights restrictions that represent minimum

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<sup>70</sup> See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 174–75 (1984).

<sup>71</sup> See Benjamin Novak & Patrick Kingsley, *Hungary's Leader Grabbed Powers to Fight the Virus. Some Fear Other Motives.*, N.Y. TIMES (Apr. 5, 2020), <https://perma.cc/9ZP3-K7Y7>.

<sup>72</sup> See Benjamin Novak, *Hungary Outlaws Changing Gender on Documents After Birth*, N.Y. TIMES (May 28, 2020), <https://perma.cc/5778-MX6G>.

<sup>73</sup> See Selam Gebrekidan, *For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power*, N.Y. TIMES (Mar. 30, 2020), <https://perma.cc/J8H7-EGVF>.

<sup>74</sup> See Matina Stevis-Gridneff, *E.U. Adopts Groundbreaking Stimulus to Fight Coronavirus Recession*, N.Y. TIMES (July 20, 2020), <https://perma.cc/95TS-GXVZ>.

<sup>75</sup> See *id.*

restrictions necessary to combat the virus, and power grabs in which governments use the pandemic as a pretext to entrench unrelated policies. International law, human rights law, and many countries' constitutional rules on the derogation of human rights provide a helpful conceptual framework for this distinction. An appropriate derogation requires the existence of a threat to the life of a nation, a formal declaration, and a recognition that some rights can never be suspended.<sup>76</sup> Moreover, an appropriate derogation requires that restrictions be lifted when the emergency ends, and, just as a limitation, requires that all restrictions be related and proportional to the emergency.<sup>77</sup> A rights restriction which is excessive relative to the emergency, and thus violates human rights law, is not always put in place by an authoritarian government eager to grab more power. Democratic governments can often violate rights by being overly cautious in responding to COVID-19, for example, or by allocating too little funding in ordinary or crisis times, as a large jurisprudence on social and economic rights explains.

Human rights jurisprudence on pandemics can add precision on which rights are appropriately restricted, and which rights are unnecessarily curtailed, perhaps, as Chilton and Versteeg argue, because they lack robust organizational protection. Pandemic jurisprudence emphasizes, for example, that quarantines are permissible even though they severely restrict freedom of movement. For example, Article 5, Section 1(e) of the European Convention on Human Rights permits "the lawful detention of persons for the prevention of the spreading of infectious diseases" as long as this is in "accordance with a procedure prescribed by law."<sup>78</sup> Indeed, courts have upheld quarantines that include, in extreme cases, compulsory involuntary detention.<sup>79</sup>

### 1. Civil and political rights.

Civil and political rights, such as freedom of movement, are rights that lack inherent organizational support in the Chilton

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<sup>76</sup> See generally David Kretzmer, *State of Emergency*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2008); Audrey Lebet, *COVID-19 Pandemic and Derogation to Human Rights*, 7 J.L. & BIOSCIS. 1 (2020).

<sup>77</sup> See generally Kretzmer, *supra* note 76; Lebet, *supra* note 76; Laurence Helfer, *Rethinking Derogations from Human Rights Treaties*, 115 AM. J. INT'L L. 20 (2021) (reviewing the system of limitations and derogations post-COVID-19).

<sup>78</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 5 § (1)(e), *opened for signature* Nov. 4, 1950, E.T.S. No. 5 (entered into force Sept. 3, 1953).

<sup>79</sup> See, e.g., *Enhorn v. Sweden*, 2005-I Eur. Ct. H.R. 97.

and Versteeg typology. In the COVID-19 era, freedom of movement is restricted in unprecedented ways; not only are international borders effectively closed to noncitizens in much of the world, but over 133 countries have also imposed internal controls on movement.<sup>80</sup> Moreover, many states have derogated from the right of assembly.<sup>81</sup> While extraordinary in scope, these restrictions on individual rights in response to COVID-19 do not seem, at first glance, obviously unnecessary and inappropriate.

At the same time, many governments are putting in place COVID-19-related censorship efforts, which often take the form of restrictions on fake news and limit freedom of expression.<sup>82</sup> In the hands of authoritarian governments, such restrictions often far exceed in scope any plausible pandemic-related rationale. But even when implemented by well-meaning democratic governments, information restrictions in times of crisis can often backfire by creating mistrust in officials and opening up space for self-interested information brokers to tell alternative narratives.<sup>83</sup> Other restrictions on individual freedoms that authoritarian states, such as Venezuela, are implementing include using the pandemic as pretext to prosecute critics and abuse detainees.<sup>84</sup> This may be a more generalized phenomenon. Information on torture is not readily available, but the UN Anti-Torture mechanisms warn that the pandemic has greatly exacerbated the ill-treatment of prisoners, that tens of thousands of prisoners have already contracted COVID-19 as of mid-June 2020, and these numbers are sure to rise.<sup>85</sup>

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<sup>80</sup> See Slipowitz, *supra* note 7.

<sup>81</sup> See generally LAWS ON THE RIGHT OF PEACEFUL ASSEMBLY WORLDWIDE, DEROGATIONS BY STATES PARTIES FROM ARTICLE 21 ICCPR, ARTICLE 11 ECHR, AND ARTICLE 15 ACHR ON THE BASIS OF THE COVID-19 PANDEMIC (2020); Lebret, *supra* note 76.

<sup>82</sup> See Jacob Mchangama & Sarah McLaughlin, *Coronavirus Has Started a Censorship Pandemic*, FOREIGN POL'Y (Apr. 1, 2020), <https://perma.cc/BZ8Z-8HS6>.

<sup>83</sup> See, e.g., Melissa Carlson, Laura Jakli & Katerina Linos, *Rumors and Refugees: How Government-Created Information Vacuums Undermine Effective Crisis Management*, 62 INT'L STUD. Q. 671, 682 (2018) [hereinafter Carlson et al., *Rumors and Refugees*] (explaining how international organization and government policies restricting information flows to migrants and refugees backfired by making smugglers key information providers); Melissa Carlson, Laura Jakli & Katerina Linos, *Refugees Misdirected: How Information, Misinformation and Rumors Shape Refugees' Access to Fundamental Rights*, 57 VA. J. INT'L L. 539, 568–69 (2017) [hereinafter Carlson et al., *Refugees Misdirected*].

<sup>84</sup> See *Venezuela: A Police State Lashes Out Amid COVID-19*, HUM. RTS. WATCH (Aug. 28, 2020), <https://perma.cc/6JD2-2QTN>.

<sup>85</sup> See *COVID-19 Exacerbates the Risk of Ill-Treatment and Torture Worldwide*, *supra* note 8.

## 2. Social rights.

In addition to civil and political rights, social rights have also been significantly restricted during the COVID-19 crisis. Let us look to two: the rights to education and health care. Chilton and Versteeg classify these as nonorganizational rights, as they are primarily enjoyed and defended by individuals. The right to education has undoubtedly been severely restricted around the globe. UNESCO reports that most governments around the world have temporarily closed schools.<sup>86</sup> UNESCO makes an interactive map available, which illustrates how this varies at different times in the pandemic.<sup>87</sup> School closures peaked in April 2020—when 166 states had countrywide school closures impacting over 1.6 billion learners.<sup>88</sup> As of January 2021, UNESCO estimated that globally, on average, students had lost two-thirds of an academic year due to school closures.<sup>89</sup> The right to health care is also directly and severely compromised by the pandemic, and by government decisions on how to manage the pandemic. For some governments, the pandemic seems like a wake-up call, and there is at least the stated intention to increase investments in health and strengthen health infrastructures.<sup>90</sup>

In short: nonorganizational rights are massively restricted during the pandemic. Every civil and political right examined in the Chilton and Versteeg volume has been severely curtailed, including freedom of movement, freedom of assembly, freedom of speech, and the prohibition against torture. It is not at all clear that these last two sets of restrictions are in any way justifiable, as they do not appear to be related and proportional to the COVID-19 emergency and because freedom from torture is a non-derogable right. Likewise, many social rights have been limited.

Some of these restrictions—like restrictions on the right of free movement—seem entirely appropriate (for now) and are popularly supported.<sup>91</sup> Yet it does seem very possible that other

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<sup>86</sup> See *Education: From Disruption to Recovery*, *supra* note 9.

<sup>87</sup> See *id.*

<sup>88</sup> See *id.*

<sup>89</sup> *UNESCO Figures Show Two Thirds of an Academic Year Lost on Average Worldwide Due to Covid-19 School Closures*, UNESCO (Jan. 25, 2021), <https://perma.cc/KTU6-SMXM>.

<sup>90</sup> See Julia L. Marcus & Joshua Barocas, *The Coronavirus Pandemic Could Transform Our Health Care System—for the Better*, STAT (Apr. 14, 2020), <https://perma.cc/NR6X-BJTW>.

<sup>91</sup> See *All Things Considered, Many Americans Willing to Trade Some Civil Liberties to Combat Coronavirus*, NPR (Apr. 12, 2020), <https://perma.cc/YU4L-TLJ2>.

restrictions, such as restrictions on the right to education, would be more forcefully resisted if students and parents generally, and working mothers in particular, were better organized. I develop this claim below.

### 3. Beyond the pandemic.

Are organizational rights more robust than individual rights in this time of crisis? Are freedom of religion, unionization, and the right to form political parties more robust because of their organizational character? Freedom of religion is impacted through restrictions on all types of gatherings, including religious gatherings, though religious groups have often sought, and sometimes obtained, exemptions.<sup>92</sup> Political rights are restricted during the pandemic, as governments postpone elections and put in place other vote suppression measures,<sup>93</sup> but it does not seem that organizational rights to form parties are under global threat.<sup>94</sup> Core labor union goals, such as widespread employment at good pay and under safe conditions, are under threat globally as the pandemic coincides with widespread business closures. But new restrictions on union activity don't seem to be widely implemented globally, and some unions are showing renewed strength by pressing for health and safety measures and, in some cases, reduced hours of work.<sup>95</sup>

A broad overview of rights restrictions can't give us a clear answer yet. It is too early to tell because, at present, every right studied in the Chilton and Versteeg book, organizational and non-organizational alike, is restricted. Some of these restrictions are appropriate, while others involve clearly excessive and pretextual measures. Some restrictions may, unfortunately, become permanent, and by outlasting the pandemic, reveal their pretextual character. Also, so far, it is not the case that organizational rights are respected uniformly, while individual rights are widely curtailed.

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<sup>92</sup> See Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic* 31–36, 51 (Va. Pub. L. & Legal Theory, Rsch. Paper No. 2020-52; Univ. of Chi., Working Paper No. 747, 2020) (describing judicial rulings on different nations' restrictions of public gatherings).

<sup>93</sup> See Kevin Townsend, *Voter Suppression by Pandemic*, ATLANTIC (Apr. 11, 2020), <https://perma.cc/QYX7-WMUU>.

<sup>94</sup> See Anatoly Kurmanaev, *Latin America Is Facing a 'Decline of Democracy' Under the Pandemic*, N.Y. TIMES (July 29, 2020), <https://perma.cc/YV89-QYBC>.

<sup>95</sup> See Eliza Berkon, *The Pandemic Is Inspiring a Wave of Unionization Efforts. Will It Lead to Greater Protections?*, WAMU 88.5 (May 13, 2020), <https://perma.cc/JAU8-ED9E>.

That said, because Chilton and Versteeg explain the mechanisms through which their theory operates, it is possible to take a closer look at whether their proposed mechanisms are already at work. By deepening this thought experiment and more closely comparing two rights, the right to religion and the right to education, it is possible to identify the value of organizations. This comparison offers some support for the Chilton/Versteeg thesis. More specifically, I will argue that in the face of unprecedented challenges, religious organizations, unlike student and parental organizations, have been able to articulate shared positions and fight for them through direct political representation, protests, and litigation.

#### B. Case Study: Education and Religious Rights

I compare the right to religion and the right to education because they are often exercised, and restricted, in similar ways. That is, it is common for both religious and educational services to take place in groups. In the pandemic, many group activities are restricted, so as we compare the two rights, the question is whether, for moderate levels of COVID-19 risk, we see different restrictions and different protests in response to these restrictions.

Comparing two rights, one organizational and the other non-organizational, that are otherwise similar is a useful case-selection strategy. This follows Mill's "most similar case" design so often used in qualitative and quantitative social science.<sup>96</sup> But as no two cases are ever sufficiently similar, it is important to combine careful case selection with within-case analysis, also known as process tracing.<sup>97</sup> Process tracing requires that a theory not only has an end point and a conclusion, but also specific mechanisms. A scholar then looks for evidence of these mechanisms or intermediate steps.

In the Chilton and Versteeg account, two mechanisms—information and collective action—are critical to the robustness of organizational rights. During crises, information dissemination is critical, and governments, by delaying in its production or by being untrustworthy, often create information vacuums ripe for exploitation.<sup>98</sup> Are religious organizations, or student and parental

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<sup>96</sup> See generally Linos & Carlson, *supra* note 26. See also Linos, *supra* note 26, at 481–82.

<sup>97</sup> See Linos & Carlson, *supra* note 26, at 231–32.

<sup>98</sup> See Carlson et al., *Rumors and Refugees*, *supra* note 83, at 682 (identifying frequent policy shifts, limits on information dissemination, and ad-hoc policy implementation

organizations, able to step into this information space to articulate for their members whether their rights are being respected or not? When faced with new threats, who is better able to articulate a collective position, religious organizations or student and parent organizations? And once a position is articulated, who is better able to fight for it?

### 1. Right to religion.

While COVID-19 has come with major restrictions on the rights of religious communities,<sup>99</sup> we also see extraordinary efforts on the parts of these communities to preserve the right to worship communally. In contrast, there seems to be minimal organizational effort on the part of students and parents, and in particular working mothers, to keep schools open. This is puzzling for a number of reasons. To start, there seems to be ample evidence that churches have greatly contributed to the spread of COVID-19,<sup>100</sup> and some evidence that schools are not major contributors to the spread of the virus.<sup>101</sup> There is also ample evidence that school closures harm children. Finally, unlike prisoners, whose ability to organize collectively to vindicate their rights is sharply limited, parents have, and could again use, their numerical and socioeconomic power to advance collective claims. They don't seem to be doing this.

Sometimes, religious organizations are successful in having their claims vindicated. For example, in the United States, most

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as common crisis-management tools that create information vacuums and space for disinformation); Carlson et al., *Refugees Misdirected*, *supra* note 83, at 568–69.

<sup>99</sup> For one example of a major religious restriction on a majority community, see *Hajj 2020: What You Need to Know About This Year's Pilgrimage*, AL JAZEERA (July 25, 2020), <https://perma.cc/9D32-RMBR> (reporting on the cancellation of the Hajj for pilgrims from outside Saudi Arabia that impacted millions of Muslims). See also Ben Hubbard & Declan Walsh, *The Hajj Pilgrimage Is Canceled, and Grief Rocks the Muslim World*, N.Y. TIMES (June 23, 2020), <https://perma.cc/DQM2-SL8A>. For additional examples on how COVID-19 restrictions have impacted minority religious communities, see generally Scott Weiner, Kirsten Lavery & Dominic Nardi, *The Global Response to the Coronavirus: Impact on Religious Practice and Religious Freedom*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, <https://perma.cc/2X4B-M4V2>.

<sup>100</sup> See Kate Conger, Jack Healy & Lucy Tompkins, *Churches Were Eager to Reopen. Now They Are Confronting Coronavirus Cases.*, N.Y. TIMES (July 8, 2020), <https://perma.cc/T77V-YXPM>.

<sup>101</sup> See Dyani Lewis, *Why Schools Probably Aren't COVID Hotspots*, NATURE (Oct. 29, 2020), <https://perma.cc/LYZ4-W7Y3>.

states have religious exemptions to COVID-19 social distancing rules.<sup>102</sup>

To take another example, a decision of the Israeli government to avoid another national lockdown by heavily restricting movement primarily in cities with high virus volumes failed when it turned out that the vast majority of these cities turned out to be Arab or ultra-Orthodox.<sup>103</sup> The political clout of ultra-Orthodox leaders, with separate organizational structures, was critical in having the government of Prime Minister Benjamin Netanyahu reverse course to pay closer attention to constitutional rights.<sup>104</sup> Sometimes, however, religious organizations fail.<sup>105</sup>

## 2. Right to education and health care.

But student organizations, parent organizations, and working-women organizations don't even seem to be trying hard to keep schools open. This is very puzzling, as in many countries parents are a numerically and economically powerful group, and yet they have no national organizations or other infrastructure through which to formulate and fight for collective claims. Working mothers could have organized to keep schools open and to keep their jobs. But in all countries for which the International Labour Organization (ILO) has data, workforce participation declined more sharply for women than for men during the pandemic, in part because of heightened care responsibilities disproportionately shouldered by women.<sup>106</sup>

Working women have organized very successfully in the past; indeed, it is no accident that the first ILO Convention established the eight-hour workday, the second ILO Convention established unemployment insurance, and the third ILO Convention established maternity leave. These three critical conventions date from 1919, the year of the organization's founding. One hundred years

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<sup>102</sup> See Virginia Villa, *Most States Have Religious Exemptions to COVID-19 Social Distancing Rules*, PEW RSCH. CTR. (Apr. 27, 2020), <https://perma.cc/D7MG-A4AV>.

<sup>103</sup> See David M. Halbfinger & Isabel Kershner, *Israel's Virus Czar Was Making Headway. Then He Tangled with a Key Netanyahu Ally*, N.Y. TIMES (Sept. 8, 2020), <https://perma.cc/4UM8-FR47>.

<sup>104</sup> See *id.*

<sup>105</sup> See, e.g., *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (denying injunctive relief for a church seeking an exception to state gathering restrictions); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2603 (2020) (same); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527, 527 (2020) (same).

<sup>106</sup> See *The Impact of the COVID-19 Pandemic on Jobs and Incomes in G20 Economies*, INT'L LAB. ORG. 3 (2020).

later, with women's workforce participation so much better established, it is shocking we are still resorting to privatized solutions, rather than organizational action, to address school closures.<sup>107</sup> These individual, privatized solutions often involve the unpaid work of (primarily) female family members or the private hiring of tutors, and further sharpen gender, class, and race inequities.<sup>108</sup>

In describing education and health care as individual rights, Chilton and Versteeg suggest while organization on the part of students could theoretically be advanced through schools and that organization on the part of patients could theoretically be advanced through hospitals, this will rarely happen. One inference that can be fairly drawn from their work is that, when push comes to shove, both schools and hospitals will prioritize their employees. The pandemic does offer some support for this conjecture. In the course of the pandemic, teacher and parent positions have often conflicted, with teachers seeking remote instruction and shorter hours, and parents seeking in-person instruction and more extensive hours. To the extent that schools could have provided an organizational framework to protect students' rights to education, it seems that they are functioning, at least in some parts of the world, with teachers' interests top-of-mind.<sup>109</sup> This too is very much consistent with Chilton and Versteeg's emphasis on organizational rights, as it is teachers' success at unionizing that

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<sup>107</sup> See KATERINA LINOS, *THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES* 8–9 (2013); Mona L. Siegel, *The Forgotten Origins of Paid Family Leave*, N.Y. TIMES (Nov. 29, 2019), <https://perma.cc/NTJ5-8ZUE>.

<sup>108</sup> Pandemic pods, which are small groups of families who work together to continue their children's education at home, are one example of privatized solutions. For those privileged families who can create and sustain them, pandemic pods are at best suboptimal solutions to school closures, as they make privatized compromises which threaten to significantly set back both public education and women's workforce gains, as well as dramatically widen inequalities. These compromises are in large part an organizational failure. See Emma Goldberg, *The Pandemic's Setbacks for Working Moms*, N.Y. TIMES (July 2, 2020), <https://perma.cc/MKA5-SETV>. Admittedly, if parents were better organized, wealthy families would have benefitted the most. Indeed, it is typical for certain in-groups to benefit more from the exercise of organizational rights at the expense of other individuals. Yet the absence of any form of organizing means the rights of all individuals go unprotected, as illustrated by parents' lack of organization that has impacted both wealthy and low-income parents—albeit to differing degrees, because of the availability of privatized solutions like pandemic pods for wealthy families.

<sup>109</sup> See Dana Goldstein & Elizabeth Shapiro, *Online School Demands More of Teachers. Unions Are Pushing Back.*, N.Y. TIMES (Apr. 21, 2020), <https://perma.cc/LK24-LFJB> (emphasizing that teachers are opting for work from home and reduced contact hours); Benjamin Herold & Holly Kurtz, *Teachers Work Two Hours Less Per Day During COVID-19: 8 Key EdWeek Survey Findings*, EDUC. WK. (May 11, 2020), <https://perma.cc/J7ZH-9QKW>.

contributes greatly to their ability to have their voices heard. Similarly, when there is conflict in the exercise of religious rights among minority and majority groups, it is the best organized who typically triumphs.

To conclude, while rights of all types are widely restricted at present, the pandemic and postpandemic world are illustrating anew the value of organizations such as unions, religious groups, and political parties to bring together people and seek collective benefits, at least for organization members, in times when collective action is urgently needed. In comparing the right to education and the right to freely practice religion, it is clear that both are restricted in important ways. But whereas churches, mosques, and synagogues are fighting these restrictions through political representation and through litigation, parents are not organizing collectively to pressure the state. In one study of litigation in the face of the pandemic, lawsuits by religious organizations were commonplace, whereas lawsuits by parent groups were rare.<sup>110</sup> When parents adopt private solutions, instead of organizing to pressure the state for collective solutions, they are not only taking on short-term costs, but also may be contributing to the deterioration of children's education, women's employment, and a broad range of societal inequalities for years to come.

#### CONCLUSION

Whereas constitutional law scholarship might assume that rights, once put on paper in a constitution, generate protections by themselves, law and social science work emphasize legal mobilization as necessary for rights protection. Chilton and Versteeg move us beyond this scholarship, both by changing the dependent variable from litigation and conflict to enforcement, and by changing the organization from an institution focused on conflict to an institution focused on providing tailored benefits to its members. One innovation in Chilton and Versteeg's *How Constitutional Rights Matter* comes from their emphasis that sometimes, organizations are so strong that governments don't even think to challenge their rights.

Chilton and Versteeg are transforming several fields. They are raising the bar in constitutional law theory by explaining how individual rights and organizational structures connect in a

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<sup>110</sup> See generally Ginsburg & Versteeg, *supra* note 92.

systematic way across very diverse national landscapes. They are documenting how best to answer empirical questions in comparative and international law, even when there exist multiple theories that are consistent with key facts about the world. Their data presentation is a model of transparency. But most of all, Chilton and Versteeg have put forth a theory that already seems to stand the test of time, by helping explain the post-pandemic world.