ARTICLES

DIASPORA BONDS

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Diasporas—groups who maintain ties to a homeland while living abroad—present a challenge to standard paradigms of international law. The dominant statist model of international law, which limits the reach of a state's laws to its own geographic boundaries, allows no legal connection between a diaspora and its homeland. The cosmopolitan model of international law, which minimizes the importance of nationality, also discourages such legal ties. Professor Anupam Chander proposes a third paradigm—the diasporan model—which accommodates the dual loyalties and interests of people living in diasporas by allowing them to be governed by the laws of both their homelands and their adopted countries. As an example of how the diasporan model might settle concrete legal problems, Chander discusses Resurgent India Bonds, a mechanism that the Indian government uses to raise capital from the Indian diaspora. He suggests a diasporan solution to the choice-of-law question raised by foreign-issued securities: enforcing forum-selection clauses which keep private litigants out of U.S. courts, while allowing regulators to enforce U.S. law against foreign issuers. This hybrid solution, Chander argues, makes a diasporan compromise: It respects the sovereignty of the adopted country over matters of public concern while allowing the diaspora to choose the law of its homeland to resolve private disputes.

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INTRODUCTION

A Chinese American wakes up and logs on to China.com where she catches up on the previous day's events in China and in ethnic Chinese communities around the world.[1] A sari-clad woman on Long Island purchases Resurgent India Bonds over the phone, putting her savings into the service of her homeland.[2] A Jewish American boards a subsidized flight, joining other Jewish Americans flying to Israel to vote in a crucial election.[3] Taking office as President of Ireland, Mary Robinson declares her intention to represent not just the 3.5 million people residing in the Republic, but also the other seventy million worldwide who claim Irish descent.[4] An Albanian American in Yonkers prepares to go fight in the Kosovo Liberation Army.[5]

While diasporas are as old as history, diasporas at the turn of the millennium maintain bonds to their homelands and among their members that are stronger than ever. Today, the diaspora—people dispersed from their homelands, yet maintaining ties to those homelands and to each other—votes, invests capital, participates in political life, and even takes up arms, all for a distant homeland. These expressions are markers of citizenship and nation, not only private association and culture. Because they maintain important relationships that defy national borders, diasporas today do not fit easily into the simple Cartesian geography of the nation-state system, which conceives of political communities expressed only *within* a nation-state, not *across* nation-states.[6] Empowered by communication and transportation revolu-

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[1] This image refers to the Internet portal of China.com, which, as a U.S.-listed, publicly traded corporation owned in part by AOL and the Chinese state news agency, Xinhua, is itself very much diasporan. http://corp.china.com/shareholders.htm (last visited Apr. 12, 2001).

[2] An advertisement for Resurgent India Bonds depicts an image of a woman in a sari advising: "You don't need to be a financial wizard. You need to be Indian." Somini Sengupta, India Taps Into Its Diaspora: Investing for Love of Country, and 7.75% Interest, N.Y. Times, Aug. 19, 1998, at B1 ("[T]he Government is hoping to cash in on the patriotic fervor among its departed native sons and daughters.").

[3] Jackie Rothenberg, Vote May Turn on a Wing & a Low Fare, N.Y. Post, May 16, 1999, at 7 (noting that "Israelis leaving from New York, Los Angeles and Toronto, along with others departing from Europe, could make a difference" in Israeli national election).

[4] Rob Brown, Putting the Sporran Into Diaspora, Sunday Herald (Glasgow), Jan. 23, 2000, at 8, LEXIS, News Library.

[5] Barbara Stewart, Signing Up in Yonkers to Fight for Kosovo, N.Y. Times, Apr. 12, 1999, at A1.

[6] As Thomas Franck describes:

> Since the Reformation, the Peace of Westphalia and the writings of Hugo Grotius, the state has been the alpha and omega of personal identity. One is Canadian or American or Rwandan or Indonesian. All persons and corporate entities have a nationality, which describes their singular and total identity as recognized by the international legal and political system.

tions that help bind far-flung people, diasporas now fundamentally challenge the international legal system.

The traditional response to this challenge would be to insist upon the clean demarcations of the nation-state. For "statists," the nation-state defines the borders of the political community to which one can legitimately belong.[7] Statists would presume diaspora relations to be the stuff of private contacts, of sentiment that should diminish over time. To leave one's homeland is, under the theory embedded in the traditional international system, to reject any political connection with that homeland and to tie one's fortunes and loyalties entirely to one's adopted land.

The statists, however, face their own critics in the form of internationalists who deny the moral salience of the state. These modern "cosmopolitans," led by renowned scholars such as Brian Barry, Charles Beitz, Martha Nussbaum, Thomas Pogge, and Jeremy Waldron, believe that an individual's primary commitment should be to humankind rather than to her compatriots or national flag.[8] Globalization, the cosmopolitans believe, should lead to a global citizenry. Like statists, however, cosmopolitans too would be hostile to the diaspora, rejecting the diaspora's patriotism either to its original or adopted *patria*. For the cosmopolitans, the diaspora is doubly misguided because of its potential commitment to not just one, but two states.[9]

This Article proposes a third paradigm for conceiving of the citizen and her relationship to a country. Rejecting both the statist and cosmopolitan worldviews as faulty accounts of who we are now, this Article offers a "diaspora model" of citizenship and the nation-state. A globalized world requires a new paradigm of the relationship of the citizen to the state. In place of the statist insistence on a singular state loyalty or the cosmopolitan call for global citizenship, the diaspora model would permit individuals to construct national and transnational communities of their own choosing. According to the diaspora model, one's loyalty can be to the country in which one lives, the country or countries from which one's ancestors came, the diaspora to

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Thomas M. Franck, Clan and Superclan: Loyalty, Identity and Community in Law and Practice, 90 Am. J. Int'l L. 359, 360 (1996); cf. James Clifford, Diasporas, 9 Cultural Anthropology 302, 307 (1994) ("Diasporas are caught up with and defined against . . . the norms of nation-states . . . .").

[7] See infra notes 122-27 and accompanying text. **R**

[8] See infra notes 193-98 and accompanying text. **R**

[9] For ease of exposition, this Article speaks of the potential commitments of a diasporan individual as being to her homeland and her hostland. However, a diasporan individual may have more than two potential states to which she feels a commitment, perhaps because she has lived, for example, in India, Kenya, and then the United States.

which one belongs, or all or none of the above. This diaspora model finds in the hybridity and dual loyalty of diaspora the basis for reconceiving the citizen as able to live and thrive with multiple and overlapping loyalties and sovereigns. This Article begins to explore the important legal implications of this model of the relationship of citizen to state.

The legal literature treats diaspora as a historical or perhaps a cultural phenomenon,[10] but ignores its political and legal relevance.[11] The law is still focused on the traditional constructs of "immigrant" and "minority," not recognizing the fundamental change occurring in people's understanding of themselves and their relationship to the nation-state.[12] Little attention is paid to the transnational ties of diasporas, especially their concern for their homeland.[13] In fact, the concepts of the homeland and the transnational community built by a diaspora, so dear to many people's lives and so important to interna-

[10] While agreeing that diasporas are crucial to understanding our time, many may question their relevance to legal and political structures. They will say that diasporas are properly the subject of cultural or economic inquiry. This relegation of diaspora to the realm of the private denies the aphorism that the "personal is the political." See Catharine A. MacKinnon, Toward a Feminist Theory of the State 95 (1989) (describing consequences of consciousness-raising about individual experience for normative questions about public institutions and observing that "split between public and private," in the context of relations between the sexes, "functioned ideologically to keep each woman feeling alone"). Indeed, the cultural and economic aspects of diaspora help determine its political and legal relations. Furthermore, people living in diaspora today undertake activities that are explicitly political and legal. Whether private or public, the diaspora's maintenance of a sort of transnation—a nation crossing state borders—affects the basic conceptions of the international system and the citizen's relationship to the state. None of this denies that many of the major tectonic shifts introduced by diasporas may be in the cultural and economic landscapes.

[11] Three exceptions should be noted. See Madhavi Sunder, Intellectual Property and Identity Politics: Playing With Fire, 4 J. Gender Race & Just. 69, 90-98 (2000) (cautioning that legal efforts to regulate media premised upon notions of "authenticity" and "preservation" are undermined by diaspora); Peter J. Spiro, The Citizenship Dilemma, 51 Stan. L. Rev. 597, 621-25 (1999) (book review) (recognizing nonstate communities such as diasporas and the possibility that "individuals may find that they cannot be fully happy unless they are part of communities that are supportive of their identities and interests as they understand them" (internal quotation marks omitted)); Jonathan Boyarin, Note, Circumscribing Constitutional Identities in *Kiryas Joel*, 106 Yale L.J. 1537, 1547 (1997) (arguing for recognition of identity as organized around diaspora and genealogy).

[12] Even important recent immigration law scholarship focusing on understanding citizenship at the turn of the century overlooks diasporas. See, e.g., Linda Bosniak, Citizenship Denationalized, 7 Ind. J. Global Legal Stud. 447, 452 (2000) (examining efforts to locate citizenship "beyond the nation-state").

[13] The traditional focus on "immigrants" draws attention to the relationship between the individual and the place to which she migrates, potentially obscuring the relationship between the person and the place she left behind, as well as the importance to her new country of that continuing relationship.

tional economics and politics, make only a rare appearance in legal scholarship.

Where law has faltered, the humanities have forged ahead. The humanities have adopted diaspora as a central focus of inquiry in understanding our time. Humanities scholars have found in diaspora "the exemplary communities of the transnational moment,"[14] and the "exemplary condition of late modernity."[15] Humanities and social science scholars have begun to study the impact of diasporas on fundamental legal concepts such as immigrant, citizen, and nation.[16] A journal dedicated to the study of diaspora, entitled *Diaspora: A Journal of Transnational Studies*, has been established.[17] Diaspora provided the theme of the 1999 Annual Meeting of the American Historical Association,[18] and the year 2000 saw numerous international conferences devoted to the subject.[19]

Even while the law has ignored diaspora qua diaspora, legal scholarship has begun to respond to some of its salient characteristics. Multiculturalism takes as its mandate the need to respond to and accept the heterogeneous population of the late-modern nation-state—in direct repudiation of the assimilationist ideal. Drawing on the in-

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[14] Khachig Tölölyan, The Nation-State and Its Others: In Lieu of a Preface, 1 Diaspora 3, 5 (1991) (describing *Diaspora* journal as seeking to trace struggles over homeland and nation).

[15] Vijay Mishra, The Diasporic Imaginary: Theorizing the Indian Diaspora, 10 Textual Prac. 421, 426 (1996) (recognizing modern view of diasporas that questions whether "a people" must have "a land").

[16] Consider, for example, the anthropologist Stanley Tambiah: "[Transnational] flows of people, capital, and information" combine to "test and breach the autonomy, sovereignty, and territorial boundaries of extant nation-states hitherto considered as the primary units of collective sociopolitical identity and existence." Stanley J. Tambiah, Transnational Movements, Diaspora, and Multiple Modernities, Daedalus, Winter 2000, at 163, 164. See generally Aihwa Ong, Flexible Citizenship: The Cultural Logics of Transnationality (1999) (examining possibility of revising concept of citizenship based on transnational experiences of Chinese people).

[17] Scholarship on diasporas abounds in other social science and humanities journals as well. See, e.g., V.Y. Mudimbe & Sabine Engel, Introduction, 98 S. Atlantic Q. 1 (1999) (introducing symposium on "Diasporas and Immigration").

[18] See Robert Townsend, 1999 Annual Meeting Highlights, http://www.theaha.org/perspectives/issues/1999/9903/9903ANN2.CFM (describing Annual Meeting's general theme of "Diasporas and Migrations in History").

[19] The Institute of Social Anthropology at the University of Hamburg held a conference in February 2000 on "Locality, Identity, Diaspora." See http://www.rrz.uni-hamburg.de/diaspora/home.htm. The European Research Forum on Migration, Ethnic Relations, Refugee Protection and Minority Politics (EUROFOR) sponsored a conference on "Immigrant Communities, Diasporas, and Politics" in Athens in May 2000. See http://userpage.fu-berlin.de/~migratio/eurofor/e31_abs.htm (providing abstracts of papers presented at conference). The Nationalism and Ethnic Conflict Research Group at the University of Western Ontario held a conference on "Diasporas and Transnational Identities" in October 2000 in Ontario. See http://www.ssc.uwo.ca/polysci/necrg/diaspora/about.html.

sights of multiculturalism, LatCrit[20] scholars have illuminated the struggles of people who live, either literally or figuratively, in the borderlands between two societies.[21] Immigration scholars have discussed the rise of dual nationality and recognized the dual loyalties of people who maintain ties to different states.[22] Recent scholarship, often written from law and economics and law and society perspectives, has described the private orderings that ethnic groups sometimes use, enforcing norms other than those of the dominant polity.[23]

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[20] "LatCrit" refers to "a group of progressive law professors engaged in theorizing about the ways in which the Law and its structures, processes and discourses affect people of color, especially the Latina/o communities." Kevin R. Johnson, Celebrating LatCrit Theory: What Do We Do When the Music Stops?, 33 U.C. Davis L. Rev. 753, 754-55 (2000) (citing Fact Sheet: LatCrit, in LatCrit Primer (1999) (unpublished materials distributed to participants at LatCrit IV Conference)). See also Francisco Valdes, Under Construction: LatCrit Consciousness, Community and Theory, 85 Cal. L. Rev. 1087, 1089 n.2 (1997) ("LatCrit theory is the emerging field of legal scholarship that examines critically the social and legal positioning of Latinas/os, especially Latinas/os within the United States, to help rectify the shortcomings of existing social and legal conditions.").

[21] See, e.g., Kevin R. Johnson, How Did You Get to Be Mexican? 6-9 (1999) (describing efforts of mixed Latino/Anglo scholar to fit into fixed racial categories of American society); Renato Rosaldo, Culture and Truth: The Remaking of Social Analysis 208 (1989) ("[B]orderlands should be regarded not as analytically empty transitional zones but as sites of creative cultural production that require investigation."); Leslie Espinoza & Angela P. Harris, Embracing the Tar-Baby: LatCrit Theory and the Sticky Mess of Race, 85 Cal. L. Rev. 1585, 1612-19 (1997) (describing literal and figurative borders between states, races, and public/private life); Enid Trucios-Haynes, LatCrit Theory and International Civil and Political Rights: The Role of the Transnational Identity and Migration, 28 U. Miami Inter-Am. L. Rev. 293, 298-302 (1997) (envisioning demise of nation-state and recognition of transnational identity); Valdes, supra note 20, at 1122 ("[Latina/o] communities and identities within the United States are constructed on pillars that straddle nations and borders."). James Clifford observes that border theories "share a good deal with diaspora paradigms." Clifford, supra note 6, at 304. He distinguishes the two as follows: "Diasporas usually presuppose longer distances and a separation more like exile: a constitutive taboo on return, or its postponement to a remote future. Diasporas also connect multiple communities of a dispersed population." Id. R R

[22] See, e.g., Peter H. Schuck, Citizens, Strangers and In-Betweens: Essays on Immigration and Citizenship 238-39, 245 (1998) (noting anxiety "that allegiance of dual citizens to America is wanting—at best divided and at worst subordinate to their earlier allegiance" and suggesting that naturalization oath be "revised to require person to pledge primary loyalty to the United States"); Peter J. Spiro, Dual Nationality and the Meaning of Citizenship, 46 Emory L.J. 1411, 1416 (1997) ("In a world of liberal states, . . . the necessity of exclusive allegiances has largely dissipated . . . ." (citation omitted)).

[23] See, e.g., Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115, 138-41 (1992) (describing development of private law system among historically ethnically homogenous diamond merchants); Lan Cao, Looking at Communities and Markets, 74 Notre Dame L. Rev. 841, 848 (1999) (observing efforts by various immigrant groups to establish community-based savings and credit associations outside conventional banking system); Walter Otto Weyrauch & Maureen Anne Bell, Autonomous Lawmaking: The Case of the "Gypsies," 103 Yale L.J. 323 (1993) (studying autonomous laws and legal processes among transnational communities of Romani people). The literature on norm theory is burgeoning. See Eric A. Posner, Law and Social Norms 5 (2000) (developing general model of nonlegal

Law and development theorists have explored the interplay between markets, democracy, and ethnicity.[24] Postcolonial theorists have uncovered the hidden relationship between the history of colonialism and the status of immigrants today.[25] Yet none of these approaches have dealt directly with the challenge that diasporas pose to the traditional conception of the international system.

Diasporas at the turn of the millennium share three new features that make them a more potent political and economic phenomenon than they have been in the past, making them, in turn, a phenomenon that demands new consideration in law. First, diasporas have become increasingly economically empowered, principally because their greatest numbers tend to be in prosperous, industrialized states.[26] Moreover, hostility toward them in these lands has declined. Second, revolutions in transportation and communications technologies, especially the Internet, permit diasporas to participate actively in their homelands' affairs and to maintain a virtual community across borders to a more significant degree than was possible at any earlier time.[27] Third, perhaps because of a deepening sense of an individual right to define one's identity,[28] diasporas now are more likely to assert their right to maintain ties to their homelands and to each other. The increased economic and political ties afforded by these developments inevitably will lead to legal conflicts, especially those involving choice of law and concurrent efforts by nations to exercise prescriptive jurisdiction.

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cooperation). A seminal work on norms is Robert C. Ellickson, Order Without Law (1991). Perhaps the most important contribution to the theory of private ordering has been made by the economist Friedrich Hayek. See, e.g., 2 F. A. Hayek, Law, Legislation and Liberty 107-32 (1976) (describing spontaneous order generated by market).

[24] See, e.g., Amy L. Chua, Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development, 108 Yale L.J. 1 (1998) (observing perils of combined pursuit of marketization and democratization given presence of economically dominant minority ethnic group).

[25] See, e.g., Tayyab Mahmud, Migration, Identity, and the Colonial Encounter, 76 Or. L. Rev. 633, 634 (1997) ("[R]elationships of empire and imperialism between 'the West and the Rest' are central to the inter/national imagining and construction of the immigrant . . . ." (citation omitted)).

[26] The majority of international migrants now go to just four wealthy countries: the United States, Germany, Canada, and Australia, in that order. World Bank, Entering the 21st Century: World Development Report 1999/2000, at 37-38 (2000).

[27] See infra note 94. R

[28] See, e.g., Thomas M. Franck, The Empowered Self 2 (1999) ("[T]he law—national and international—is moving to accommodate this new interest of persons in taking charge of determining who they are."); Franck, supra note 6, at 359 ("What is new is a growing R consciousness of a *personal* right to compose one's identity."); Charles Taylor, The Politics of Recognition, in Multiculturalism 25, 28 (Amy Gutmann ed., 1994) (describing "new understanding of individual identity" based in ideal of authenticity that emerged at end of eighteenth century).

Whereas at one time diaspora relations with the homeland tended to be disorganized and private, increasingly those relationships are well organized and public. We see this especially in the role diasporas play in the globalization of capital.[29] Because of its members' expertise and ties to the homeland and because of their knowledge of Western corporations, the diaspora serves as the vanguard of multinational corporations that invest in developing and transition economies.[30] Traditionally, diasporas also contributed capital directly through private mechanisms—sending remittances to loved ones left behind,[31] offering charity, and investing directly in companies.[32] Now, however, homeland governments are making official efforts to spur homeward investment from their diasporas with appeals founded on the patriotism of the diaspora.[33] For example, Scotland has set up a Scottish North American Business Council to take advantage of "the warm emotional ties between . . . North American Scots and their

[29] In a recent report on the state of world development, the World Bank points to the important role diasporas play in facilitating the dissemination of information and capital: "Diasporas serve as channels for the flow of information, market intelligence, capital, and skills." World Bank, supra note 26, at 39. They also "may supplement formal channels that rely on market institutions," which in turn provides a way for migrants to conduct transactions in an atmosphere of trust, and offsets information asymmetries and other market failures. Id. Finally, modern diasporas, like their Mediterranean predecessors, see infra notes 75, 76 and accompanying text, expedite business transactions by resolving monitoring problems, reducing opportunism, and building reputations and ethnic trust based on networking. Id.

[30] Diasporas have long played a central role in international commerce. John Armstrong notes, for example, that "Spanish Jews were indispensable for international commerce in the Middle Ages and Armenians controlled the overland trade between Europe and the Orient as late as the nineteenth century." John A. Armstrong, Mobilized and Proletarian Diasporas, 70 Am. Pol. Sci. Rev. 393, 396 (1976). Armstrong also observes that diasporas historically have been "directly involved in transmitting innovative economic techniques—e.g., Saxon miners in Eastern Europe and Chinese exploitation of gold and tin mines in Borneo and Malaya." Id. at 397.

[31] Sharon Stanton Russell, Migrant Remittances and Development, 30 Int'l Migration 267, 267-75 (1992) (discussing impact of remittances on migration and development and noting increase in remittances between 1980 and 1990).

[32] Commentators have, for example, discussed the importance of direct investment by overseas Chinese to the furious pace of economic development in the People's Republic of China. See Paul J. Bolt, Looking to the Diaspora: The Overseas Chinese and China's Economic Development, 1978-1994, 5 Diaspora 467, 468 (1996) (describing China as "a state that has deliberately instituted policies to attract the resources of its diaspora"); see also The Overseas Chinese: A Driving Force, Economist, July 18, 1992, at 21, 24 (observing that overseas Chinese populations are largest source of direct foreign investment in China).

[33] The World Bank observes that "[g]overnments in South Asia, Central and South America, and Sub-Saharan Africa have made limited efforts to exploit the potential of overseas networks to further development." World Bank, supra note 26, at 39-40. It continues: "In the next few decades, . . . countries with large and growing emigrant communities scattered throughout the world will have the opportunity to tap into the development potential of their diasporas." Id. at 40.

ancestral home."[34] Most notably, instead of borrowing money in the international capital markets or from foreign governments or multilateral financial institutions, some homeland governments have begun to turn to their diasporas for funding.[35]

The "Diaspora Bonds" of this Article's title carry both figurative and literal meanings, describing the sentimental attachments of the diaspora to its homeland, as well as the debt instruments offered by a homeland government to raise capital principally from its diaspora. Diaspora Bonds, in the latter sense, have a rich history, going back at least as far as the bonds offered overseas by Japan and the Republic of China in the 1930s,[36] continuing through the State of Israel Bonds offered by the fledgling state beginning in 1951,[37] to the recent successful Indian offering of Resurgent India Bonds in the wake of the international sanctions following that country's 1998 nuclear tests.[38] Bangladesh[39] and the Philippines[40] have considered issuing their own Diaspora Bonds. One also can conceive easily of Diaspora Bonds offered by China and Mexico, as well as by many African,[41] Central or

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34 Mark Nicholson, Scots Clans Eye Slice of American Pie, Fin. Times, Apr. 28, 2000, at 6. Scotland seeks to spur business relations with the Scottish diaspora in North America, which reportedly numbers between fifteen and forty million. Id. As the Council's chair explains, "There are as many Macs in the New York phone book as in the Glasgow or Edinburgh phone books." Id.

35 See infra Part IV.

36 SEC v. Chinese Consol. Benevolent Ass'n, 120 F.2d 738, 739, 741 (2d Cir. 1941) (describing efforts by Chinese Benevolent Associations in United States to sell bonds for China and by Japanese Patriotic Bond Subscription Society in United States to sell bonds for Japan).

37 See infra notes 292, 303, 332, 333, and accompanying text. **R**

38 See infra notes 306-25. **R**

39 On the heels of the success of the Resurgent India Bonds, Bangladesh announced its intention to appoint banks to manage its own issuance of Diaspora Bonds. Bangladesh Readies Non-Resident Bond Issue, Emerging Markets Week, Apr. 26, 1999, at 2. Bangladesh previously issued such instruments in 1986 with foreign currency Wage Earner Development Bonds specifically designed for migrant workers. Shivani Puri & Tineke Ritzema, Migrant Worker Remittances, Micro-Finance and the Informal Economy: Prospects and Issues 14 (Int'l Labour Org., Working Paper No. 21, 1999), http://www.ilo.org/public/english/employment/ent/papers/wpap21.htm.

40 $500-M Bonds Eyed for OFWs, Manila Standard, Feb. 18, 2000, 2000 WL 8892265 (noting proposed $500 million bond issue targeted at overseas Filipino workers); Philippine Government to Issue More Treasury Bonds Next Year, AFX News, Dec. 14, 1999, 1999 WL 25422960 (noting launch of dollar-denominated bonds targeting overseas Filipino workers).

41 Diaspora Bonds issued by African states present the special difficulty that arises from the evisceration of the personal histories of the enslaved Africans, namely, that it is difficult if not impossible to identify a diaspora of a particular region. It is currently feasible only to identify an "African" diaspora, one encompassing all who are descended from nearly the entire continent of Africa. See e. christi cunningham, The "Racing" Cause of Action, 30 Rutgers L.J. 707, 715 (1999). Orlando Patterson has called the process by which slavery sought to deny blacks their history, culture, family ties, and community "social

South American, Asian, or European countries.[42] Because Diaspora Bonds raise questions of choice of law, jurisdiction, dual loyalty, and citizenship, they crystallize some of the legal issues raised by diasporas.[43] Accordingly, this Article offers a case study of the diaspora model by applying it to the issues raised by Diaspora Bonds, particularly the Resurgent India Bonds. In addition, because Diaspora Bonds represent an important mechanism by which poor nations can tap the wealth of their relatively rich diasporas, the study is important in its own right, providing a legal analysis of these instruments that will assist countries in considering such offerings in the future.

Part I of this Article begins with an analysis of the rise of diaspora. It identifies and explains a discursive shift from the identification of people as "overseas communities," "exiles," or "minorities,"[44] to their identification as "diasporas." The description of the rise of diasporas sets the stage for Part II, which attempts to categorize the legal claims that diasporas could make. In Part III, this Article considers three different models for resolving the legal issues raised by diasporas and, ultimately, for defining the relationship of citizen to state. It rejects the "statist" model, which demands loyalty to a single sovereign. It also rejects the "cosmopolitan" alternative, which devalues the citizen's relationship to state as anything other than a logistical device. Instead, it proposes a "diaspora model," which accepts the dual loyalties of diasporas and even allows them some level of autonomy. Under the diaspora model, the hermetic sovereignty of nation-states is replaced by overlapping sovereignties dispersed among states and diasporas. A case study of Diaspora Bonds in Part IV illuminates the kinds of legal issues that arise out of the relations between the diaspora and its homeland—particularly with respect to economic re-

death." Orlando Patterson, Slavery and Social Death: A Comparative Study (1982). But see Editorial, DNA to Link Blacks to African Past, Chi. Trib., Aug. 31, 2000, at 22 (concluding that, because of DNA technology, "the slavers did not win" in their efforts to erase roots of African Americans); Tatsha Robertson, Families Seek Link Across Centuries: DNA May Reunite Blacks, African Kin, Boston Globe, Aug. 13, 2000, at B3.

[42] Noting the success of the Israeli bonds, for example, in 1994 Nobel Laureate and Irish Prime Minister John Hume proposed "Peace Bonds" to raise money from the Irish diaspora to support development in Northern Ireland. SDLP Call for Peace Dividend Body, Irish Voice, Dec. 13, 1994, at 4, http://www.softlineweb.com/bin/KaStasGw.exe?k_a=d5afmd.1.searchwin.w.; Sean MacCarthaigh, NY Pledge to Back Irish Economy if Peace Bid Succeeds, Irish Times, July 5, 1997, at 16, LEXIS, News Group File. While Hume's proposal has not been implemented, he has recently reiterated his desire to harness the "goodwill" of the diaspora in "the economic sphere." John Hume, Ireland—The Healing Process, 22 Fordham Int'l L.J. 1171, 1177 (1999).

[43] See infra Part IV.

[44] Khachig Tölölyan, Rethinking *Diaspora*(s): Stateless Power in the Transnational Moment, 5 Diaspora 3, 3 (1996) (describing shift from "exile groups, overseas communities, ethnic and racial minorities" to "diasporas").

lationships—and offers one application of the model. This Article ends by offering some cautions and concluding thoughts.

This Article has three goals. First, it seeks to introduce diaspora as a subject of legal inquiry by describing the concept of diaspora and identifying legal issues that a diaspora raises. Second, it proposes an alternative to the established statist and cosmopolitan models of citizenship, an alternative that reconciles globalization with people's desire for a sense of rootedness. Third, its case study of Diaspora Bonds describes the legal issues that arise in the United States due to a (previously unnamed) capital-raising method that will prove important to economic development.

I
THE RISE OF DIASPORA

A. Defining Diaspora

Diaspora is the Greek word for "scattering" or "dispersion," and derives from the compounding of the Greek prefix for "through" and the Greek verb meaning "to sow or scatter."[45] As used in English, *diaspora* refers either to "the settling of scattered colonies of Jews outside Palestine after the Babylonian exile" or, more generally, to "the breaking up and scattering of a people."[46] The term presupposes a people, such as the Jews, who once lived together in some defined territory. It does not refer to the entirety of a dispersed people, but only to "that segment of a people living outside the homeland."[47]

While this definition accurately reflects how the term is often used, it is subject to the moral objection that it does not require "doing": The diasporan individual need do nothing to show an affiliation with a diaspora community, but yet may be branded part of it on ac-

[45] 4 The Oxford English Dictionary 613 (2d ed. 1989).

[46] Merriam-Webster's Collegiate Dictionary 502 (deluxe ed. 1998).

[47] Walker Connor, The Impact of Homelands Upon Diasporas, in Modern Diasporas in International Politics 16, 16 (Gabriel Sheffer ed., 1986). Gabriel Sheffer offers yet another definition, centered around what he considers three quintessential elements that must exist if an ethnic group is to comprise a diaspora: identity, organization, and meaningful contact with the homeland. Gabriel Sheffer, Ethnic Diasporas: A Threat to Their Hosts?, in International Migration and Security 263, 263 (Myron Weiner ed., 1993). However, by itself, "identity" is unhelpful because its use here is recursive; it is identity itself that the word "diaspora" helps to define. With respect to the second element, it seems unclear whether "organization" should be treated as a quintessential element or rather as a factor determining how effective diasporas may be in asserting group preferences. The third element, "meaningful contact with the homeland," is indeed important because it avoids "biologism" in favor of self-identification. Infra note 48 and accompanying text. R

count of her genealogy. It risks "biologism," as Khachig Tölölyan, the editor of the journal *Diaspora*, calls it,[48] or identity based on biology.

As the links to a homeland increasingly become attenuated with each successive generation in the new country, many will identify only with their parents' adopted country, not with the homeland of their ancestors. Others may have left their homeland specifically because they reject its norms and prefer those of the adopted country. If, as discussed later, diaspora serves as a means towards reaching the ideal of personal authenticity, it would undermine that goal to deny someone the ability to reject a connection to her homeland.[49] By definition, then, "the diasporic segment . . . labors to remain in interaction with the larger transnation which includes the homeland and other diasporic segments."[50] Leaving a homeland can sever an ancient relationship with a particular people or land.[51]

But even this more liberal position, permitting people to "opt out" of the diaspora, can itself be criticized as "biologic." An individual, regardless of her cultural or emotional affinities with a particular homeland or people, cannot join that people simply by personal declaration. There is no "opting in" to the diaspora for individuals who do not share that diaspora's homeland. This criticism is powerful, relying upon the freedom to choose as the only basis for things of moral consequence. It would be too romantic, however, to think of our identities as fully self-crafted. We are constituted in part by our histories; denying the moral role of these histories seems ruthless.[52] As

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[48] Tölölyan, supra note 44, at 30. R

[49] See infra Part III.C.2. The primacy given here to individual choice is consistent with Amartya Sen's notion of "development as freedom," that is, the idea that economic development should be defined as the expansion of the opportunities for human functioning. See Amartya Sen, Development as Freedom 3 (1999). This Article focuses on the diasporan individual who is likely to be found in the economically developed world rather than, as is Sen's focus, on the individual living in the developing world. Nevertheless, the principle of freedom described by Sen certainly is relevant worldwide, and even more so here given that a major concern of this Article is with how the diaspora can support economic development in its homeland.

[50] Tölölyan, supra note 44, at 29. R

[51] Cf. Michael Walzer, On Involuntary Association, in Freedom of Association 64, 64 (Amy Gutmann ed., 1998) ("I want to argue that freedom requires nothing more than the possibility of breaking involuntary bonds and, furthermore, that the actual break is not always a good thing, and that we need not always make it easy.").

[52] Michael Sandel criticizes the liberal egalitarian philosophy of John Rawls on precisely this point, observing that Rawls would require us to shed our attachments in making the constitutive decisions for a political society. See Michael J. Sandel, Liberalism and the Limits of Justice 179 (2d ed. 1998) (

> [W]e cannot regard ourselves as independent . . . without great cost to those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are—as members of this family or community or nation or people, as

Amartya Sen writes, "[t]he real options . . . are always limited by our looks, our circumstances, and our background and history."[53] At the same time, it is not necessary to see identity in a strong communitarian sense of being an immanent quality waiting to be discovered or revealed.[54] Rather, the approach offered by Charles Taylor, in which identity is created and recreated in a dynamic process between the individual and her environment, seems more compelling.[55]

The fiction of voluntary association as the basis for political legitimacy found in many contractarian liberal and libertarian theories[56] finds a certain degree of realization in migrants: While many people are forced to leave their country, driven out by war or poverty, many modern migrants *do* choose the society in which they live, though this choice is often dictated by immigration laws, the individual's economic resources, and the receptivity of different societies to people like that individual migrant. Focusing on the voluntary nature of membership in a diaspora distinguishes it from traditional citizenship, which we ascribe most often on the basis of birth or ancestry—not on any action demonstrating volition, except, of course, naturalization and renunciation. An individual could demonstrate her membership in a diaspora by maintaining her citizenship in the homeland, but she might also demonstrate it through voluntary homeland-regarding actions shy of citizenship.

The requirement of voluntary action signals the individualistic approach adopted here. While diaspora by its very nature connotes a group, the requirement that individuals conceive of themselves as

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bearers of this history, as sons and daughters of that revolution, as citizens of this republic.).

53 Amartya Sen, Reason Before Identity 17-18 (1999); see also K. Anthony Appiah, Identity, Authenticity, Survival, in Multiculturalism, supra note 28, at 149, 155 ("We make up selves from a tool kit of options made available by our culture and society. We do make choices, but we do not determine the options among which we choose."). R

54 Appiah describes this as the error of thinking that there is a "real self buried in there, the self one has to dig out and express." Appiah, supra note 53, at 155. R

55 See infra Part III.C.2; see also Taylor, supra note 28. R

56 See, e.g., Thomas Hobbes, Leviathan 131-32 (Oxford Press 1909) (1651) (describing creation of state "Leviathan" as arising from "Covenant" in which each person submits his will to will of state); John Locke, Treatise of Civil Government and A Letter Concerning Toleration 67 (Charles L. Sherman ed., 1979) (1690) (characterizing move from state of nature to "politic societies" as beginning "from a voluntary union, and the mutual agreement of men freely acting in the choice of their governors and forms of government"); John Rawls, A Theory of Justice 16 (1971) (describing theory of justice as founded on hypothetical contract consisting of set of principles to which society would agree). But see, e.g., Lea Brilmayer, Consent, Contract, and Territory, 74 Minn. L. Rev. 1, 5 (1989) (questioning this fiction by arguing that "[a]n individual's unwillingness to incur the extraordinary costs of leaving his or her birthplace should not be treated as a consensual undertaking to obey state authority").

members of a diaspora in order for that characteristic to have any legitimate purchase returns us to an individualistic foundation.

The relationship between a diaspora and its homeland need not include the diaspora's "desire for eventual return."[57] Many individuals living in diaspora do not evince such a desire.[58] One dispersed population, the Romani, does not seem to hold a hope for return to their homeland; it may have no vision of a homeland at all.[59] Other diasporas may be split between those who desire to return and those who do not.

Though diasporas do not necessarily share a teleology of return, the homeland exerts a strong emotional pull on the diaspora.[60] As one writer describes: "Perhaps hoping for recognition from their land, it is not uncommon to see members of the [Eritrean] Diaspora kissing the ground and raising their hands to the sky upon finally returning to Eritrea."[61]

The relationship between diasporan individuals and the homeland (or, for a lack of a homeland, with each other across state boundaries) distinguishes the notion of "diaspora" from that of "ethnic group" or "immigrant." A diaspora, as Tölölyan suggests, acts consistently for the homeland in an organized fashion, whereas the ethnic community has little or no commitment to maintain connections with its homeland and the connections that exist are manifested by individuals rather than the community as a whole.[62] Similarly, the concepts of "immigrant," "minority," and "person of color" neglect the

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[57] Clifford, supra note 6, at 305 (referring to William Safran, Diasporas in Modern Societies: Myths of Homeland and Return, 1 Diaspora 83, 83-84 (1991)). R

[58] As James Clifford points out, even a significant portion of the Jewish diaspora, used as an archetype by William Safran, would not meet this criterion because many Jews in diaspora did not seek to return to their homeland, except as part of a religious eschatology. Clifford, supra note 6, at 305 (referring to Safran, supra note 57, at 83-24, 91); see also Clifford, supra note 6, at 322 (finding "ambivalence in Jewish tradition, from biblical times to the present, regarding claims for a territorial basis of identity") (citing Daniel Boyarin & Jonathan Boyarin, Diaspora: Generation and the Ground of Jewish Identity, 19 Critical Inquiry 693 (1993)); Arnold M. Eisen, Galut: Modern Jewish Reflection on Homelessness and Homecoming 50 (1986) (noting medieval and early modern rabbis' "pronounced ambivalence concerning the Land's centrality"). R R

[59] Tölölyan, supra note 44, at 32 n.17. The main body representing Europe's twelve million Roma has recently declared the Roma to constitute a "'non-territorial'" nation. One reporter calls it a "'country' which boasts a flag and an anthem but neither borders nor an army." Gary Younge, A Nation Is Born: Europe and Race: Gypsies Build a Defense Against Extremism As Germans Wring Their Hands, Guardian, July 31, 2000, at 15. R

[60] The Roma appear to be an exception to this, if they are to constitute a diaspora.

[61] Peggy A. Hoyle, The Eritrean National Identity: A Case Study, 24 N.C. J. Int'l L. & Com. Reg. 381, 410 (1999).

[62] Tölölyan, supra note 44, at 16. R

diasporan community to which the person may belong, as well as that community's relationship to the homeland.

The nature of the emigrant's relationship to her homeland cannot be predicted with any great certainty. The ethnic studies scholar Ling-chi Wang offers a typology for the different orientations Chinese Americans have towards China. The different types depict the different possible relationships of the diasporan individual to her roots (*gen*, in Chinese);[63] they are:

- *Yeluo guigen* (to return, as fallen leaves return to their roots): The sojourner who intends to return home eventually;[64]
- *Zhancao chugen* (to eliminate weeds, one must pull out their roots): The assimilationist;[65]
- *Luodi shenggen* (to settle down or sow seeds in a foreign land and accommodate to the host society): The accommodationist;[66]
- *Xungen wenzu* (to search for one's roots and ancestors): The person with ethnic pride or consciousness;[67]
- *Shigen qunzu* (to lose contact with one's roots and ancestors): The uprooted, the alienated, the wandering intellectual away from her roots in historic China, in exile.[68]

Kwok Bun Chan adds a sixth type, the one most typical of the diaspora model:

- *Zhonggen* (to embody multiple rootedness or consciousness): The person who values her diverse roots.[69]

Ling-chi Wang's use of metaphor to describe the diasporan experience vividly depicts the myriad ways that a person might approach her experience as an immigrant.[70] Moreover, as cultural studies have taught us, a person may shift approaches from time to time, gyrating between alienation and assimilation, for example.[71] The individual

63 L. Ling-chi Wang, Roots and Changing Identity of the Chinese in the United States, Daedalus, Spring 1991, at 181, 182, 192.

64 Id. at 193-95.

65 Id. at 196-99.

66 Id. at 199-200.

67 Id. at 200-02.

68 Id. at 202-05.

69 Kwok Bun Chan, A Family Affair: Migration Dispersal, and the Emergent Identity of the Chinese Cosmopolitan, 6 Diaspora 195, 206-07 (1997).

70 William Safran has characterized this as a "continuum of ethnicity ranging from assimilation to intense ethnopolitical mobilization." Safran, supra note 57, at 84. R

71 See Sen, supra note 53, at 17 (observing that "our loyalties and self definitions often oscillate"); Wang, supra note 63 at 198 (noting that "a person may move from one identity to another"). R R

may adopt different identities in different contexts, defining or revealing herself differently before different groups of people.[72]

It is the *zhancao chugen* (the complete assimilationist who pulls out her roots) who, despite her Chinese ancestry, would not belong to the Chinese diaspora, which by our definition requires an individual commitment to a transnational community or homeland. Perhaps also the *shigen qunzu* (the person who has lost contact with her roots, who is alienated from them) and the *luodi shenggen* (the person who sinks roots and accommodates in the foreign land) may, at least at times, not consider themselves members of the Chinese diaspora. The *yeluo guigen* (the sojourner who returns to her roots), the *xungen wenzu* (the person who expresses ethnic pride or consciousness), and the *zhonggen* (who values her diverse roots) clearly offer diaspora archetypes.[73]

With this background, then, we can offer this working definition of "diaspora": that part of a people, dispersed in one or more countries other than its homeland, that maintains a feeling of transnational community among a people and its homeland.

B. History: From Ancient to Modern

The discourse of diaspora has evolved from the ancient experience of the Hellenes and, later, the Jews, through its use to describe the Armenian experience, to the late modern adoption (or appropriation) of the term by many displaced, transnational peoples. Where once there were dispersions, overseas communities, immigrants, minorities, and just one diaspora—the Jewish Diaspora—there are now diasporas of many peoples.[74]

Given that "diaspora" is a Greek word, it has naturally been used since antiquity to refer to the many migrations of the Greek people. In his *History of the Peloponnesian War* (written between circa 421 B.C. and circa 400 B.C.),[75] Thucydides employed the root form of the

[72] See E.J. Hobsbawm, Nations and Nationalism Since 1780, at 8 (1990) (noting that individual may think of self as British citizen, Indian, or Gujarati, depending on circumstances); Orlando Patterson, Context and Choice in Ethnic Allegiance: A Theoretical Framework and Caribbean Case Study, in Ethnicity: Theory and Experience 305, 307-08 (Nathan Glazer & Daniel P. Moynihan eds., 1975) (describing cases of black Jamaicans, Puerto Ricans, and Jamaican Sephardic Jews who choose to emphasize different ethnic identifications in different social contexts).

[73] The last type accepts the "double consciousness" common to diaspora members. See infra notes 250-57 and accompanying text. R

[74] Tölölyan, supra note 44, at 3. R

[75] See 18 Encyclopaedia Britannica 359 (15th ed. 1974) (stating that Thucydides began writing *History of the Peloponnesian War* soon after Peace of Nicias in 421 B.C.); 11 Encylopaedia Britannica 456 (11th ed. 1911) (stating that Thucydides died circa 400 B.C.).

term to refer to the scattering of the population of the Greek city-state of Aegina after its destruction by the Athenians in 431 B.C.[76]

The term became identified with the Jewish dispersion via the Septuagint, the Greek translation of the Hebrew Bible, circa 250 B.C. The Oxford English Dictionary locates an early reference to "diaspora" in Deuteronomy 28:25 in the Septuagint.[77] That dictionary translates a portion of this verse into English as: "[T]hou shalt be a diaspora . . . in all kingdoms of the earth."[78] With the destruction of Jerusalem and its Temple by the Romans and the uprooting of the rural Jewish populations (circa 66-140 A.D.), the concept of diaspora "became suffused with the suffering that accompanies many sorts of exile."[79] With this dispersion, the term "diaspora" came to be applied to Jews throughout the Graeco-Roman world.

In the thirteenth century, Marco Polo noted the dispersion of the Armenian ethnic group during his travels.[80] By this time, there were already many diasporan Armenians, as they had been pushed out of their homeland by conquering groups beginning as early as the sixth century with the Byzantine expulsion of thousands of Armenians to the Philippopolis (Plovdiv) region.[81] The Seljuk Turks captured the Armenian capital city of Ani in 1064 A.D., and defeated the Byzantine emperor in 1071 A.D., resulting in a period of widespread migration of some 200,000 Armenian refugees.[82]

Nearly a millennium later, in the late 1960s, black scholars began employing the unifying concept of diaspora to describe all of the descendants of the Africans who survived the middle passage and other African dispersions. According to one scholar, the "African diaspora concept subsumes . . . the global dispersion (voluntary and involuntary) of Africans throughout history; the emergence of a cultural identity abroad based on origin and social condition; and the psychological or physical return to the homeland, Africa."[83] The concept of an Afri-

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[76] Tölölyan, supra note 44, at 10-11; see 1 Encyclopaedia Britannica 108 (15th ed. 1993) (entry for "aegina"). Earlier in his History, Thucydides used the verb "diaspeire" to refer to the Athenian forces who became dispersed through Troy, eventually settling there. Tölölyan, supra note 44, at 10-11. Other ancient references to "diaspora" include Herodotus, Books V-VII 397 (A.D. Godley trans., G.P. Goold ed., Loeb Classical Library 1922) (referring to "Trojans of the dispersal"). **R** **R**

[77] 4 Oxford English Dictionary 613 (2d ed. 1989).

[78] Id. The major English translations of the Bible, however, do not use the word *diaspora*, preferring *dispersion* instead. Cf. id. (referring to books of James and I Peter).

[79] Tölölyan, supra note 44, at 11-12. **R**

[80] Armstrong, supra note 30, at 394. **R**

[81] David Marshall Lang, The Armenians: A People in Exile 99 (1981).

[82] Id. at 99-100.

[83] Joseph E. Harris, Introduction to Global Dimensions of the African Diaspora 3, 3 (Joseph E. Harris ed., 2d ed. 1993).

can diaspora, imported from "unacknowledged Jewish sources,"[84] fit well with the view of a common Pan-African people, including Africans and their Caribbean, American, European, Pacific, and Asian descendants.

From there, the term was taken up by scholars to refer to the experience of almost every significant displacement and dispersion of a people,[85] thereby returning the word to its original Greek roots. Scholars by then spoke of an Irish diaspora, an Indian diaspora, and a Chinese diaspora.[86] The use of the term was often political and sought to establish a common identity through a shared historical experience to gain political strength through numbers and solidarity.[87] Others suggested that the concept of diaspora described their experience better than other available concepts. One scholar explains his use of the term "diaspora" rather than "emigration": "I choose the word 'diaspora' for the transplantation of my community from India to the French West Indies . . . because it carries psychological connotations of deep sorrow and suffering, inconsolable mourning along with the everlasting feeling of being torn inside."[88] Along with the jarring dislocation from the homeland that it might recall, however, the term "diaspora" converted dispersed and often disempowered individuals into a single community, with shared interests, history, and goals.

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[84] Paul Gilroy, The Black Atlantic: Modernity and Double Consciousness xi (1993); see also Clifford, supra note 6, at 321 (discussing "ongoing entanglement of black and Jewish disapora visions"). R

[85] See, e.g., Sharon K. Hom, Introduction to Chinese Women Traversing Diaspora: Memoirs, Essays, and Poetry 3, 14-16 (Sharon K. Hom ed., 1999); Martin Baumann, Shangri-La in Exile: Portraying Tibetan Diaspora Studies and Reconsidering Diaspora(s), 6 Diaspora 377 (1997); Anne-Marie Fortier, The Politics of "Italians Abroad": Nation, Diaspora, and New Geographies of Identity, 7 Diaspora 197 (1998); Brij V. Lal, The Odyssey of Indenture: Fragmentation and Reconstitution in the Indian Diaspora, 5 Diaspora 167 (1996) (describing scope of Indian indentured emigration, which introduced over one million Indians to other British colonies); Palestinian Diaspora & Refugee Centre (Shaml), http://www.shaml.org (visited Nov. 10, 1999) (describing center as seeking "to strengthen links between Palestinian communities in the Diaspora and the homeland"); Paul Gillespie, New Ireland Needs to Hear From Its Expatriates, Irish Times, Sept. 9, 2000, http://www.ireland.com/newspaper/archive/ (observing that "[t]hrough the 1990s there was a sea-change in attitudes towards the Irish abroad. Gradually the term diaspora was accepted to describe them, as awareness grew that this is a tremendous resource in an era of globalisation").

[86] See supra note 85. R

[87] Cf. supra note 85. R

[88] Lotus Vingadassamy-Engel, The Hindu Diaspora in the French West-Indies, India Int'l Centre Q., Monsoon 1992, at 6, 6.

C. Explaining the Rise of Diaspora

Drawing upon Benedict Anderson's language of an "imagined community,"[89] cultural studies scholar James Clifford observes that "[t]he language of diaspora is increasingly invoked by displaced peoples who feel (maintain, revive, invent) a connection with a prior home."[90] How and why did this renaming—from "exile groups, overseas communities, [and] ethnic and racial minorities"[91] into "diaspora"—occur?

The rise of diaspora consciousness at the turn of the millennium can be attributed in part to some of the same factors that led to the rise of national consciousness in the eighteenth and nineteenth centuries. Benedict Anderson finds that people began to imagine *nations* as a result of the interaction between capitalism, print communication, and linguistic diversity.[92] Analogously, diaspora consciousness has been aided by the increasing wealth of diasporas, revolutions in communication and transportation technologies, and continuing feelings of difference.[93] Many members of diasporas have been able to move

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[89] Benedict Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism 5-7 (rev. ed. 1991) (describing nation-state as "imagined political community").

[90] Clifford, supra note 6, at 310. R

[91] Tölölyan, supra note 44, at 3. R

[92] Anderson, supra note 89, at 42-43. R

[93] Tölölyan identifies a parallel list of factors that help explain the rise of diasporas; these factors include:

- Accelerated immigration to the industrialized world coupled with easier modes of communication and travel;
- Changes in countries' apparatus for addressing immigration (Tölölyan notes the increasing tendency of many nations, especially the United States, to permit immigrants "the choice as to whether to assimilate or to emerge as ethnodiasporan groups");
- Greater degrees of institutional organization in the national homelands, and the extent to which that organization accompanies the emigrants;
- Proportion of immigrants relative to the indigenous population (with rapid concentration in one geographical area tending to endure as a diaspora);
- Racial difference (with higher feelings of racial difference contributing to diasporization);
- Real or perceived religious incompatibility;
- The emergence of the Israeli state as a figure of diasporan achievement;
- The special-interest state (a growing realization of the power wielded by special interests over national policies, leading to a willingness of immigrant groups to exercise that power themselves);
- The upward devolution of state power in Europe (leading to the possibility of supra-state power); and
- The American university (as the site of transnational multiculturalism, the humanities revolution that transformed categories, and the paradigm shift away from assimilation).

Tölölyan, supra note 44, at 20-27. R

beyond the struggle for economic survival in their new lands and are becoming increasingly empowered by their accumulated capital. Better and cheaper telecommunications technologies, especially the Internet,[94] and more easily available transportation permit people in the diaspora to maintain connections to their relatives in their homelands. Feelings of difference, like those arising out of linguistic diversity, may persist because immigrants, even second and third generation ones, still are often treated as "foreigners,"[95] leading some to seek refuge in their diaspora community.

Clifford makes this last point, observing that "[d]iaspora consciousness is . . . constituted both negatively and positively."[96] It is constituted negatively "by experiences of discrimination and exclusion" and positively "through identification with world historical cultural/political forces, such as 'Africa' or 'China.'"[97] The negative construction arises as threats from other groups cause stronger ties among the diaspora to be forged as a defense, just as danger from other peoples may have helped create nation-states.[98] Alienation from the majority society may lead to a greater solidarity in the diaspora, a solidarity that may at times minimize internal differences that would have been more noticeable in the homeland. For example, "Balkan immigrants to Canada whose first wave regarded themselves as 'Dalmatians' or 'Istrians' responded to the experience of discrimination, combined with that of being lumped and regarded as 'one' by the dominant majority in Canada, by developing a view of themselves as Croats."[99]

At the same time, however, threats from other groups based on one's minority status may lead one to take steps to hide that minority status, to assimilate, or to pass. While it may be impossible to rid oneself completely of one's racial markers, that does not stop one from trying, at least, to minimize difference. Vijay Mishra finds this

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[94] See Arjun Appadurai, Modernity at Large: Cultural Dimensions of Globalization 194-96 (1996) (describing role of "mass media, especially in its electronic forms, in creating new sorts of disjuncture between spatial and virtual neighborhoods"); Henry H. Perritt, Jr., Cyberspace and State Sovereignty, 3 J. Int'l Legal Stud. 155, 163 (1997) (describing Internet as "technique for organizing those with shared interests. It permits members of relatively specialized diaspora to find each other anywhere in the world"). India recently launched a website for its diaspora, http://www.IndianDiaspora.nic.in (last visited April 14, 2001), seeking "to nurture [the] symbiotic relationship" between the diaspora and the people of India.

[95] See infra note 101 (citing literature examining "foreignness"). R

[96] Clifford, supra note 6, at 311. R

[97] Id. at 311, 312.

[98] See Franck, supra note 6, at 367 (observing that sense of danger may be "one of the historic factors that forge nation-states"). R

[99] Tölölyan, supra note 44, at 13. R

futile, saying that such markers lead almost inexorably to hyphenation, to an identity as a(n) _____ American:

> [T]he pure, unhyphenated generic category is only applicable to those citizens whose bodies signify an unproblematic identity of selves with nations. For those of us who are outside of this identity politics, whose corporealities fissure the logic of unproblematic identification, plural/multicultural societies have constructed the impure genre of the hyphenated subject.[100]

The host society often imposes a "foreignness" on the immigrant such that the immigrant's efforts to assimilate may be in vain.[101]

In addition, the modern diaspora would not exist without the historical development of the nation-state.[102] The rise of the nation-state and its focus on territoriality dialectically created the modern understandings that strengthened a diaspora consciousness. This process strikingly recalls the way in which the nineteenth-century colonial state "dialectically engendered the grammar of the nationalisms that eventually arose to combat it."[103] In this sense, diaspora is the ne-

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[100] Mishra, supra note 15, at 433. **R**

[101] See Neil Gotanda, Race, Citizenship, and the Search for Political Community Among "We the People": A Review Essay on Citizenship Without Consent, 76 Or. L. Rev. 233, 252 (1997) (describing imposition of "foreignness" as "recurrent form of racism"); see also Kevin R. Johnson, Racial Hierarchy, Asian Americans and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?, 76 Or. L. Rev. 347, 352-58 (1997) (examining similarities between Latino and Asian American experiences as "foreigners" in the United States); Natsu Taylor Saito, Alien and Non-Alien Alike: Citizenship, "Foreignness" and Racial Hierarchy in American Law, 76 Or. L. Rev. 261 (1997) (exploring presumption of "foreignness" of Asian Americans, its legal and social influences, and its role in preservation of racial and social hierarchy); Natsu Taylor Saito, Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity, 4 Asian L.J. 71 (1997) (examining relationship of "foreignness" to contradictory portrayal of Asian Americans and reinforcement of racial hierarchy); Enid Trucios-Haynes, Latino/as in the Mix: Applying Gotanda's Models of Racial Classification and Racial Stratification, 4 Asian L.J. 39, 53-59 (1997) (discussing legal and analytical implications of identification as "foreigner").

[102] Cf. Jon Stratton, (Dis)placing the Jews: Historicizing the Idea of Diaspora, 6 Diaspora 301, 310 (1997). He states:

> The modern discourse of diaspora evolved out of the association of the idea that a national population is homogeneous and the idea that it is distributed over a particular territorial space; that is, the new, nineteenth-century usage of 'diaspora' developed as a way of talking about *people who were thought of as being out of place*, displaced.

Id. (emphasis in original).

[103] Id. at xiv. Alternatively, some have suggested that diasporas are gaining strength now due to the contemporary debilitation of the nation-state. See, e.g., Stratton, supra note 102, at 303 (associating rise of world diaspora to "weakening of the meaning of the nation-state"); cf., e.g., Tölölyan, supra note 44, at 4 ("[J]ust as the nation-state has begun to encounter limits to its supremacy and perhaps even to lose some of its sovereignty, diasporas have emerged in scholarly and intellectual discourse."). **R** **R**

glected child of the international system—created by that system, yet ignored by it.

Also crucial to this recharacterization from immigrants to diaspora is what Thomas Franck identifies as "a growing consciousness of a *personal* right to compose one's identity."[104] According to Franck, international law now shows a greater receptivity for an individual asserting her membership in a transnational community, such as that of a diaspora.

The rise of diaspora, or the assertion of membership in a transnational community, will, somewhat counterintuitively, trouble many diasporan individuals themselves. Immigrants' alleged refusal to assimilate has long been used to justify discrimination against them, so any suggestion that any group of immigrants still retains its ties to its homeland or to other expatriates may jeopardize the reception of that group in its new country.[105] The mass internment of Japanese Americans (and not other groups such as German Americans and Italian Americans) during World War II rested in part on the view that persons of Japanese descent belonged to "an enemy whose racial strains are undiluted."[106] Individuals such as Fred Korematsu bravely protested this characterization, resting their claims in part on their status as pure Americans with no loyalties abroad.[107] But the rise of diasporas suggests that individuals now are more able and willing to maintain and reveal their transnational community despite the potential negative consequences attending such an approach.

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104 Franck, supra note 6, at 359; see also Franck, supra note 28 (further developing idea of growing consciousness). For Franck, this right to choose one's own identity includes more than the right to define oneself by one's ancestry, but also to maintain transnational communities based on all sorts of commonalities, such as interests or political activism. See id. at 79 (**R**

> [M]any individuals now tend to define themselves on the basis of dependent variables (such as their economic self interest) rather than being governed by independent variables (such as their race). 'Environmentalists, human rights activists, women, children, animal rights advocates, consumers, the disabled, gays and indigenous peoples have all gone international.')

(quoting Peter J. Spiro, New Global Communities: Nongovernmental Organizations in International Decision-Making Institutions, Wash. Q., Winter 1995, at 45, 45).

105 See infra notes 146-47 and accompanying text. **R**

106 Korematsu v. United States, 323 U.S. 214, 236 (1944) (Murphy, J., dissenting) (quoting final military report on Japanese evacuation); see also Trucios-Haynes, supra note 101, at 56 ("Clearly the results in *Korematsu* indicate that the element of foreignness as part of a racial identity is maintained regardless of citizenship status, when a group is viewed as unassimilable."). **R**

107 Even the authorities did not claim that Korematsu was disloyal. See *Korematsu*, 323 U.S. at 243 (Jackson, J., dissenting) ("No claim is made that he is not loyal to this country.").

Through this historical sketch, we see how "a term once saturated with the meanings of exile, loss, dislocation, powerlessness and plain pain"[108] has transformed, through an assertion of discursive power and through improvement in the actual condition of dispersed peoples, into one that is valorized and deployed to build community and demand recognition.

A description of the rise of diaspora serves two purposes. First, it demonstrates a growing diaspora consciousness at the turn of the millennium, positioning diaspora as a subject for inquiry into the contemporary condition. Second, the history and description of diaspora help define and refine the concept, thus laying the groundwork for understanding what legal claims diasporas may assert. It is to the identification of such claims that we now turn.

II
The Legal Claims of the New Diasporas

What legal claims are groups that have a diaspora consciousness making? What kinds of claims might they make in the future? A typology of claims serves a number of purposes. First, it enables policymakers to think comprehensively about diasporas and their implications for law. Second, it distinguishes diasporas as an analytical concept from close alternatives such as ethnic groups and minorities, whose own claim types will overlap with those of diasporas, but will not coincide perfectly. Finally, by identifying a claim as belonging to a larger general category of claims, it forces responses to that claim to be framed in terms of general principles, rather than ad hoc solutions.[109] This Article offers the following typology:[110]

- Diasporas make claims for *recognition* from both their adopted countries and their homelands. Implicit in such recognition is the rejection of the adopted country's assimilationist strategies in immigration law and in education.
- Diasporas favor the possibility of *dual nationality*. Dual nationality allows individuals in diaspora to maintain officially

[108] Tölölyan, supra note 44, at 9. **R**

[109] Benedict Kingsbury makes this point nicely: "The lack of a generalized normative and procedural framework has also reinforced inevitable tendencies of major states to react in different ways to different claims, not for principled universal reasons but for particularist reasons reflecting the special interests of major states and decisionmakers." Benedict Kingsbury, Claims by Non-State Groups, 25 Cornell Int'l L.J. 481, 508 (1992).

[110] Kingsbury offers a more general typology for all nonstate groups. He describes five different "domains of discourse" in which claims by nonstate groups are asserted: claims to self-determination, minority rights claims, human rights claims, claims to sovereignty legitimized by historical arguments or other special circumstances, and claims to special rights by virtue of prior occupation. Id. at 486-96.

sanctioned connections to a foreign state, whereas recognition of the diaspora gives official sanction to the transnational community itself.

- Diasporas may seek a minimum amount of *self-governance* or, alternatively, governance by their homeland's government.[111] It is this exception to domestic jurisdiction that is the central issue with respect to Diaspora Bonds.[112]
- Diasporas may seek to *discriminate* in favor of other diaspora members, restricting access only to members of the diaspora.[113] For example, they may establish rotating credit associations open only to others in the diaspora.[114] This issue is raised squarely by the Resurgent India Bonds, which are available for purchase only by the Indian diaspora as defined by the Indian government.[115]
- Diasporas may seek to *petition* the government of the adopted country on behalf of, or at least with respect to, the homeland.[116]
- Diasporas may make *multicultural* claims.[117] Diasporas, generally belonging to a minority culture in their adopted land, may seek to protect their own culture (or cultures)[118] against the

[111] This may be for good or bad. Citing the absence of labor law protection in the Chinatown garment industry, one commentator observes that "Chinatowns remain in some ways beyond the reach of formal American law . . . ." Teemu Ruskola, Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective, 52 Stan. L. Rev. 1599, 1727 (2000).

[112] See infra Parts IV.A.4, IV.C, IV.D.

[113] Charles Jones calls this type of discrimination "compatriot favouritism." Charles Jones, Global Justice: Defending Cosmopolitanism 112-34 (1999).

[114] Cao, supra note 23, at 874-84. R

[115] See infra Part IV.E.

[116] See, e.g., Yossi Shain, Marketing the Democratic Creed Abroad: US Diasporic Politics in the Era of Multiculturalism, 3 Diaspora 85, 85-87 (1994) (discussing influence of diasporic populations on U.S. foreign policy); Yossi Shain, Multicultural Foreign Policy, 100 Foreign Pol'y 69, 71 (1995) (same). The diaspora also is likely to be directly involved in the domestic politics of its homeland. One paper reports that, because of its important Sikh community, "'Vancouver is now a fund-raising stop for anyone who wants to get elected to anything in Punjab.'" James Brooke, Sikhs on the Rise in British Columbia, N.Y. Times Int'l Ed., July 18, 2000, at A8 (quoting Canadian reporter Kim Boland).

[117] See Jacob T. Levy, Classifying Cultural Rights, 39 Nomos 22, 25 (1997) (categorizing classes of cultural claims).

[118] Any particular diaspora is itself likely to be multicultural. The African experience demonstrates this: "The uniformity of Black social identification throughout the Black diaspora is by virtue of the fact that a Black person is viewed as distinct because of appearance, ancestry, or both, and *not because of any commonality in culture*." Tanya Kateri Hernandez, Multiracial Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 Md. L. Rev. 97, 112 (footnote omitted) (emphasis added) (1998); see also Gilroy, supra note 84, at 195 (discussing journal that reflected "developing awareness of the African diaspora as a transnational and intercultural multiplicity"). R

dominant culture. Diasporas may demand *freedom of movement*.[119] They may demand the right to pass freely between their homeland and their adopted land, and to bring their capital and possessions with them.[120]

- Diasporas may seek *liberal immigration* policies, especially policies oriented towards family reunification, to permit other members of their homeland community to join them.
- Finally, diasporas may desire *representation* in international lawmaking.[121] As a transnational community, their lives will be especially vulnerable to international sanctions and other restrictions on the movement of capital, goods, and people. Diasporas may not be able to depend on their adopted or homeland governments to champion their interests internationally. The diaspora might, for example, wish to see a change in its homeland's government, but the diaspora's adopted country's government may not be willing to expend political capital agitating for such a change. Diasporas are distinct from nongovernmental organizations, which have become accepted participants in international lawmaking, because diasporas represent a transnational political community characterized by the kinship loyalties of a *people*, which generally differ in character from those that bind an association of *individuals*.

III
THE LAW'S RESPONSE

A. The Statist Model

To resolve many of these questions, the conventional approach would appeal to the principle of strict territorial sovereignty. This principle is said to have originated in the Peace of Westphalia, signed

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[119] For example, Mexico's new president, Vicente Fox, has proposed the radical step of opening the U.S.-Mexico border to permit people to move freely between the two countries. Marjorie Valbrun, Mexican Leader's Vision for Border Collides With U.S. Political Realities, Wall St. J., Aug. 24, 2000, at A24.

[120] Freedom of movement as it stands now encompasses three key subsidiary rights: the right to leave any country, the right to return to one's own country, and the right to move freely within a country into which one is lawfully admitted. See Reg'l Bureau for Europe, United Nations High Comm'r for Refugees, NGO Manual on Int'l and Reg'l Instruments Concerning Refugees and Human Rights 251-64 (1998) (discussing freedom of movement). It does not include "a general right to enter the country of one's choice." Id. at 251.

[121] Cf. John F. Stack, Jr., Ethnic Groups as Emerging Transnational Actors, in Ethnic Identities in a Transnational World 17, 27 (John F. Stack ed., 1981) (describing ethnic groups' participation in world politics).

in 1648, an event which ushered in the modern era of nation-states,[122] with each entity being completely sovereign and having unlimited power over its own territory.[123] As the international relations scholar Stephen Krasner describes, "[t]he fundamental norm of Westphalian sovereignty is that states exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate behavior."[124] Along with this notion of territorial dominion developed an international system that recognized states as the only juridical entities capable of participating in the international system.

The "statist" model, then, consists of two fundamental principles: (1) an international system of states which exercise exclusive dominion over their own territories; and (2) states which are the sole sources of authoritative decision in international law. Statism exalts the state as the nearly exclusive entity authorized to assert coercive power, subject only to a limited set of international constraints.[125] International relations scholars such as Hans Morgenthau, Kenneth Waltz, and Stephen Krasner are among statism's most prominent proponents,[126] but it is perhaps most popular among the world's policymakers and

[122] Stephen D. Krasner, Compromising Westphalia, 20 Int'l Security 115, 115 (1995/96) ("The Peace of Westphalia . . . is taken to mark the beginning of the modern international system as a universe composed of sovereign states, each with exclusive authority within its own geographic boundaries."). Others place the development of the sovereign state much earlier, for example in the work of Hendrik Spruyt at around the year 1000. Harold K. Jacobson, The Sovereign State and Its Competitors, 90 Am. J. Int'l L. 526, 526 (1996) (book review).

[123] Stephen D. Krasner, Pervasive Not Perverse: Semi-Sovereigns as the Global Norm, 30 Cornell Int'l L.J. 651, 656 (1997) ("The Westphalian model is an institutional arrangement for organizing political life that is based on two principles: territoriality and autonomy. States exist in specific territories. Within these territories, domestic political authorities are the only arbiters of legitimate behavior."). Kenneth Randall and John Norris note that, in the context of international business, under the Westphalian paradigm each nation applied its own law to behavior within its borders; they argue that this paradigm stymied efforts to develop supranational private international law. Kenneth C. Randall & John E. Norris, A New Paradigm for International Business Transactions, 71 Wash. U. L.Q. 599, 630-31 (1993).

[124] Stephen D. Krasner, Sovereignty: Organized Hypocrisy 20 (1999). Put more graphically, "[t]he Westphalian system refers to the organization of the world into territorially exclusive, sovereign nation-states, each with an internal monopoly of legitimate violence." James A. Caporaso, The European Union and Forms of State: Westphalian, Regulatory or Post-Modern?, 34 J. Common Mkt. Stud. 29, 34 (1996).

[125] Brian Barry offers a different description of "statism": "Statism is in essence a doctrine that endorses the status quo among states . . . ." Brian Barry, Statism and Nationalism: A Cosmopolitan Critique, 41 Nomos 12, 25 (1999).

[126] Krasner, supra note 124, at 20 (arguing that statism is the "fundamental norm of Westphalian sovereignty"); see also Hans Morgenthau, Politics Among Nations (1948); Kenneth N. Waltz, Man, the State, and War (1959); Barry, supra note 125, at 15 (describing international realist scholars such as Morgenthau and Waltz as subscribing to statist position). R R

lawgivers.[127] In law, the statist perspective appears in the legal positivism of John Austin, which posits an international system of states in "hermetical isolation."[128] While the statist model has never described the international system perfectly,[129] deviations from it generally are resisted, though more and more unsuccessfully.[130] Unsurprisingly, nations invoke the statist model when they seek to repudiate foreign interventions into their "internal" affairs,[131] but invoke other justifications for their actions when perpetrating such interventions.[132]

Statism must be distinguished from its sister concept of *nationalism*. Colloquially, the terms "nation" and "state" often are used interchangeably to refer to a country and its citizens. Scholars, however, have long distinguished between the two, using "nation" to mean "a community of people who share loyalties, civic allegiance, and national character,"[133] and "state" to refer to a political entity that exer-

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[127] Brian Barry places the United Nations among those who often champion statism, as evidenced in its reluctance to support secessionist movements. Barry, supra note 125, at 25-26. **R**

[128] John Austin, The Province of Jurisprudence Determined 171 (Wilfrid E. Rumble ed., 1995) (1832) (focusing on "independent political societ[ies]" as units in international "law"); see also Myres S. McDougal et al., Theories About International Law: Prologue to a Configurative Jurisprudence, in International Law Essays 43, 97 (Myres S. McDougal & W. Michael Reisman eds., 1981).

[129] See infra note 171 and accompanying text. **R**

[130] Anthony D'Amato, The Invasion of Panama Was a Lawful Response to Tyranny, 84 Am. J. Int'l. L. 516, 523-24 (1990) (characterizing U.S. invasions of Grenada and Panama as affirming new customary international law rule permitting humanitarian intervention in support of actual popular sovereignty); Lori Fisler Damrosch, Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs, 83 Am. J. Int'l L. 1, 2 (1989) (observing "[p]atterns of transnational political influence" in domestic political affairs despite purported norm of nonintervention).

[131] See, e.g., D'Amato, supra note 130, at 518 (criticizing critics of United States invasion of Panama as employing "rhetoric of statism"). China exemplifies this phenomenon, vigorously protesting as an intrusion upon its sovereignty any human-rights-based interference in its internal affairs. See Samuel S. Kim, Sovereignty in the Chinese Image of World Order, in Essays in Honor of Wang Tieya 425, 428 (Ronald St. John McDonald ed., 1994) (noting Chinese government's strong support for Westphalian notion of sovereignty); No More of "Human Rights Above State Sovereignty," XINHUA News Agency, May 26, 1999, LEXIS, News Library, Xinhua File (reporting view of official Chinese news agency that "it is time now to put an end to the fallacy that human rights are above state sovereignty[, a fallacy] cooked up by the United States and its major allies"). **R**

[132] Peter Ford, Few Sacred Borders to New UN, Christian Sci. Monitor, Sept. 29, 1999, at 1 (quoting U.N. Secretary-General Kofi Annan as saying: "This developing international norm in favor of intervention to protect civilians from wholesale slaughter is an evolution that we should welcome"); Geoffrey Varley, France Defends Rwanda Intervention, Keen to Avoid Clashes, Agence Fr. Presse, July 5, 1994, LEXIS, News Group File (quoting French Prime Minister Edouard Balladur's defense of use of French troops in Rwanda on ground that mission was "strictly humanitarian").

[133] Note, The Functionality of Citizenship, 110 Harv. L. Rev. 1814, 1815 (1997). For Ernest Renan, writing more than a century ago, the nation is "a spiritual principle, the outcome of the profound complications of history." Ernest Renan, What is a Nation?, re-

cises a high degree of territorial dominion and does not itself have any politically superior entity above it. This distinction makes the yoking together of the two words into "nation-state" (a linkage credited to Hegel)[134] more meaningful—the linkage expresses the idea that the natural political and geographical division of the world is based on the lines of one nation per state. "Nationalism" thus has been defined as the political movement seeking to ensure that "the state and nation coincide."[135] But this is not the current way of the world. As Thomas Franck observes, "today, almost no states are nations and hardly any nations are states."[136] Diasporas exemplify this, representing a nation that is no longer territorially limited by the political boundaries of the state.

1. Application of the Statist Model to Diasporan Legal Questions

How would the statist model approach the legal claims of diasporas? How would a statist host government, for example, respond to a diaspora's claim for recognition, dual citizenship, limited self-governance, pro-diaspora discrimination, petitioning, multicultural rights, freedom of movement, liberal immigration, and representation in international lawmaking? We briefly consider each such claim in turn. First, the statist model would disfavor the recognition of a transnational community, such as the diaspora, that did not order its affairs according to state borders. Second, allowing people dual citizenship would encroach upon the strict territorial ideal, as the dual citizen would be subject to the commands of two sovereigns and would experience feelings of dual loyalty. Third, allowing certain areas of autonomy to domestic groups would violate the Westphalian state's monopoly on prescriptive authority. With respect to the fourth category of claims, discrimination in favor of diaspora members, the statist model would disfavor preferential treatment of other members of the diaspora, and would instead encourage feelings of camaraderie exclusively with fellow citizens of the adopted country. Fifth, the statist model would reject, as inconsistent with its demand for a singular loy-

printed in Nation and Narration 8, 18 (Homi K. Bhabha ed., 1990). Compare Stalin's definition: "A nation is a historically constituted, stable community of people, formed on the basis of a common language, territory, economic life, and psychological make-up manifested in a common culture." Joseph Stalin, The Nation, in Nationalism 18, 20 (John Hutchinson & Anthony D. Smith eds., 1994).

134 Franck, supra note 28, at 7. R

135 Will Kymlicka & Christine Straehle, Cosmopolitanism, Nation-States, and Minority Nationalism: A Critical Review of Recent Literature, 7 Eur. J. Phil. 65, 66 (1999).

136 Franck, supra note 28, at 7; see also Walker Connor, A Nation Is a Nation, Is a State, Is an Ethnic Group, Is a . . ., in Nationalism, supra note 133, at 36, 39 (observing that most states in world are not true "nation-states"). R R

alty, petitions of domestic groups in favor of their homelands abroad. Sixth, though the model could theoretically be said to be consistent with multiculturalism, the one nation/one state paradigm associated with the statist model favors assimilation. Seventh, the statist approach would respect the freedom of movement of the diaspora but would disfavor the use of this freedom to maintain loyalties to foreign lands. Eighth, the statist approach would impose restrictive immigration policies to protect its national character. Finally, the model would reject the participation of nonstate actors such as diasporas in international lawmaking.

Given its concern with granting a state exclusive dominion over its territory, the statist model seeks to apply a state's law to transactions occurring within, or having an effect on, its territory. Accordingly, the unilateral approach in conflict-of-laws theory has much appeal to statists. Under unilateralism, the court asks only "whether the forum's law applies to the activity in question, without worrying that another forum might also apply its law."[137] In this way, the territorial sovereignty of a state is not diminished by the possibility that a court might conclude that another state's law might be better applied to the dispute. Multilateralism, on the other hand, seeks to assign prescriptive competence to only one state in a multistate transaction, requiring a court to choose the law of the state with the strongest connection to the dispute. Unilateral judicial decisions abound. The most prominent recent example in United States jurisprudence is the Supreme Court's decision in *Hartford Fire Insurance Co. v. California.*[138] In *Hartford*, the Court upheld the application of the Sherman Act against London reinsurers, despite the fact that British law permitted them to engage in the very acts that the Sherman Act prohibited, as the British government attested as amicus curiae in the appeal.[139] Unilateral approaches to diaspora relations with the homeland and to each other will lead to similar conflicts between sovereigns.

[137] William S. Dodge, Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism, 39 Harv. Int'l L.J. 101, 104 (1998); see also Lea Brilmayer, Conflict of Laws 17-19 (1995) (contrasting unilateralist and multilateralist approaches in conflict of laws).

[138] 509 U.S. 764, 794-99 (1993).

[139] Id. at 798-99.

2. *Statism and Dual Sovereignty*

The central insight of the statist model came as early as the sixteenth century in Jean Bodin's account of sovereignty.[140] According to Bodin, sovereignty was indivisible because logic required that it be vested in a single individual or group.[141] This notion of indivisibility was later enshrined in the maxim, popular during the time of the founding of American democracy, that "*imperium in imperio* [is] justly deemed [a] solecism," that is, that a sovereign within a sovereign is logically absurd.[142] To avoid this absurdity, it was considered necessary to arrange international relations according to the rule of one territory, one sovereign.

This underlying hostility to any possibility of dual sovereignty leads to the statist model's hostility towards the possibility of loyalty to two sovereigns. The United States, for example, requires all persons who are naturalized as U.S. citizens to take an oath renouncing all allegiance to "any foreign prince, potentate, state, or sovereignty," though the United States does not enforce this oath.[143] The oath's focus on the power exercised by foreign sovereigns is evident in the requirement that an individual give up allegiance to foreign sovereigns, but not nongovernmental connections to her homeland.[144]

The hostility towards dual loyalty has manifested itself in coercive, discriminatory action against diasporas. The experience of Japanese Americans in the United States during World War II stands as a clear example of this sad history. Justice Frank Murphy, dissenting in *Korematsu v. United States*,[145] revealed the motives underlying the ex-

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[140] Thomas Pogge describes Bodin's work as one origin of what he calls the "dogma of absolute sovereignty," but also finds antecedents in the writings of Aquinas, Dante, and Marsilius. Thomas W. Pogge, Cosmopolitanism and Sovereignty, 103 Ethics 48, 59 & n.20 (1992).

[141] Jean Bodin, On Sovereignty: Four Chapters From the Six Books of the Commonwealth 92 (Julian H. Franklin ed., Cambridge Univ. Press 1992) (1583) ("For if sovereignty is indivisible, . . . how could it be shared by a prince, the nobles, and the people at the same time?"); see also Julian H. Franklin, Sovereignty and the Mixed Constitution: Bodin and His Critics, in The Cambridge History of Political Thought, 1450-1700, at 298, 298 (J.H. Burns ed., 1991). Franklin criticizes Bodin for being "innocent of any notion of constitutional coordination of co-equal parts." Id. at 305. Bodin did not recognize the possibility of separate domains of powers. Id.

[142] Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 527-30 (1969).

[143] See infra note 180. **R**

[144] Sanford Levinson, Constituting Communities Through Words That Bind: Reflections on Loyalty Oaths, 84 Mich. L. Rev. 1440, 1441 (1986) (quoting Professor Salvemini as stating that "[y]ou are asked to sever your connections with the government of your former country, not with the people and civilization of your former country").

[145] 323 U.S. 214 (1944) (upholding military order restricting Japanese Americans to internment camps).

clusion order by quoting directly from the Commanding General's Final Report on the internment of Japanese Americans: The General, Justice Murphy writes, "refers to all individuals of Japanese descent as 'subversive,' as belonging to 'an enemy race' whose 'racial strains are undiluted,' and as constituting 'over 112,000 potential enemies . . . at large today' along the Pacific Coast."[146] The concern that Japanese Americans would commit sabotage and espionage against the United States to aid Japan justified, to the majority of the Court and to the executive branch, their internment in desert camps and the dispossession of their homes and property.[147]

Suspicion of dual loyalty still prevails. While the days of internment camps and the questioning of John F. Kennedy's loyalty due to his Catholicism may seem like a distant memory, complaints about dual loyalties remain a common feature of contemporary discourse. Suspicion of dual loyalty is evident in the treatment of Asian Americans following unsubstantiated accusations that China funneled money into American political campaigns,[148] and that American scientists of Chinese descent spied on United States nuclear installations for China.[149]

International law traditionally has sought to reduce the incidence of dual nationality, one important instance of dual loyalty. As early as 1868, the United States began concluding bilateral treaties with European countries to define a single nationality for persons who might

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[146] Id. at 236 (Murphy, J., dissenting) (quoting final military report on Japanese evacuation).

[147] Hostility towards diasporas may arise not only because of concerns about dual loyalty, but because of antipathy based on race or ethnicity. Indeed, Justice Murphy denounces the apparent racism of the government in its internment of Japanese Americans on the West Coast while leaving most German Americans and Italian Americans free: He wrote that internment "falls into the ugly abyss of racism" and noted differential treatment between persons of German and Italian ancestry and those of Japanese ancestry. Id. at 233, 241 (Murphy, J., dissenting).

[148] L. Ling-chi Wang, Beyond Identity and Racial Politics: Asian Americans and the Campaign Fund-Raising Controversy, 5 Asian L.J. 329, 332 (1998) (characterizing Senate inquiry into Chinese contributions to American political campaigns as attack on Asian Americans).

[149] See, e.g., Nick Anderson, Spy Scare Taints Labs' Atmosphere, Asian Americans Say, L.A. Times, May 21, 1999, at A12 (reporting Chinese American lab worker's complaint that he had been asked at work whether he had "dual loyalties"); Annie Nakao, Asian Americans Fear Backlash, S.F. Examiner, May 26, 1999, 1999 WL 6873486 (citing Professor Bill Hing and Professor Frank Wu's concern that Cox Report on Chinese spying failed to distinguish between Chinese Americans and Chinese nationals). According to a recent survey, nearly one-third of Americans not of Chinese descent believe that Chinese Americans are more loyal to China than to the United States. Comm. of 100, Yankelovich Partners Survey of American Attitudes Towards Chinese Americans and Asian Americans 6 (April 2001), at http://www.committee100.org/amer-att/amer-att.pdf (last visited May 1, 2001).

otherwise have double nationality.[150] In 1906, the United States signed a convention with seventeen Central and South American countries requiring that a naturalized person returning to the state of his original nationality would be considered to have reassumed his original citizenship and to have renounced the citizenship acquired through naturalization.[151] The 1930 Hague Conference on the Codification of International Law resulted in a Final Act which recommended that "[s]tates should apply the principle that the acquisition of a foreign nationality through naturalisation involves the loss of the previous nationality."[152] In the late 1950s, the Soviet Union concluded a series of bilateral treaties with its fraternal states to reduce cases of multiple nationality.[153] The Council of Europe adopted a similar approach in the 1963 Convention of Reduction of Cases of Multiple Nationality.[154]

United States law exhibited hostility towards dual nationality for a long time.[155] "The moment a foreigner becomes naturalized his allegiance to his native country is severed forever," wrote the Secretary of State in 1859.[156] "He experiences a new political birth."[157] Even in the midpart of the twentieth century, United States citizenship was revoked for birthright citizens if they took certain actions that might suggest that they were loyal to a foreign country.[158]

3. Statism and Assimilation

The statist model's central focus on the nation-state and its concomitant hostility towards dual loyalties drive it towards an assimila-

150 See, e.g., Treaty With the King of Prussia, Feb. 22, 1868, U.S.-Prussia, 15 Stat. 615, 615; see also Spiro, supra note 22, at 1435 n.98 (arguing that Article I of treaty strongly implied that original nationality would be lost upon naturalization). R

151 Convention Between the United States and Other Powers Establishing Status of Returning Naturalized Citizens, Aug. 13, 1906, art. I, 37 Stat. 1653, 1655.

152 Myres S. McDougal et al., Nationality and Human Rights: The Protection of the Individual in External Arenas, 83 Yale L.J. 900, 931 (1974); see also Spiro, supra note 22, at 1435 n.98 (citing bilateral treaties). R

153 McDougal et al., supra note 152, at 986. R

154 Id. at 985.

155 In the latter half of the twentieth century, the United States came to accept dual nationality. See infra notes 179-80 and accompanying text. R

156 Spiro, supra note 22, at 1435. R

157 Id.

158 Nationality Act of 1940, Pub. L. No. 76-853, § 401, 54 Stat. 1109 (1940). The acts included: naturalizing in a foreign state, taking an oath of allegiance to another country, participating in the armed services of another country where the individual had acquired nationality, voting in the election of a foreign country, or working as a government employee in a foreign country where employment was limited to naturalized citizens. Id.

tionist political ideology and assimilationist legal norms.[159] Statism long has been associated with the often coercive assimilation of disparate groups living within the state's territory to create a single nation from distinct tribes with different traditions, languages, worldviews, and cultures.[160] Assimilationist strategies are, by definition, hostile to diasporas, since diasporas are defined by the transnational community they seek to maintain.[161]

Immigrants who resist assimilation or who live double lives often are thought to threaten the "perceived minimum order requirements of the environing community."[162] During the Congressional debates on the Fifteenth Amendment, Senator George H. Williams of Oregon denounced the proposed amendment because it could lead to sovereignty conflicts with respect to Chinese immigrants who were not assimilated into American society: "They are a people who . . . will not adopt our manners or customs and modes of life; they do not amalgamate with our people; they constitute a distinct and separate nationality, an *imperium in imperio*—China in the United States . . . ."[163]

The immigrant's strong desire for acceptance through assimilation often results in her intentional rejection of ties to the homeland. The immigrant, motivated by concern over potential accusations of

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159 With respect to legal norms, for example, Kenji Yoshino has observed an assimilationist bias in American equal protection jurisprudence. Kenji Yoshino, Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell," 108 Yale L.J. 485, 487 (1998). Christopher Eisgruber argues that assimilation is a constitutional value, one reconciling a commitment to pluralism with a commitment to justice. Christopher L. Eisgruber, The Constitutional Value of Assimilation, 96 Colum. L. Rev. 87, 87-88 (1996).

160 Ernest Gellner, Nations and Nationalism 8-18 (1983) (describing roles of states in preindustrial, agrarian societies).

161 James Clifford observes that "assimilationist national ideologies such as those of the United States" produce "narratives [that] are designed to integrate immigrants, not people in diasporas." Clifford, supra note 6, at 307. R

162 W. Michael Reisman, Autonomy, Interdependence, and Responsibility, 103 Yale L.J. 401, 415 (1993) (worrying that "[m]inorities concerned with resisting assimilation and maintaining their identity and group integrity . . . will be the targets" of "national and racist hysteria").

163 Alfred Avins, The Reconstruction Amendments' Debates 358 (1967) (presenting legislative history and debates in Congress on Thirteenth, Fourteenth, and Fifteenth Amendments). The ability to assimilate has long been used to judge whether certain groups should be accepted as part of American society. See Rosaldo, supra note 21, at 209 R (describing American notion of "melting pot" as process that strips immigrants of their cultures, enabling them to become American citizens); Kevin R. Johnson, "Melting Pot" or "Ring of Fire"? Assimilation and the Mexican-American Experience, 85 Cal. L. Rev. 1259, 1312 (1997) (stating that "infamous Chinese exclusion laws of the 1800s and the internment of persons of Japanese ancestry during World War II were rationalized, and upheld by the Supreme Court, on the ground that Chinese and Japanese persons had failed to assimilate"); see also Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 590 (1823) (describing Native Americans as "fierce savages" for whom assimilation is impossible).

disloyalty to her adopted country, may give up citizenship in her homeland even if that country permits dual citizenship. Even more perversely, homeland states might intentionally deny their diasporas the possibility of dual citizenship because of the fear that their diasporas might then be accused of disloyalty to their adopted lands. Since its issuance of the Resurgent India Bonds,[164] India recently revisited the possibility of allowing its diaspora to maintain its Indian citizenship even when it takes on the citizenship of another country.[165] Some diasporan Indians spoke up against the idea, afraid that "if they sought . . . dual citizenships, their loyalty to their countries of adoption may become suspect."[166] This is reminiscent of the declaration by "the American Council for Judaism, founded in 1943 but now moribund, that Jews are Jews in a religious sense only and any support given to a Jewish homeland in Palestine would be an act of disloyalty to their countries of residence."[167] The fear of being marked as disloyal to their adopted country often has induced diaspora members to assimilate and to reject any offer of dual nationality.

4. Critique of Statism

The traditional premise of international law—that nation-states are sovereign over their territory—has been under attack from various quarters.[168] Perhaps the earliest breach in that construction of

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164 See infra Part IV.A.

165 See Arvind Padmanabhan, Contribution of the Indian Diaspora Stretches Beyond Business, India Abroad, Feb. 25, 2000, at 30, http://www.softlineweb.com/bin/KaStasGw.exe?k_a=5033m.1.searchwin.w (providing search engine that can find this article).

166 Lalit K. Jha, PIO Card Scheme Continues to Be a Nonstarter, India Abroad, Jan. 1, 1999, at 4, http://www.softlineweb.com/bin/KaStasGw.exe?k_a=5033m.1.searchwin.w (providing search engine that can find this article). India has not yet approved dual nationalities, though it has begun issuing "Persons of Indian Origin" (PIO) cards for one thousand dollars each, allowing one, quite literally, to be a card-carrying member of the Indian diaspora. Centre Launches PIO Cards, The Statesman (India), March 31, 1999, LEXIS, Asia Intelligence Wire File. The PIO card may presage other identification documents that proclaim an individual to be a recognized member of the diaspora of a particular country. Cf. Barbara J. Merguerian, A Status for Diasporan Armenians?, Armenian Mirror-Spectator, Sept. 19, 1999, http://www.armeniadiaspora.com/htms/remarks.html (describing suggestion that Armenian government issue Armenian Identity Certificate to individuals of Armenian descent). See generally John Torpey, The Invention of the Passport: Surveillance, Citizenship and the State 158 (2000) (noting that "identification documents such as passports have played a crucial role in modern states' efforts to generate and sustain their 'embrace' of individuals").

167 The New Encyclopedia Britannica 69 (15th ed. 1989) (entry for "diaspora").

168 Criticism of traditional conceptions of sovereignty has become commonplace. Louis Henkin suggests that we do away with the term as applied to states in their external relations, preferring instead terms describing various attributes of states, such as political independence, territorial integrity, and the right to be left alone. Louis Henkin, The Mythology of Sovereignty, in Essays in Honor of Wang Tieya, supra note 131, at 351, 352-54. Jack Rakove seeks to banish the term altogether because it is often used imperiously to aggran- R

sovereignty can be found in the law of war, which holds states accountable internationally even for actions committed within their own borders. Through the trials following World War II at Nuremberg, that law of war grew into a full-fledged human rights law.[169] A third concession to foreign power developed through post-war international regimes such as trade organizations.[170] While it is true, as Krasner writes, that there was never an era in which nation-states had absolute dominion over their territory,[171] the last century saw a higher degree of legalization of intrusions into territorial sovereignty, as well as a magnification of the number and breadth of such intrusions.[172] Bodin's doctrine of absolute territorial sovereignty "has been overtaken by the historical facts of the last two hundred years or so, which show conclusively that what cannot work in theory works quite well in practice."[173]

The Westphalian principle of an international system that recognizes only states as players in international relations came under assault, especially after World War II, as new nonstate actors such as nongovernmental organizations (NGOs) and multilateral institutions sought roles on the world stage.[174] The participation of NGOs and multilateral institutions has become widely accepted in international

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dize power and secure rhetorical advantage by entities claiming authority to do something based on their "sovereignty." Jack N. Rakove, Making a Hash of Sovereignty, Part II, 3 Green Bag 2d 51-52 (1999). Rakove's complaint should not apply to use of the term in the diaspora model since sovereignty's use as a trump is limited in that model.

169 See Harold Hongju Koh, Statement Before the Senate Commission on Foreign Relations (Oct. 7, 1998) (testimony of Harold Hongju Koh regarding his nomination as Assistant Secretary of State for Democracy, Human Rights, and Labor), 1998 WL 18089125. According to Koh:

> The modern-day international human rights movement rose from the ashes of World War II, with the war crimes trials at Nuremberg and Tokyo and the Universal Declaration of Human Rights, proclaimed fifty years ago this coming December. The international labor movement spurred the development of universal human rights standards and their inclusion into global diplomatic discourse.

Id. See also Fernando R. Tesón, Humanitarian Intervention: An Inquiry Into Law and Morality 155-57 (2d ed. 1997) (discussing Nuremberg trials' message that individuals are entitled to fundamental human rights).

170 But see John O. McGinnis & Mark L. Movsesian, The World Trade Constitution, 114 Harv. L. Rev. 511, 528 (2000) (refuting "conventional wisdom" that world trade regime necessarily poses threat to state sovereignty).

171 Krasner, supra note 122, at 150; Krasner, supra note 124, at 238 (noting that there "has never been some ideal time during which all, or even most, political entities conformed with all of the characteristics that have been associated with sovereignty—territory, control, recognition, and autonomy"). **R**

172 Cf. John Rawls, The Law of Peoples 27 (Harvard Univ. Press 1999) ("Since World War II international law has become stricter.").

173 Pogge, supra note 140, at 59. **R**

174 Hedley Bull, The Anarchical Society 38-40 (1977).

lawmaking.[175] The demonstrations at the Ministerial Conference of the World Trade Organization in Seattle in 1999 show a public clamor for additional nonstate actors to be involved in international lawmaking.[176]

The statist approach also has been undermined by the growing acceptance of dual nationality in both international and municipal law. The Council of Europe repealed its earlier prohibitions on dual nationality by amending in 1993 the Convention on the Reduction of Cases of Multiple Nationality.[177] Britain, Switzerland, Portugal, and France now all permit dual nationality.[178] The law in the United States, shaped by Supreme Court decisions that declared unconstitutional statutory provisions that denaturalized United States citizens based on their activities abroad,[179] has come to accept fully the possibility of dual nationality.[180] And crucially, many homeland countries of major diasporas are now permitting their diasporas to retain their

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175 Id.

176 Protesters sought to include "labor groups, environmentalists, farmers, and other workers from developing countries" in process of making rules for international trade. See Robert A. Jordan, Battle in Seattle Sent a Message, Boston Globe, Dec. 7, 1999, at D4.

177 Second Protocol Amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, Feb. 2, 1993, paras. 5-7, Europ. T.S. No. 149 (amending Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, May 6, 1963, art. 1, Europ. T.S. No. 43). Franck, supra note 6, at 381-82, 382 n.108. R

178 Franck, supra note 6, at 380. R

179 In Schneider v. Rusk, 377 U.S. 163 (1964), the Court invalidated the 1952 Immigration Act's presumption that a naturalized United States citizen renounced her United States citizenship if she resided in her country of origin for three consecutive years. The Court held that this provision constituted an unconstitutional discrimination against naturalized citizens. Id. at 168-69. In Afroyim v. Rusk, 387 U.S. 253 (1967), the Court overruled its earlier decision in Perez v. Brownell, 356 U.S. 44 (1958), and held that voting in a foreign election could not deprive one of United States citizenship. *Afroyim*, 387 U.S. at 267-68.

Asked whether a person would lose United States citizenship if that person became the Prime Minister of a foreign country, the State Department mustered only this noncommittal answer, using a triple negative: "'It has not been established that the act of serving as Prime Minister of a foreign country is not necessarily inconsistent with American citizenship and would not automatically deprive the actor of U.S. citizenship.'" Marian Nash (Leich), Contemporary Practice of the United States Relating to International Law, 87 Am. J. Int'l L. 595, 599 (1993) (quoting letter written by Edward A. Betancourt, Chief, East Asian and Pacific Division, Office of Citizens Consular Services). Despite the permissive United States law with respect to dual nationality, the State Department still maintains in its official pronouncements that "'[t]he United States does not favor dual nationality as a matter of policy, but does recognize its existence in individual cases.'" Id. at 601, 604 (quoting United States State Department circular).

180 See Franck, supra note 6, at 378-79 (discussing erosion of U.S. prohibition on dual citizenship, culminating in State Department's 1990 announcement acknowledging that some U.S. nationals also have other citizenships); Spiro, supra note 22, at 1454-55 (describing State Department tolerance for dual nationality in wake of court decisions and amendments to Immigration and Nationality Act). R R

citizenship despite naturalization elsewhere.[181] Italy, Turkey, Colombia, the Dominican Republic, and Mexico, for example, now allow their diasporas to keep their homeland citizenship.[182] As Franck argues, "[t]he response of a legal system to a citizen's claim to 'dual nationality' is an excellent indicator of that society's tolerance not merely for multiple loyalty but for the right of individuals to choose their affiliations."[183] International and national law's increasing acceptance of dual nationality—without any evident catastrophic consequences—weakens the validity of the statist claim to singular loyalties.

The statist model has no room for the dual nationalities, double consciousness, or the plural identities of diasporas.[184] It demands a singular identity so as to conform to its one nation/one state paradigm. It rejects the pluralism of diasporas, in favor of the homogenizing force of assimilation. In this way, the statist model fails to recognize the "bifocal"[185] or "dispersed" identities of members of the diaspora.

Finally, the territorialist obsession with avoiding jurisdictional conflict by drawing bright lines at borders fails to appreciate the reality that negotiating multiple and conflicting sovereignties is commonplace. Sanford Levinson argues that the claim that there can be only one sovereign within a polity is undermined by the concept of a religious sovereign.[186] Loyalties too are multiple[187] and perhaps even proliferating. Franck notes that multiple loyalties have marked the human condition for a long time:

> Human beings for millennia have defined themselves in terms of loyalty to more than one system of social and political organization: as subjects of the emperor or king; communicants of a transnational church; members of a family, clan and nation; and perhaps members of an artisan or professional guild or of a secret order or society. Historically, the eternal question—who am I?—has more often than

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[181] Spiro, supra note 22, at 1457. **R**

[182] Id.

[183] Franck, supra note 6, at 378. **R**

[184] See infra Part III.C.

[185] Purnima Mankekar, Reflections on Diasporic Identities: A Prolegomenon to an Analysis of Political Bifocality, 3 Diaspora 349, 364 (1994) ("[A] notion of political bifocality enables us to subvert the binaries of homeland and diaspora.").

[186] Levinson, supra note 144, at 1467 ("[A]nyone who takes (at least Western) religion seriously poses an alternative sovereign against the claims of the State, however much the claims are dissipated by doctrines like the Talmudic injunction to follow the local law or by Christian doctrines about God and Caesar."). **R**

[187] Id. at 1468 ("All political states . . . face the problem of multiple loyalties of their citizenry; this is the price of a pluralist culture. Some of the time the competing loyalty is to other political entities; on other occasions, though, the competitors are other institutions within the society, whether family or religious community.").

> not been answered in terms of multiple external references, to which loyalty was felt to be owed.[188]

Where the statist model organizes loyalties in a clear hierarchy and admits no conflict of loyalties, the diaspora model accepts multiple, even sometimes conflicting, loyalties as a condition of our contemporary society.

Recognizing diasporas suggests yet another compromise to the traditional principle of territorial sovereignty.[189] Diasporan individuals often seek to retain ties to the homeland and to each other that might jeopardize their relations with their new territorial sovereign. Diasporas, by their very nature, reject the statist insistence on a singular loyalty. The diaspora model described below suggests that, if diasporan individuals maintain ties with their homeland, it may be appropriate to allow them to choose the law of their homeland to govern those ties—even where those ties involve events in the territory of the diaspora's new, adopted country,[190] but only so long as such events do not violate the public law of the adopted country.[191]

B. The Cosmopolitan Model

An alternative approach to statism would deny a primary commitment to any one country or any two countries. One could say instead, "I am a citizen of the world."[192] Cosmopolitan theories share three common elements. First, individualism—the belief that the ultimate unit of value is the individual human being, not family or ethnic group. Second, equality—the belief that no categories of individuals have more or less moral weight. Third, universality—the belief that these characteristics apply to all human beings.[193] The legal philosopher Jeremy Waldron has described the "cosmopolitan" person as one who essentially rejects borders altogether, one who "refuses to think of himself as *defined* by his location or his ancestry or his citizenship or his language."[194] The polar opposite of statists, cosmopolitans deny

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188 Franck, supra note 6, at 370. **R**

189 As one scholar describes, "the lived history of diasporas challenges the everyday boundaries of international law's conceptual maps." Vasuki Nesiah, Territorial Sovereignty in ICJ Jurisprudence, 92 ASIL Proc. 376, 377 (1998).

190 See infra Part IV.D; see also infra notes 260-65 and accompanying text. **R**

191 See infra Part IV.D; see also infra note 261. **R**

192 Scholars including Immanuel Kant have referred to such a person as a Weltbürger—a citizen of the world. Franck, supra note 6, at 376. **R**

193 Barry, supra note 125, at 35-36. Barry's delineation tracks Pogge, though Pogge uses slightly different terminology: individualism, universality, and generality. Pogge, supra note 140, at 48. **R**

194 Jeremy Waldron, Minority Cultures and the Cosmopolitan Alternative, 25 U. Mich. J.L. Reform 751, 754 (1992).

that the state is a crucial component of identity, preferring to describe membership in a polity as incidental[195] and certainly "morally irrelevant."[196] Waldron puts it colorfully: The cosmopolitan does not feel the loss or compromise of any essential identity "when he learns Spanish, eats Chinese, wears clothes made in Korea, listens to arias by Verdi sung by a Maori princess on Japanese equipment, follows Ukrainian politics, and practices Buddhist meditation techniques."[197] Such a person "is a creature of modernity, conscious of living in a mixed-up world and having a mixed-up self."[198]

Being a world citizen does not, however, mean that one wishes to be a subject of a world government or to do away with states entirely.[199] Cosmopolitans generally disfavor a world sovereign, concerned that such an entity might, in Kant's words, become a "universal monarchy."[200] Cosmopolitanism can be seen as a "moral stance" without "institutional nostrum,"[201] except perhaps an abiding suspicion of the strongly statist solutions.

The force of cosmopolitanism can be felt in its call for serious efforts to redistribute wealth to the poorer parts of the world. The cosmopolitan argues that the "demands of global justice include various positive actions aimed at protecting the vital interests of everyone, regardless of their location, nationality, or citizenship."[202] While cosmopolitans might permit a greater concern for the local (for example, for one's own family or one's own country) than for the foreign, such greater concern could be justified not because "the local is better per se, but rather that this is the only sensible way to do good."[203] Thus,

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195 Barry, supra note 125, at 35. **R**

196 Martha Nussbaum, Patriotism and Cosmopolitanism, Boston Rev., Oct./Nov. 1994, at 3, 3.

197 Waldron, supra note 194, at 754. **R**

198 Id.

199 See, e.g., Pogge, supra note 140, at 63 ("While a world state could lead to significant progress in terms of peace and economic justice, it also poses significant risks of oppression."). **R**

200 Immanuel Kant, Perpetual Peace 155 (M. Campbell Smith trans., George Allen & Unwin Ltd. 1st. ed. 1903) (1795). See also Thomas Mertens, Cosmopolitanism and Citizenship: Kant Against Habermas, 4 Eur. J. Phil. 328, 330 (1996) (describing Kant's concern about world government); Martha C. Nussbaum, Kant and Stoic Cosmopolitanism, 5 J. Pol. Phil. 1, 6-9 (1997) (discussing influence of Stoic cosmopolitanism on Kant).

201 Barry, supra note 125, at 36; cf. Jones, supra note 113, at 228 (noting two branches of cosmopolitanism: moral and institutional). **R**

202 Jones, supra note 113, at 2; see also Charles R. Beitz, Political Theory and International Relations 136-43 (1979) (arguing for redistribution of natural resources for maximum societal benefit). But see Thomas W. Pogge, Realizing Rawls 250-53, 263-65 (1989) (critiquing Beitz's redistribution theory). **R**

203 Martha C. Nussbaum, Reply, in For Love of Country 131, 135-36 (Joshua Cohen ed., 1996).

the perfect cosmopolitan bumper sticker: "Think globally, act locally."

Cosmopolitan thought in Western philosophy can be traced back to Diogenes the Cynic, who declared himself "a citizen of the world," and to the Stoics, who further developed the concept of the *kosmou politês* (world citizen).[204] Kant follows the Stoic elaboration of cosmopolitanism in *Perpetual Peace*.[205] The end of the Cold War has seen a revival of interest in cosmopolitanism.[206] It is no coincidence that the year 1999 saw the publication of two cosmopolitan-themed books both entitled "Global Justice";[207] the concern with justice at a global level becomes more acceptable when the world is not divided between two warring camps.

Contemporary cosmopolitan theorists often rest their theory on an application of John Rawls's procedural approach to devising just institutions.[208] As applied by cosmopolitans, the Rawlsian approach would begin with an original position where the fair rules for world society are to be devised.[209] Denied knowledge of the country into which one is to be born (which is, after all, "an accident of birth"),[210] the participants in this deliberation would choose to diminish the importance of one's country to one's flourishing, mindful that any of them might land in an impoverished or otherwise unlucky country; they would accordingly choose global commitment (cosmopolitanism) over national commitment (statism).[211]

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[204] Nussbaum, supra note 196, at 4 (tracing Stoic concept of world citizen); Nussbaum, supra note 200, at 4 & n.11, 5 (describing influence of Stoic cosmopolitanism on Kant's political writing). R R

[205] See Kant, supra note 200; see also Nussbaum, supra note 200, at 4. R

[206] Cf. Samuel Scheffler, Conceptions of Cosmopolitanism, 11 Utilitas 255, 255 & n.1 (1999) (noting "resurgence of interest in the idea of cosmopolitanism" and citing recent works).

[207] Jones, supra note 113; see also Barry, supra note 125. R

[208] Pogge, supra note 202, at 240. Rawls's original theory applies only within a predefined society, presumably determined by the boundaries of the nation-state. Kymlicka & Straehle, supra note 135, at 65. R R

[209] Rawls's own internationalization of his theory of justice can be found in a recent book. Rawls, supra note 172. Rawls proposes two original positions, the first being among members of a particular society wherein the internal rules of that society are devised, and the second being among representatives of different societies (peoples) wherein the laws governing the relations among societies are devised. Id. at 30-35. R

[210] Nussbaum, supra note 203, at 133 (arguing that factors of birth, such as nationality, ethnicity, and gender, "should not be taken to be a determinant of moral worth"); see also Nussbaum, supra note 200, at 7 (attributing to Stoic cosmopolitans idea that one's local or national identity is less important than one's identity as world citizen). R R

[211] This is a simplified version of the line of reasoning offered by a number of Rawlsian cosmopolitan scholars. See, e.g., Beitz, supra note 202, at 127-36 (drawing on Rawlsian view of distributive justice to argue that persons of diverse citizenship have obligation to reduce global distributive inequalities); Pogge, supra note 202, at 240-80 (offering Rawlsian R

An alternative path to cosmopolitanism can be found in Bentham's utilitarianism,[212] which Brian Barry calls the "simplest form of cosmopolitanism, since it says that we weigh the interests of everybody on the same scale . . . ."[213] Thus, the law and economics school, which rests in very large part on a utilitarian philosophy, has a strong cosmopolitan strain. Economists are the strongest proponents of free trade and the free movement of capital and labor—a strongly cosmopolitan view. Indeed, Amartya Sen describes Adam Smith as a cosmopolitan.[214] Generally, however, economists often have not owned up to the cosmopolitan nature of their underlying philosophy, preferring instead to focus on the mutual benefits of free movement of capital, labor, and goods for all of the states involved.[215] While many economists might limit their social welfare functions only to the members of a particular polity, such a restriction finds no basis in the underlying utilitarianism of neoclassical economics and rests instead on some other political theory.

1. Application of the Cosmopolitan Model to Diasporan Legal Questions

The relationship between cosmopolitanism and diaspora is complex. Cosmopolitans are among the greatest champions of multiculturalism and diversity, finding value in cultures throughout the world.[216] Moreover, cosmopolitans favor individual moral commitments that transcend national borders. Yet cosmopolitans would be

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conception of global justice in which advantaged global participants share responsibility for global order); Barry, supra note 125, at 35-36 (noting that Rawlsian theory of justice requires "commit[ment] to universal civil and political rights and the redistribution of material resources for the benefit of those with the least, wherever on earth they may be living"). R

212 See Jones, supra note 113, at 46-48. R

213 Barry, supra note 125, at 36; Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 2-3 (Hafner Publishing 1948) (1789) (describing principle of utility). R

214 Amartya Sen, Humanity and Citizenship, in For Love of Country, supra note 203, at 111, 113. See Adam Smith, The Theory of Moral Sentiments 229 (D.D. Raphael & A.L. Macfie eds., Clarendon Press 1976) (1759) ("[E]ach nation ought, not only to endeavour itself to excel, but from the love of mankind, to promote [improvements of the world], instead of obstructing the excellence of its neighbors."). Smith expressed this cosmopolitanism in his policy prescriptions, for example, in his critique of mercantilism, a policy that focused on national economic development. Hobsbawm, supra note 72, at 26. R R

215 Barry observes more generally that "utilitarians have been remarkably unforthcoming about the international implications of the doctrine." Barry, supra note 125, at 36. R

216 See Scheffler, supra note 206, at 257 (describing cosmopolitan view of culture as one that celebrates "people's remarkable capacity to forge new identities using material from diverse cultural sources"). This reveling in diversity also is evidenced in Waldron's quote about an eclectic cosmopolitan. See supra text accompanying note 194. R

skeptical of the patriotism of the diaspora either to its homeland or its adopted land.

Cosmopolitanism would approach the legal claims of diasporas[217] as follows. First, diasporas would not be recognized because they represent the type of historical, ethnic, and national affiliation above which cosmopolitans seek to rise. Second, cosmopolitans would dislike the concern for two states that dual citizenship entails, but might allow it as a step towards a true world citizenship. Third, since cosmopolitans are not beholden to the state, they would permit voluntary, transnational self-regulated civic associations, though again they would disfavor diasporan associations based on history and ethnicity. Fourth, cosmopolitans would reject discrimination in favor of diaspora members, again because of the unenlightened basis for such discrimination. Fifth, the cosmopolitanism model would disfavor diaspora petitions on behalf of their homeland, again because of the historical and ethnic ties to states that such petitions would evince. Sixth, as Waldron demonstrates,[218] multiculturalism, at least when defined as the acceptance of different cultural forms, is welcomed by cosmopolitans, though cosmopolitanism is often critical of arguments for government-sponsored cultural survival. Seventh, cosmopolitanism, having little tolerance for notions of ethnic or cultural purity, would support the freedom of movement of the diaspora. Eighth, cosmopolitans reject the notion of a particular "people," and thus have no legitimate basis for denying anyone entry into a country. Finally, cosmopolitans would disfavor the participation of diasporas in international lawmaking, again because diasporas are based on ethnicity and history.

2. Critique of the Cosmopolitan Model

The cosmopolitan model, while recognizing the possibility of a non-national identity, dissolves the multirootedness of diasporas into a global identity.[219] It fails to capture what is important to diasporas:

> The powerful pull of loyalty exerted by the imagined nation demonstrates that, even in the age of science, a loyalty system based on myths of shared history and kinship has a capacity to endure that

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217 See supra Part II.

218 See supra note 194 and accompanying text. **R**

219 Bruce Ackerman makes plain his rejection of nationality: "If I were a European right now, I hope I would have the guts to stand up for rootless cosmopolitanism: forget this nationalistic claptrap, and let us build a world worthy of free and equal human beings." Bruce Ackerman, Rooted Cosmopolitanism, 104 Ethics 516, 534 (1994). But even Ackerman retreats from this ideal, allowing instead that he is a "rooted cosmopolitan," faithful to the American Constitution. Id. at 535.

> may be the envy of a state with the most liberal civil society and patriotic citizenry.[220]

Cosmopolitanism is less a theory about who we are than about who we ought to be.[221] But its aspirations for a *Weltbürger*, a citizen of the world, premised on an internationalization of Rawls's theory of justice,[222] are subject to the same criticism as has been leveled against Rawls domestically: The image of the self removes the aspects that make the self special.[223] Specifically, the view of a person detached from her nation-state denies the attachments of the person to the nation-state.[224] Nussbaum herself concedes that "cosmopolitanism seems to have a hard time gripping the imagination."[225] Perhaps a moral philosophy need not seek to inspire or reflect what individuals find important in life. But a philosophy that ignores both of these goals will find it difficult to establish itself as the basis for a new world order.

When Waldron claims that the cosmopolitan "learns Spanish, eats Chinese, wears clothes made in Korea," one recalls a popular Hindi

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[220] Franck, supra note 6, at 374. R

[221] Brian Barry seems to recognize this, conceding that it is "not easy to tell" how well cosmopolitanism resonates with the publics of Western countries. Barry, supra note 125, at 35. But it cannot be predicted with certainty that cosmopolitanism will never gain widespread popularity. Many more of us may be willing sometime in the future to shed our national garb in favor of a global identity. The creation of the European Union has led to a sense of pan-European citizenship, demonstrating the dynamic nature of our self-identification with a larger community. See, e.g., Roger Cohen, A European Identity: Nation-State Losing Ground, N.Y. Times, Jan. 14, 2000, at A3 (quoting young person as saying, "I used to think of myself as German. Now I feel a little European, too"). R

[222] Barry, supra note 125, at 36. R

[223] See Michael J. Sandel, America's Search for a New Public Philosophy, Atlantic Monthly, Mar. 1996, at 57, 70 (arguing that "liberal conception of citizens as freely choosing, independent selves" fails to acknowledge "our identities as members of families, peoples, cultures, or traditions"). Bruce Ackerman ridicules Sandel's criticism: "If, as the trendy cant assures us, our very identities as persons are constituted by the local practices in which we find ourselves, the particular evils rooted in our particular communities are irretrievably rooted in our very souls as well." Ackerman, supra note 219, at 534. R

[224] A cosmopolitanism founded on utilitarianism rather than Rawls's liberal egalitarianism similarly would prove too demanding on individuals. It would impose a mandate for global distributive justice on individuals who would often prefer more parochial social welfare as the objective function to be maximized by society.

[225] Nussbaum, supra note 196, at 6. One scholar objects to the "thinness of cosmopolitanism" and suggests that "global citizenship demands of its patriots levels of abstraction and disembodiment most women and men will be unable or unwilling to muster, at least in the first instance." Benjamin R. Barber, Constitutional Faith, in For Love of Country, supra note 203, at 30, 33-34. Nussbaum returns to this issue in a later article, conceding that cosmopolitanism may be "less colorful" than "tradition, identity and group membership" but observing that the Stoics found the cosmopolitan concern with every individual "ultimately more beautiful." Nussbaum, supra note 200, at 8. R R R

song recited by Salman Rushdie's narrator, "Angel Gibreel," as he falls from the heavens in *The Satanic Verses*[226] (translated roughly):

Mera joota hai Japan	(O, my shoes are Japanese)
Yé patloon Inglistan	(These trousers English, if you please)
Sar pé lal topi Rusi—	(On my head, red Russian hat—
Phir bhi dil hai Hindustani	(My heart's Indian for all that.)[227]

The singer feels exactly the opposite of Waldron's cosmopolitan; the singer's foreign garb does not diminish his feeling of Indianness. International interaction does not necessarily make one an internationalist. Ling-chi Wang's poetic description of the different approaches that overseas Chinese have taken to their roots serves as a reminder that there are a multiplicity of personal responses to such interaction.[228] Some people may, for example, identify strongly as members of a diaspora, with the shared transnational community that that entails, while others may identify with a particular state or as citizens of the world.

C. The Diaspora Model

1. Articulating the Diaspora Model

In a world that is increasingly diasporan, full of crisscrossing loyalties, transborder mobility, multinational political states, and transnational communities, neither the statist nor the cosmopolitan paradigm fits.[229] Diasporas require a reconceptualization of the nation-state and the international system. They challenge both the Westphalian cartography of territorially defined sovereigns and the cosmopolitan utopia of a united mankind.

The diaspora model begins with the recognition that diasporas exemplify the contemporary condition. Corporations too have become increasingly multinational, with their ownership and operations dispersed through the world.[230] Labor and capital, seeking their high-

[226] Salman Rushdie, The Satanic Verses 5 (1988).

[227] Id. at 5. The translation is given by Rushdie. Salman Rushdie, Imaginary Homelands (1982), reprinted in Imaginary Homelands: Essays in Criticism 1981-1991, at 11 (1991).

[228] See supra note 63-69 and accompanying text. It is interesting that Ling-chi Wang's typology omits a description of Waldron's type of cosmopolitan. See id. R

[229] The statist conception of the world as neatly divided into separate communities is clearly outmoded (if it was ever accurate at all). As one observer of the migration from Aguililla, Mexico to Redwood City, California points out, "[i]t has become inadequate to see Aguillan migration as a movement between distinct communities, understood as the loci of distinct sets of social relationships." Roger Rouse, Mexican Migration and the Social Space of Postmodernism, 1 Diaspora 8, 13 (1991).

[230] See, e.g., supra note 1 (describing China.com). R

est valued use, move with fewer legal and technological barriers across states. Additionally, information has become widely disseminated, its passage sped through the Internet, resulting in the creation of virtual transnational communities.[231] The hallmarks of a globalized world are hybridity, intermingling, and multiple allegiances. But despite this intermingling, most people have not sloughed off their nationalist skin in favor of an evolved cosmopolitanism. Rather, the hybridity resulting from globalization often manifests itself in individuals who subscribe to *multiple* nationalisms[232] or a *trans*nationalism. Multiple nationalisms and transnationalism become possible because "the nationalist genie, never perfectly contained in the bottle of the territorial state, is now itself diasporic."[233] The diaspora model does not seek to dismantle the nation-state, but rather to rearticulate it as a multinational state permitting the voluntary transnational associations of its people. Furthermore, the model seeks to enfranchise diasporas as recognized legal subjects in the transnational legal process.[234]

The lived experience of diasporas demonstrates the possibility of negotiating such divided feelings in a way that allows diasporas to contribute to their homelands and adopted lands simultaneously.[235] Moreover, it demonstrates the possibility of a transnational community built on individual voluntary commitments. Increasingly, we see the emergence of a transnational civic republicanism, with the diaspora taking an active part in shaping the future direction of its homeland. A globalized world requires a new paradigm of the relationship of the citizen to the state. The diaspora model proposes that we view that relationship as complicated and dynamic. The model would permit individuals to construct national and transnational communities of their own choosing. In this way, then, the diaspora model rejects the unitary ideology of statism in favor of an understanding of the state that respects the possibility of plural commitments and loyalties. And instead of requiring us to refashion ourselves, first and foremost, as world citizens, the diaspora model offers an internationalism that re-

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231 See supra note 94 and accompanying text. R

232 Mudimbe & Engel, supra note 17, at 4 ("Members of diasporas define themselves in terms of at least a double identity, thus bracketing the unconditional fidelity associated with citizenship in a particular nation-state. They see themselves as being, for instance, both African and American, French and Palestinian, Jewish and Spanish."). R

233 Appadurai, supra note 94, at 160. R

234 The transnational legal process is the way in which public and private actors interact "to make, interpret, enforce, and ultimately, internalize rules of transnational law." Harold Hongju Koh, Transnational Legal Process, 75 Neb. L. Rev. 181, 183-84 (1996).

235 Tölölyan pleads: "[A]t its best the diaspora is an example, for both the homeland's and hostland's nation-states, of the possibility of living, even thriving in the regimes of multiplicity which are increasingly the global condition, and a proper version of which diasporas may help to construct, given half a chance." Tölölyan, supra note 44, at 7. R

spects patriotic feelings and individual attachments to country and community—with the hope that such attachments might bind the world closer together.

Thus, the diaspora model complicates the international system, replacing the clean demarcations of statism with an acceptance of overlapping sovereignties.[236] As the communitarian philosopher Michael Sandel observes, "[t]he most promising alternative to the sovereign state is not a cosmopolitan community based on the solidarity of humankind but a multiplicity of communities and political bodies—some more extensive than nations and some less—among which sovereignty is diffused."[237] This approach does not mean doing away with states, but rather denying their claim to the exclusive allegiance of their residents. The diaspora model thus offers an intermediate point between the exclusivity of statism and the universality of cosmopolitanism.

With some optimism, the model locates in diasporas the possibility of building bridges across the world, between rich and poor countries and between liberal and illiberal societies. Diasporas offer the possibility of uniting the world through a web of personal and community loyalties, while international capital flows and international trade create a web of international economic dependencies. This web of personal loyalties is spun through the dual loyalties of individuals in diaspora. The relationship of individual to state, conceived by Westphalians as a one-to-one relationship and by cosmopolitans as ethically irrelevant, can be reimagined to promote both the ideal of authenticity and the possibility of economic development.

2. Recognizing Diaspora

The claim that diaspora has meaning in both municipal and international law is, at its core, a claim for *recognition*. Charles Taylor, in his influential essay on the "politics of recognition," describes the efforts by subaltern groups to obtain recognition from the world at large, and the importance of this recognition to their self-constitution.[238] Taylor begins by observing that the collapse of the traditional social hierarchies has led to a shift from "honor" to "dignity" as the basis for describing an individual's relationship to society at large.[239]

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[236] Indeed, one could argue that the term "international system" is a misnomer, that the term "interstate system" would have been more true to the Westphalian paradigm. The diaspora model moves a little bit in the direction of a true international system.

[237] Sandel, supra note 223, at 73-74. R

[238] Taylor, supra note 28. R

[239] Note, for example, the New Haven School of International Law's concern with individual dignity as the central value of both international and municipal law. Richard A.

Then, he reports that authenticity—the idea that there is a "way of being human that is *my* way"[240]—has become an ideal to be sought after, and which the social order should help one achieve.[241] Recognizing that our identities are shaped dialogically—that is, in dialogue with others—the only way to develop authentically is if others recognize us for who we are.[242] This is the politics of recognition—the need for society to recognize what makes us distinct so that each of us can understand this in ourselves.

The difficulty in Taylor's account is that societal recognition can take the form of a stereotyping essentialism rather than a true dialogism.[243] Society might tightly script identity such that the identity it recognizes becomes the controlling identification of the individual.[244] Thus, a true politics of recognition must allow for dialogue by being loose enough to allow the individual to reject any "recognized" way of being.[245]

The logic of the politics of recognition reaches beyond multiculturalism (and beyond nationalism, ethnic politics and feminism, where it has also been applied) to diaspora. If, as Taylor describes, our identity is partially shaped by recognition or its absence, if authenticity is a central virtue, and if membership in diaspora is an important component of our authentic selves, then we should seek to *recognize* diaspora.[246]

Falk, Casting the Spell: The New Haven School of International Law, 104 Yale L.J. 1991, 1991 (1995) (book review) (characterizing New Haven School of International Law as having "promotion of human dignity" as its "normative rudder").

240 Taylor, supra note 28, at 30. R

241 Id. at 33-34.

242 This is reminiscent of Du Bois's African American looking at himself through the eyes of others. See infra text accompanying note 251. R

243 See Appiah, supra note 53, at 155 (discussing essentialism in questions of authenticity). R On essentialism generally, see, for example, Edward W. Said's observation that Western portrayals of East depict Eastern culture as monolithic and diametrically opposed to Western culture. Edward W. Said, Orientalism 3-5 (2d ed. 1995).

244 K. Anthony Appiah, Race, Culture, Identity: Misunderstood Connections, in Color Conscious: The Political Morality of Race 30, 99 (1996).

245 Especially helpful here is the LatCrit injunction that we "experience one another as multidimensional people who also have many things in common." Alice G. Abreu, Lessons from LatCrit: Insiders and Outsiders, All at the Same Time, 53 U. Miami L. Rev. 787, 810 (1999).

246 Michael Walzer would deny such recognition, claiming that immigrants to societies like the United States have, in coming to such a society, already chosen to receive no special protections for the culture they had in their homeland. See Michael Walzer, Comment, in Multiculturalism, supra note 28, at 99, 101. Arguing that the doctrine of the R United States is not to support preservation of immigrants' ways of life, Walzer claims immigrants intended "to take cultural risks when they came here and to leave the certainties of their old ways of life behind." Id. at 103. He allows that "[n]o doubt, there are moments of sorrow and regret when they realize how much they have left behind." Id. But the fact that immigrants to this country may have come knowing that immigration

Diasporas themselves often are leery of recognition.[247] Beleaguered by nativists,[248] diasporas often seek to distance themselves from any public actions that may suggest a loyalty to the homeland. They may be careful not to draw attention to their relations among themselves and with their homelands. At the heart of the diaspora model is an embrace—instead of the usual pushing aside—of the dual loyalty that, in fact, animates many members of diasporas.[249] That dual loyalty stems in part from what W.E.B. Du Bois has called "double consciousness."[250]

3. Doubling Consciousness

> [T]he Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twoness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.[251]

W.E.B. Du Bois's famous description of the African American looking at himself through the eyes of others and feeling a "double consciousness" has much resonance with the experience of diaspora. As Salman Rushdie describes it, "[o]ur identity is at once plural and partial."[252] He continues, "[s]ometimes we feel that we straddle two

might require them to give up their culture or their connection to their homeland does not demonstrate that it is what the immigrants wanted, nor does it justify that loss. They might have understood that as the price of entry and then decided to pay that price, but that does not mean it was a price they wanted to pay. Walzer conflates willingness to forgo one's cultural identity with a desire to forgo that identity. They might have come despite the possibility of a loss of identity.

247 See supra text accompanying notes 165-67. R

248 See Kevin R. Johnson, Fear of an "Alien Nation": Race, Immigration, and Immigrants, Stan. L. & Pol'y Rev., Summer 1996, at 111 (identifying recurrent periods of anti-immigrant sentiment in United States history).

249 Many members of a dispersed community may no longer feel an allegiance to the homeland, though they may still have affection for it. United States Secretary of State Madeleine Albright, born in the former Czechoslovakia, reacted to a suggestion that she seek the Czech presidency by asserting that her allegiance to the United States was singular, despite her love for her homeland. Eggs, Accolades Greet Albright in Czech Republic, at http://www.cnn.com/2000/WORLD/europe/03/06/czech.havel.albright/index.html (Mar. 6, 2000) (quoting Albright as saying, "I will always love the place where I was born, but my allegiance is to the United States").

250 W.E.B. Du Bois, The Souls of Black Folk 5 (Penguin Books 1989) (1903).

251 Id.

252 Rushdie, supra note 227, at 15. R

cultures; at other times, that we fall between two stools."[253] The diaspora model recognizes this straddling and falling and accepts double consciousness as emblematic of a globalized age.

Some writers have insisted that the hyphenated status of diasporas (homeland-adopted land) is not a halfway status as a refugee in some demilitarized zone between two dominant societies, but rather an enriched status where the person can claim full membership in two communities. Moreover, many have also found in diaspora a source of strength, knowledge, and wisdom.[254] In Japan, it is popular to refer to bicultural and biracial people using the English word "double" to indicate that the person has the advantage of both backgrounds, rather than the disadvantage of receiving only a diluted half of each.[255] The creation of identity is not a zero-sum game, with the addition of one culture requiring the deletion of another. Even while recognizing the difficulty of being black in America, Du Bois makes a similar point: He declares that the "American Negro" would "not bleach his Negro soul in a flood of white Americanism, for he knows that Negro blood has a message for the world."[256] Du Bois's "American Negro" does not seek to whitewash himself, but recognizes, however painfully, the potential in a bifurcated identity. In the same vein, Gilroy concludes his book on "The Black Atlantic" by noting the "legitimate value of mutation, hybridity, and intermixture."[257]

4. The Diaspora Model's Approach to Diaspora Legal Claims

At the start, it is important to note that the diaspora model does not by any means imply an uncritical capitulation to the demands of diasporas. Rather it approaches such demands with respect, understanding their basis in aspects of individual identity.

Recognition. Without question, both homeland and hostland states would recognize diasporas, with homeland states seeking to attract the capital and expertise of the diaspora, and hostland states respecting the transnational ties of the diaspora.[258]

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253 Id.

254 See, e.g., Steven Vertovec, Three Meanings of "Diaspora," Exemplified Among South Asian Religions, 6 Diaspora 277, 282 (1997) (stating that "instead of being represented as a kind of schizophrenic deficit, such *multiplicity* is being redefined by diasporic individuals as a source of adaptive strength" (emphasis in original)).

255 Jane Singer, Japan's Singular "Doubles," Japan Q., Apr./June 2000, at 77.

256 Du Bois, supra note 250, at 5. R

257 Gilroy, supra note 84, at 223. R

258 In Northern Ireland, for example, the Belfast Agreement of 1998, approved overwhelmingly in a Northern Ireland referendum in May 1998, recognizes the Irish diaspora for the first time but "to no particular legal effect." Duncan Shipley-Dalton, The Belfast Agreement, 22 Fordham Int'l L.J. 1320, 1331 (1999). In the 1980s, Greece, with its long

Dual Citizenship. Since members of diasporas often seek to maintain the formal tie of citizenship with both their homelands and adopted lands, each of the two relevant states should hold out the possibility of dual citizenship. Thus, the homeland would permit members of its diaspora to retain their citizenship when they naturalize abroad, and the adopted land would not require members of a diaspora to relinquish their homeland citizenship.[259] Each country would accept the dual loyalties that accompanied these dual nationalities as natural and respectable. Moreover, each country would accept the possibility of dual loyalties even if they are not expressed formally in dual citizenship.

Self-Governance; Choice of Law. The diaspora model would permit some minimum level of self-governance to the diaspora. Such self-governance would arise through voluntary associations of diasporan individuals with explicit choices of law to govern those associations.[260] It would distinguish between those parts of the law that deal with public order and those that deal with private, individual order. The diaspora model would say that the private order should be the domain of personal choice, and that the diaspora should be able to choose that domain to be governed by the law of either its homeland or its adopted land.[261] This is generally consistent with the traditional view that certain laws are subject to private ordering, while others are

history of diaspora, established a government agency to plan and implement policy regarding diasporan Hellenes; today, the agency publishes a manual designed to answer the questions of Greeks living abroad. See Gen. Secretariat for Greeks Abroad, Hellenic Republic, Manual for Greeks Abroad, http://www.hri.org/ggae/guide/indexen.html (last visited Apr. 13, 2001).

259 Spurred by U.S. Supreme Court decisions that barred the denaturalization of U.S. citizens for activities with respect to a foreign sovereign, U.S. law is now, in practice, quite permissive of dual nationality. See supra note 179. However, the part of the naturalization oath that forswears loyalty to other sovereigns seems to exhibit some hostility to dual nationality, even though it is not enforced. See Schuck, supra note 22, at 223 ("[T]he U.S. has . . . refrained from taking any meaningful steps to ensure that its new citizens' renunciation oaths are legally effective in their countries of origin."); see also Stanley Mailman & Ted J. Chiappari, Nationality Law Issues Subject to Debate, N.Y. L.J., June 14, 1999, at 9 ("As a matter of policy, the U.S. has not enforced the oath, and may have no mechanism to do so."); Spiro, supra note 22, at 1415 ("[T]he oath of renunciation undertaken by naturalization applicants has never been enforced.").

260 See infra Part IV.D for an elaboration and application of this diaspora choice-of-law model.

261 Two important questions arise, both beyond the scope of this Article: First, should this autonomy be restricted only to the diaspora? And second, should we permit the diaspora to choose not only the law of its homeland but also the law of a third state, no law at all, or the rules promulgated by a private association?

mandatory.[262] However, the traditional approach seeks to classify each law as one or the other[263] without analyzing whether a particular law might have both public and private aspects.

This approach recalls, at least superficially, the conflict-of-laws approach of the "Italian patriot, lawyer, statesman and professor"[264] Pasquale Stanislao Mancini, who in 1851 advocated that choice-of-law rules for private law (such private law being personal and not related to territory) should be based on party autonomy and links to the person's homeland.[265] Mancini promoted a choice-of-law system based on the *lex patriae*, the national law of the person living abroad, as contrasted with the *lex fori*, the law of the forum where the dispute arose.[266] But unlike Mancini's approach, which relies on citizenship—the citizen taking his homeland's private law with him when he travels abroad—the diaspora model does not require citizenship in the homeland before it permits the diaspora individual to travel with her homeland's law.[267] Also, more importantly, unlike Mancini's approach, the choice of law and forum would be explicit and transaction-based, rather than implicit and comprehensive.

In determining whether to enforce a choice-of-law clause selecting the law of the homeland, a court would consider the individual's status as a member of a diaspora to be legally relevant.[268] Many, including members of diasporas, will find such an official acknowledgment of an individual's national origin distasteful. Why should we treat people differently based on their national origin? Is that not racism? However, if we view membership in diaspora through the same lens as we view citizenship, we can see that treating diaspora membership as legally relevant should not always be considered impermissible. Many decisions in conflict of laws are influenced by the

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262 See generally Symposium, A Symposium on the Public/Private Distinction, 130 U. Pa. L. Rev. 1289 (1982).

263 Following this approach, Philip McConnaughay suggests that the public/private distinction can best be seen as a distinction between laws that have significant externalities associated with noncompliance (thus being "public" laws because of the public impact) and those having a private impact. Philip J. McConnaughay, Reviving the "Public Law Taboo" in International Conflict of Laws, 35 Stan. J. Int'l L. 255, 305-07 (1999).

264 Friedrich K. Juenger, Choice of Law and Multistate Justice 41 (1993).

265 Id.

266 Id.

267 Ancient history provides an interesting precedent: "With some exaggeration, Josephus asserts that the one Law of Judaism prevailed throughout the vast Diaspora, though its sanctions were exclusively moral." Jacob A. Agus, Judaism, in Historical Atlas of the Religions of the World 139, 144 (Isma'il Ragi al Farquqi ed., 1974).

268 Cf. Kenneth L. Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L. Rev. 303, 305 (1986) ("When can government properly treat membership in a racial or ethnic group as legally relevant?").

citizenship of the parties.[269] If diaspora membership were viewed as something akin to citizenship then it may not seem unfair to find it relevant to the question whether a court should uphold the choice of the law of the homeland.

Affirmative Discrimination. The diaspora model would review discrimination in favor of other diaspora members with great care. While discrimination based on identity might seem to violate the goal of equality, the model would appreciate that the discrimination might be based on a desire for community. That would not, however, mean that such discrimination would receive a pass.[270] Instead, such discrimination would be judged according to standards similar to those we impose on classifications based on citizenship. The formal tie of citizenship is considered an acceptable basis for restricting rights to certain groups, even though such a criterion is closely related to national ancestry.

Moreover, though it is more controversial, national ancestry sometimes is used as a basis for obtaining a "right of return" which enables a person to claim citizenship in a particular country from which that person or her ancestors emigrated (or to which that person has a special link through other means). Under the law of return of countries such as Ireland and Israel, people claiming a certain ancestral or religious link to a country are permitted to "return" to that country and take up citizenship at will.[271] The right of return has a

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[269] For example, the balancing approach enunciated in Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976), inquires, inter alia, into the "nationality or allegiance" of the parties in determining whether U.S. courts have extraterritorial jurisdiction over a case. Id. at 614. Though it remains controversial, *Timberlane*'s balancing approach has been accepted in Restatement (Third) of Foreign Relations Law § 403(2) (1987) ("Whether jurisdiction . . . is unreasonable is determined by evaluating all relevant factors, including . . . nationality [and] residence . . . .").

[270] Indeed, Part IV.D of this Article suggests that the effort by India to restrict the sale of its Resurgent India Bonds only to "Non-Resident Indians" (i.e., the Indian diaspora as defined by New Delhi) may be inappropriate.

[271] David Cantrell, So You Wanna Be Irish?, 5 Eugene F. Collins Dispatch 3, ¶¶ 5-7 (Apr. 1999) at http://www.efc.ie/dispatch/issue5/three.html (describing ways in which person of Irish descent born outside Ireland can acquire Irish citizenship) (last visited Aug. 30, 2001). Under Israeli law, the right of return is quite broad, encompassing not only Jews but also their family members:

> [A]ny person who is considered a "Jew," according to the legal definition encoded in section 4B of the Law of Return, has an open invitation from the State of Israel to establish his or her life in that country as a citizen. This invitation to settle in Israel (or "right of return") is also conferred upon family members of that person, up to a third generation regardless of their own religious affiliation. Moreover, non-Jewish family members have an inalienable right to return even if the person through whom the right is claimed has deceased or has never settled in Israel.

dialectic relationship to diaspora, because each person who exercises that right removes herself from the diaspora.[272] Yet, at the same time, since it is generally unlikely that the bulk of any diaspora will exercise that right, the right of return may serve to increase the feeling of connection to the homeland, the place that, despite even separation by generations, will always welcome you back.

Influencing Public Policy Towards the Homeland. The model would allow diaspora petitions on behalf of the homeland, but it also would realize that these are nonobjective assessments, tied up in the history and politics of that land.

Multicultural Claims. The diaspora model would favor a multicultural approach to community. *Freedom of Movement and Immigration*. The diaspora model would be a strong defender of the freedom of movement and of liberalized immigration policies.

The Diaspora in International Law. At the same time that international law rejects the relevance of diasporas, it exalts the principle of the self-determination of peoples. Two explanations, both from the statist model, can be offered to reconcile these results. First, a people could be defined territorially—once persons move outside a defined territory of a community and inside the boundaries of a foreign community, they no longer belong to the people of the original community. Second, the principle of self-determination might give way to the stronger principle of logistical convenience. It is easier to deal with a world with strict boundaries on membership in the polity; the simplest existing boundaries are those of the nation-state.

But diasporas are, by definition, a scattered people who retain their sense of community. And as commentators have pointed out, "a document of the authority of the United Nations Charter states that the organization is founded by the 'peoples of the world' rather than by the states of the world."[273]

The diaspora model recognizes a weak claim to self-determination for the diaspora as a people-like community. The diaspora model adopts the New Haven School of International Law's concern with

Ayelet Shachar, Whose Republic?: Citizenship and Membership in the Israeli Polity, 13 Geo. Immigr. L.J. 233, 234-35 (1999) (citations omitted).

[272] Alan Arian, The Second Republic: Politics in Israel 19 (1998) (noting that law of return "change[s] the place of residence of the world's Jews from the Diaspora to Zion").

[273] Myres S. McDougal et al., The World Constitutive Process of Authoritarian Decision, in International Law Essays, supra note 128, at 223, (citing U.N. Charter, Preamble); see also U.N. Charter art. 1, para. 2 (referring to principles of "equal rights and self-determination of peoples"). R

individual human dignity as the primary criterion for evaluating the international system:[274]

> The long term policy most compatible with an international law of human dignity would be one that seeks the utmost voluntarism in affiliation, participation, and movement, with an easy assumption by states of a competence to protect such individuals as seek their protection. The individual should be able to become a member of, and to participate in the value processes of, as many bodies politic as his capabilities will permit.[275]

The diaspora model follows this prescription, allowing the individual to define her own political identity, subject to (as a concession to political necessity) the constraint of which states are willing to admit her. Thus, it permits a certain degree of autonomy in private matters. But if self-determination is defined by the power to decree the laws that bind oneself, it requires the right to participate in decisionmaking, to have one's voice heard. The diaspora model suggests that the diaspora may not be properly represented through the traditional organs of international lawmaking such as nation-states, multilateral organizations, and nongovernmental organizations. The demand for such representation was foreseen decades ago; scholars predicted that "[a]s global interaction intensifies and concentricity of identification increases, entities seeking formal power in arenas larger than the nation-state may be expected to increase concomitantly."[276]

One major difficulty is the lack of existing representative organs in modern diasporas. Diasporas generally do not elect representatives or maintain democratic institutions, though they may maintain important associations that do represent democratic processes. This "democracy deficit" perhaps would destroy any claim that the diaspora should be a legitimate participant in international lawmaking.[277] This lack of democratic institutions, however, may not be a permanent disability, but rather a natural result of the hostility that diasporas have faced over the centuries. That is, to organize and conduct elections

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[274] See supra note 239. R

[275] McDougal et al., supra note 152, at 903. See also Myres S. McDougal & Harold D. Lasswell, The Identification and Appraisal of Diverse Systems of Public Order, in International Law Essays, supra note 128, at 15, 28 (appraising any system of public order on basis of "the overarching goal of human dignity"); see generally Fernando R. Tesón, A Philosophy of International Law (1999). R R

[276] McDougal et al., supra note 273, at 228 (making prediction in 1967, and discussing political parties as participants in international law). R

[277] A number of scholars have suggested that states that do not represent the wishes of their people do not have a legitimate claim to participate in the international decisionmaking process. See, e.g., Tesón, supra note 275, at 2 ("If international law is to be morally legitimate . . . it must mandate that states respect human rights as a precondition for joining the international community."). R

would have offered the final proof of disloyalty to those who accused diasporas of disloyalty to their adopted country. But if the diaspora model prevailed, and dual loyalties were acknowledged and respected, then it is possible that the diaspora would feel freer to organize itself and elect representatives.

Under the model, diasporas, at least when appropriately represented through democratic processes, would be recognized as participants in international lawmaking, whether such lawmaking is conceived as a world constitutive process or as a transnational legal process.[278] Diasporas would take their place aside the territorial units such as nation-states, intergovernmental organizations, political parties, pressure groups and private associations in the world constitutive process of international lawmaking.[279] Diasporas also would stand with the "nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals" as the actors involved in the transnational legal process.[280]

The diaspora model does not suggest that diasporas be recognized in a form akin to states, with juridical equality and diplomatic immunity for their representatives. Diasporas might be permitted to enter into international agreements with other transnational actors, but only if democratic processes exist to appoint proper plenipotentiaries. Such representation has special significance for deterritorialized peoples, such as the Roma, who have no homeland to serve as the focal point of the national imagination.[281]

A diaspora can help mediate conflict between its homeland and its adopted country.[282] The diaspora can educate the leaders of its adopted country on the concerns of its homeland's government[283] while at the same time teaching the homeland's government about the

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[278] Another approach worthy of study would be to allow representation before international lawmaking bodies for the "transnation"—that is, the community formed by the joining of the homeland and other diasporan segments. Tölölyan, supra note 44, at 19, 32 n.19. **R**

[279] McDougal et al., supra note 128, at 224-31 (describing range of participants in international law). **R**

[280] Harold Hongju Koh, Why Do Nations Obey International Law?, 106 Yale L.J. 2599, 2626 (1997).

[281] In their lack of a contemporary homeland, the situation of the Roma is reminiscent of the condition of the Jews prior to the formation of the modern state of Israel (though it could be said that the ancient land of Israel did serve as a focal point for Jews in diaspora even before it became once again a Jewish homeland). At the turn of the last century, at least one prominent transnational Jewish association, the Bund, "demanded cultural and national autonomy for the Jews." Richard Marienstras, On the Notion of Diasporas, in Minority Peoples in the Age of Nation-States 119, 123 (Gérard Chaliand ed., 1989).

[282] See infra text accompanying note 472. **R**

[283] Cf. Simone Tan, Note, Dual Nationality in France and the United States, 15 Hastings Int'l & Comp. L. Rev. 447, 447 (1992) (calling U.S. citizens abroad "'ambassadors' overseas" for homeland).

concerns of the government of the diaspora's adopted country. Of course, the diaspora's concerns can be parochial in their own right. Some Indian Americans might, for example, agitate for poorer treatment of Pakistan by the United States.

Table 1 summarizes the positions that the statist, cosmopolitan, and diaspora models would likely take towards each type of diaspora legal claim. A "no" entry in the table means that the statist or cosmopolitan model would resist the specified diaspora effort, not that either model would necessarily outlaw it altogether.

IV
DIASPORA BONDS: A CASE STUDY

To attack poverty, developing nations must promote opportunities in jobs, schooling, and healthful living, facilitate empowerment by making public institutions more accountable to people, and enhance security by reducing vulnerability to economic shocks, natural disasters, and ill health.[284] While public expenditures may not be the primary means of economic development,[285] governments require capital to build and improve basic infrastructure and to manage crises—functions necessary to promote opportunities, empowerment, and security. Diasporas offer an important source of capital for a developing country and may be especially attractive sources of capital for two reasons: They may accept a lower rate of return on capital than that demanded by the general market,[286] and they may be willing to supply capital at reasonable rates even when the country is in a dire condition.[287]

Diaspora Bonds are debt instruments offered by sovereign governments to raise capital principally or exclusively from their diasporas.[288] They arise through the convergence of the globalization of capital and of people. As such, they offer an important case study of diaspora legal problems in the context of something as central as the regulation of money flows. Moreover, a study of the legal issues

284 World Bank, Attacking Poverty: World Development Report 2000/2001, at 6-7 (2001).

285 Id. at 6 (noting that investments in physical capital and infrastructure are not enough to promote development).

286 See infra notes 333-35 and accompanying text. R

287 See infra note 332. R

288 Diaspora Bonds represent only one class of sovereign capital-raising activity in the debt markets. They must be distinguished from bonds issued by a sovereign domestically (such as United States Treasury bonds), which present an important capital-raising method for nations with large domestic debt markets, and from bonds issued internationally but not targeted principally at a nation's diaspora (such as Eurobonds). The arguments made here as to how we should regulate Diaspora Bonds depend significantly on the special relationship diasporas have to their homeland, and thus should not be applied uncritically to all international debt market activity by sovereigns.

TABLE 1: THREE APPROACHES TO DIASPORA LEGAL CLAIMS

Legal Claim	Statist Model	Cosmopolitan Model	Diaspora Model
Recognition?	No. Assimilation favored.	No. No historical or ethnic allegiance.	Yes.
Dual Citizenship?	No. Undivided loyalty necessary.	Yes. Dual citizenship acceptable.	Yes.
Limited Self-Governance?	No. Would contradict state's monopoly on power.	Yes, but historical or ethnic basis of community disfavored.	Yes, but constrained by adopted land's public law.
Prodiaspora activity?	No. Reflects "patriotism" to the wrong "patria."	No, because of historical or ethnic basis of diaspora.	Yes.
Lobbying for Homeland?	No. Would show loyalty to another state.	No, because of historical or ethnic basis of such petitions.	Yes.
Multiculturalism?	No. Assimilationist ideal of one nation, one state.	Yes.	Yes.
Freedom of Movement?	Yes, but should not lead to dual loyalty.	Yes. Warmly embraced.	Yes.
Liberal Immigration?	No. Harms one nation/one state goal.	Yes. As liberal as possible.	Yes.
Representation in International Law-making?	No. States only should participate.	Yes, but norm sought should not be communal.	Yes.

raised by the offering of Diaspora Bonds in the United States may assist countries as they consider mechanisms to raise capital.

Countries have long worried about the "brain drain" represented by the diaspora, as educated individuals left to seek better economic opportunities elsewhere. Diaspora Bonds represent an effort by the homeland country to turn this loss into a gain.[289]

[289] Diaspora Bonds can be contrasted with the "citizen's tax" that economist Jagdish Bhagwati has proposed. Under that tax, a developing nation would tax the income of its citizens abroad, thereby offsetting somewhat the loss of human capital occurring through the "brain drain." The concept is laid out in Taxing the Brain Drain I: A Proposal (Jagdish N. Bhagwati & Martin Partington eds., 1976). Unlike the citizen's tax, Diaspora Bonds permit the developing nation to reach members of its diaspora who have relinquished their homeland citizenship. Cf. Richard A. Musgrave, Foreword to Income Taxation and International Mobility xi, xii (Jagdish N. Bhagwati & John Douglas Wilson eds., 1989) (noting

We can trace these efforts back at least as far as the Liberty Bonds offered by the Republic of China in the 1930s and sold through Chinese Benevolent Associations in the United States.[290] Japan also issued bonds, placed through the Japanese Patriotic Bond Subscription Society.[291] Israel began offering State of Israel Bonds shortly after its birth, and has since raised almost eighteen billion dollars.[292] In 1991, India turned to its expatriate community by offering "India Development Bonds" during a balance of payments crisis, and raised $2 billion in 1992 and 1993.[293] Again, in 1998, India found itself in need of funds, and once again turned to its diaspora as described below.[294] India's successful efforts have led nations such as Bangladesh and the Philippines to indicate their own plans to issue Diaspora Bonds.[295]

The case study focuses on some basic questions of international securities regulation raised by Diaspora Bonds: Whose law should govern these instruments? Whose courts should hear any related cases? Traditionalists (including most securities lawyers) would apply a strictly statist approach: Because Diaspora Bonds are offered through instrumentalities or means of United States interstate commerce, they should be subject to the United States's securities laws in full measure.[296] Some modern law and economics scholars, however, challenge some of the presuppositions of that view, especially the notion that it makes sense invariably to apply United States law to securities transactions occurring in the United States.[297] These scholars have argued in favor of a market approach. Here we introduce a paradigm that represents a version of cosmopolitanism.[298] The market approach, championed by corporate law scholars such as Roberta Romano, would displace mandatory securities law with optional law,

that proposed tax may be avoided by renunciation of citizenship). But fundamentally, like the citizen's tax, Diaspora Bonds help a developing country access the capital of its richer diaspora.

290 SEC v. Chinese Benevolent Ass'n, 120 F.2d 738, 739 (2d Cir. 1941) (enjoining offering of Chinese bonds in United States by Chinese American society on ground that bond was not registered with SEC).

291 Id. at 741.

292 State of Israel, Prospectus Supplement: Debt Securities D-53 (Dec. 10, 1998) [hereinafter State of Israel Prospectus]. These instruments represent one-third of Israel's total public sector external debt. Id. (describing outstanding State of Israel Bonds as representing approximately "31% of Israel's total public sector external debt" as of December 31, 1997).

293 Shefali Rekhi, Resurgent India Bonds: Forging a Bond, India Today, Aug. 3, 1998, http://www.india-today.com/itoday/03081998/biz.html.

294 See infra Part IV.A.

295 See supra notes 39-40. R

296 See infra note 355 and accompanying text. R

297 See infra notes 413-21. R

298 See supra text accompanying notes 213-15 and infra Part IV.C. R

not just with respect to Diaspora Bonds but for all securities offerings, domestic or international.[299] Relying on economic analysis, these scholars reason that it is more efficient to permit the parties to a particular transaction to choose a governing securities regime precisely tailored for the particular issuer, issue, and even purchaser.[300]

The diaspora model offers a third alternative, a hybrid approach that seeks to mediate the efficiency concern expressed through a freely chosen governing law with the public interest concern underlying the United States securities laws. It is possible to reconcile two goals: facilitating the raising of capital for economic development through Diaspora Bonds by relenting somewhat in applying the United States domestic securities regime, and still maintaining vigilant protection of American investors.

The case study will focus on the most prominent recent offering of Diaspora Bonds, the Resurgent India Bonds. These instruments present the issues raised by Diaspora Bonds in sharp relief. India's offering in 1998 to its expatriates has three novel features: (1) India asserts that these instruments offered by its state bank are certificates of deposit rather than debt securities; (2) the instruments specify that suits under them can be brought only in Indian court under Indian law; and (3) they are available only to its diaspora.

Through the first two features, India seeks to avoid the application of the strict and often expensive United States securities regulatory regime.[301] These two features, the second more directly than the first in its attempt explicitly to limit jurisdiction, thus raise the issue of the application of United States law. Because of the possibility they offer to reduce the risk of liability under the United States securities laws, these two features will undoubtedly prove attractive to other nations considering Diaspora Bonds. Through the third feature, India seeks to maintain control over who may invest in its future. The last effort has already engendered a lawsuit in New York alleging illegal national origin discrimination.[302]

It is important to note that not all Diaspora Bonds need share these features of the Resurgent India Bonds. In fact, the State of Israel Bonds exhibit none of these attributes. Instead, they are clearly denoted as securities, they are registered with the United States Securities and Exchange Commission (SEC) and, while they are marketed principally to diasporan Jewry, they are available for purchase

299 See, e.g., Roberta Romano, Empowering Investors: A Market Approach to Securities Regulation, 107 Yale L.J. 2359, 2424 (1998).

300 See infra note 343. **R**

301 See infra note 343 and accompanying text. **R**

302 See infra notes 447-48 and accompanying text. **R**

by all, without discrimination.[303] Thus, the State of Israel Bonds demonstrate one method by which a homeland might engage in relations with its diaspora—simply by complying in full with the laws of the diaspora's adopted country. But while the Israeli bonds do not raise difficult issues of securities regulation, they too demonstrate a commitment to a foreign sovereign and thereby raise issues of loyalty.

State of Israel Bonds thus remind us that, in addition to the questions about governing law, forum selection, and national origin discrimination raised by the Indian instruments, the context of the Resurgent India Bond offering raises the issue of dual loyalty. In May 1998, India exploded five nuclear bombs for testing purposes.[304] The United States and the rest of the world responded by issuing sanctions.[305] India countered by turning to its diaspora—including Indian Americans—for economic support to withstand the sanctions. In purchasing the bonds, Indian Americans deliberately flouted the stated policy of the United States—to sanction India for its nuclear testing—and joined India in celebrating its newfound military prowess. Do the Resurgent India Bonds thus demonstrate a disloyalty on the part of Indian Americans?

Aside from their implications for international securities regulation, Diaspora Bonds also tell us something about the relationship between the diaspora and its homeland. Subscription to Diaspora Bonds demonstrates support for a foreign sovereign, implying a dual allegiance that the statist model would view with suspicion. The investment itself further aligns the interests of the diaspora with those of the home government, as the value of the investment depends on the homeland's economic future. Diaspora Bonds can, as Resurgent India Bonds show, undermine United States foreign policy, as expressed through economic sanctions. How should we regulate the ties, especially economic ones, of diasporas to their homeland's governments?

The case study proceeds as follows: The first section describes the characteristics of Diaspora Bonds, and the Resurgent India Bonds in particular. The second section considers India's technical argument that Resurgent India Bonds are not subject to the United States securities regime because they are bank certificates of deposit, not debt securities. This demonstrates the possibility of structuring a transnational transaction to avoid a conflict of laws, thus avoiding making any diasporan legal claim at all. The third section turns to the cosmopolitan market approach to Diaspora Bonds, beginning with the current

303 See State of Israel Prospectus, supra note 292. **R**

304 Sengupta, supra note 2.

305 Id.

case law and then reviewing the market-oriented scholarship. The fourth section offers the diaspora model's alternative to the statist or cosmopolitan approaches. Finally, the fifth section briefly examines the limitation that only Indians in the diaspora can purchase these instruments, demonstrating the possibility of discrimination based on ancestry.

This Part concludes that the principle of strict territoriality in the application of United States laws should concede some ground in favor of the diaspora choosing to order the private aspects of its relationship with its homeland's sovereign through the homeland's laws. This conclusion helps demonstrate the vitality of the diaspora model and its applicability to real world problems.

A. Understanding Diaspora Bonds

Before turning to the regulation of Diaspora Bonds, it is useful to consider some background issues that may help clarify the debate about how to regulate these instruments. This Section begins with a brief sketch of the Resurgent India Bonds. It then turns to the question of why India chose this particular method to raise capital. Next, it examines the motivations of the persons who purchased the Resurgent India Bonds. Finally, this Section sets the stage for the inquiry of how to regulate these instruments by considering why a country such as India might prefer its own courts and laws to those of the United States.

1. A "Resurgent India"

In May 1998, India exploded five nuclear bombs in the northern desert of Pokhran for testing purposes.[306] The explosions and the international sanctions they drew reverberated through the financial markets, leading to a decline in the Indian stock markets, the rupee exchange rate, and the sovereign credit rating[307] (which was downgraded by Standard and Poor's).[308]

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306 Id.

307 Tim McGirk, Living With the Bomb, Time Asia, Aug. 3, 1998, at 22, LEXIS, Human Resources Library, Time File (noting rupee depreciation and Bombay Stock Exchange drop after nuclear tests).

308 India: Credit Rating Change Not Warranted: Sinha, Hindu, Oct. 24, 1998, 1998 WL 15916353; see also Timothy J. Sinclair, Passing Judgment: Credit Rating Processes as Regulatory Mechanisms of Governance in the Emerging World Order, 1 Rev. Int'l Pol. Econ. 133, 149-50 (1994) (noting increasing importance of sovereign credit ratings). The diaspora's strong support for India in its crisis suggests that the rating agencies need to look at a country's diaspora as bearing upon the country's creditworthiness beyond simply the worker remittance flow.

Faced with a looming economic crisis, India turned "to its sons and daughters abroad."[309] As in an earlier crisis when the State Bank of India had raised funds from Indian expatriates,[310] the State Bank of India again appealed to expatriates. It asked not for charity, but for investments in the form of deposits to be repaid in five years.[311]

The Resurgent India Bonds were promoted heavily through the media of the Indian diaspora,[312] including through the Internet (thereby demonstrating the power of the Internet as a tool to bring together the diaspora and its homeland). The instruments were marketed explicitly to appeal to nationalist sentiments of Indian expatriates, whether they were Indian citizens or not.[313] The Indian government named the instruments to evoke a mythic glorious past when India had been "surging."[314]

India did not file a registration statement with the SEC, nor did it receive no-action letter relief from the SEC recognizing the probable availability of an exemption from registration.[315] Instead, it sought and obtained clearance from banking authorities in the specific states in which it planned to market the instruments.[316] It sold the instruments in Europe, the Middle East, and the United States[317] through Indian and foreign commercial banks that specialized in providing services to Indian expatriates.[318] The sale was overwhelmingly successful, raising $4.2 billion,[319] more than double the initial goal, all the

309 Sengupta, supra note 2. R

310 See supra text accompanying note 293. R

311 Sengupta, supra note 2. R

312 Because this marketing would likely constitute a "general solicitation," India would not be able to avail itself of the safe harbor available under Regulation D exempting from required registration the private placement of securities. Securities Act of 1933, Rule 502(c). This only is relevant to the extent that the Resurgent India Bonds are treated as securities, not bank deposits. See infra Part IV.B.

313 See Sengupta, supra note 2. R

314 Cf. Eric Hobsbawm, Introduction: Inventing Traditions, in The Invention of Tradition 1, 13 (Eric Hobsbawm & Terence Ranger eds., 1983) (noting role of "invented traditions" in creation of "nation").

315 Cf. Telephone Interview with Paul Dudek, General Counsel, Corporation Finance, Securities and Exchange Commission (Oct. 5, 1998) (on file with the *New York University Law Review*).

316 US Okay for Resurgent Bonds Cleared in US, Business Standard (India), Aug. 1, 1998, at 1, 1998 WL 12550715.

317 Krishna Guha, Resurgent Bond Issue Raises $4.2bn: India Expatriates Bolster Reserves, Fin. Times (London), Aug. 26, 1998 (reporting on issue of bond subscriptions to expatriate Indians in twenty-seven countries).

318 14 Banks to Aid SBI Hawk Resurgent Bonds, Fin. Express (India), July 20, 1998, at http://www.financialexpress.com/fe/daily/19980720/20155234.html (listing ten foreign and four Indian domestic banks mandated to collect deposits in Resurgent India Bonds).

319 Amitava Sanyal & Janaki Krishnan, India Millennium Deposit Not to Be Sold in the US, at http://www.rediff.com/money/2000/oct/09imd.htm (on file with the *New York Uni-*

more remarkable because they were offered in August 1998,[320] a time of substantial turmoil in the international financial markets.[321] This infusion of capital came at a crucial time and helped India withstand the shock of economic sanctions, which continue as of this writing.[322]

The success of the Resurgent India Bonds is even more remarkable in light of the fact that the interest rates on the instruments, 7.75% for United States dollar-denominated instruments, 8.00% for British pound instruments, and 6.25% for deutsche mark instruments, were lower than what India's credit rating would suggest they should have been.[323] A sovereign with a below-investment-grade credit rating[324] would have found it difficult or impossible to obtain funding in the international debt markets at these rates without securing the debt or

versity Law Review). India raised $590 million of this sum in the United States through these instruments. Id.

320 Resurgent Bonds Pull-In Tops $4 Bn, Verma Thumbs Nose at Sanctions, Fin. Express (India), Aug. 26, 1998, [hereinafter Resurgent Bonds Pull-In] http://www.financialexpress.com/fe/daily/19980826/23855244.html (last visited May 21, 2001).

321 Bank for Int'l Settlements, 69th Annual Report 3 (1999) (noting "crisis in financial markets in August and September" of 1998).

322 Indian Economy Has Grown Despite US Sanctions, Asian Crisis, Asia Pulse, Apr. 27, 1999, LEXIS, News Group File (citing international economists' view that "the Resurgent India Bonds ensured that financial flows to India did not suffer due to the economic sanctions").

323 Heightened concerns for risk resulted in high interest rates for emerging markets borrowers during the second half of 1998. Monetary and Econ. Dep't, Bank for Int'l Settlements, BIS Quarterly Review March 1999, at 18 (noting that sovereign borrowers that "managed to launch sizable bond issues" in late 1998 did so with "margins [that were] much higher than in the first half of 1998"). The Bank for International Settlements reports that the average spread of U.S.-dollar-denominated Asian sovereign international bonds over ten-year U.S. treasury bonds was approximately 400 basis points (4.0%) during July 1998. Id. at 20; see also Kala Rao, Resurgence Bond Taps Diaspora, Euromoney, Oct. 1998, at 18 (quoting AR Barwe, managing director at SBI Capital Markets, as saying, "The best-quality Indian paper was trading at spreads of 450bp [basis points] at the time" of Resurgent India Bond offering). At that time, the yield on the ten-year U.S. treasury bond was approximately 5.3%. See Department of the Treasury, Bureau of the Public Debt, Public Debt News, Aug. 12, 1998, http://www.publicdebt.treas.gov (last visited May 10, 2001).

Adding the 400-basis-point spread to the U.S. treasury bond yield of 5.3% suggests that the Resurgent India Bonds should have yielded some 9.3% in interest annually, more than 150 basis points higher than the 7.75% at which they were actually issued. This fact was not lost on the State Bank of India, whose Chairman declared: "Debt issues of similar maturities floated in Brazil, Argentina, Mexico and Poland are priced between 8 and 13 per cent. Only debt issues floated by the European Union countries and those which are triple-A rated or backed by mortgages can raise funds at lower than 7.5 per cent . . . ." Resurgent Bonds Pull-In, supra note 320 (quoting State Bank of India Chairman M.S. Verma). **R**

324 Moody's Assigns Ba3 Rating to Resurgent Bonds, Bus. Line (India), Dec. 19, 1998, 1998 WL 20734273; see also http://www.moodys.com.

otherwise offering credit enhancement.[325] Disinterested investors would have demanded a higher rate of return to compensate for the riskiness of investing in a non-investment-grade instrument.

Because of their remarkable success and their innovative legal characteristics, the Resurgent India Bonds may prove an attractive model for raising capital for other nations with significant diasporas.

2. Why Issue Diaspora Bonds?

Why do countries issue Diaspora Bonds rather than simply asking for charity, especially given that a country does not have to repay donations? Though the answer could be that nations prefer not to ask for handouts, the more practical reason for choosing Diaspora Bonds over charity solicitation is that Diaspora Bonds raise more money.

The economic model of the rational person would suggest that if an individual is willing to donate $100 to a country, then she should be willing to purchase Diaspora Bonds in a much larger amount at a lower-than-market interest rate, such that the present value of the amount of interest forgone by not investing in a market-rate instrument equals $100.[326] Thus, rather than receive $100 in charity (and owe nothing but good will in return), the country can receive, say, $2000 as proceeds from Diaspora Bonds, but owe the principal and some interest. At the same time, for the investor, Diaspora Bonds offer a means to satisfy the altruistic desire to help one's homeland while earning a somewhat satisfactory rate of return.[327] Thus, Diaspora Bonds leverage the charitable intention into a larger investment.

By providing a source for the large amounts of capital that are often absent in emerging-market nations but necessary for growth,[328] Diaspora Bonds can help serve economic development. If successfully employed, the proceeds of Diaspora Bonds will increase growth and thereby generate the funds necessary to pay the principal and interest on the loans. Because Diaspora Bonds can be used to mobilize large amounts of capital quickly, they are especially useful for developing infrastructure or meeting short-term financial crises. In this

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325 S. Vaidya Nathan, India—Morgan Stanley's View—No Room for Further Fall, Bus. Line, Nov. 1, 1998, at 10, http://www.indiaserver.com/businessline/1998/11/01/stories/12010458.htm (reporting Morgan Stanley's finding that Resurgent India Bonds carried "a lower cost as compared to other emerging markets debt").

326 The calculations would be different if the diaspora investor had a different view of the riskiness of the instrument than did the market. If she thought the instrument were less risky, she would correspondingly be willing to buy even more.

327 See infra Part IV.A.3.

328 See, e.g., Lan Cao, Toward a New Sensibility for International Economic Development, 32 Tex. Int'l L.J. 209, 235 (1997) (describing traditional liberal economic view that developing countries lack capital surplus needed for economic growth).

way, Diaspora Bonds take the sometimes destructive force of nationalism and put it into the service of economic development. Like all capital raising, however, if the proceeds of Diaspora Bonds are misspent, they will harm the country by increasing the external debt of the country without a corresponding return.[329]

Nations can also use Diaspora Bonds to strengthen ties to their diaspora.[330] The purchase of the bonds itself aligns, to some degree, the diaspora's economic interests with the economic interests of the home country, because the value of the instruments turns upon the economic health of the country.

3. Why Buy Diaspora Bonds?

Why does the diaspora invest when the interest rate does not reflect the country's international credit rating? One answer might be that the diaspora has it right—that it assesses the risks better than the rating agencies. The diaspora may be more likely to distinguish the economic situation in its home country from those of other emerging-market nations. The diaspora is less likely to suffer from some of the worst alleged characteristics of the "Tequila Effect" or "Asian Contagion," where the failures of one emerging market economy are attributed indiscriminately to others.[331] However, whether such irrational behavior actually occurs is subject to dispute.

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[329] Diaspora Bonds can be contrasted with another method for raising capital for economic development—noncontrolling equity investment. Merritt Fox argues in favor of foreign portfolio investment in emerging-market countries on the ground that portfolio investment has two key advantages: First, control of the enterprise for which capital is being raised does not pass to the foreign investor (a feature shared with Eurodollar borrowings), and second, risk for a project is shared with the foreign investor (a feature shared with foreign direct investment). Merritt B. Fox, The Legal Environment of International Finance: Thinking About Fundamentals, 17 Mich. J. Int'l L. 721, 728-29 (1996). Diaspora Bonds carry the first advantage, but not the second: While the emerging market country retains control over the projects for which the proceeds are used, it also retains the entire project's risks.

[330] See Heather Camlot, High Holidays Feature: Rabbis Promote Bond Sales to Further Israel-Diaspora Ties, Jewish Telegraphic Agency, Aug. 22, 1996, at 8, 1996 WL 15744974 (quoting promoter as saying, "The bonds become an instrumentality to connect the Diaspora with the State of Israel"). Keith Aoki makes a related point with respect to ownership of real property: "Prevailing liberal and civic republican visions of property ownership rest on the notions that owning property, in some important way, ties an individual's fate to the fate of the larger polity, giving him or her a stake in important political controversies of the day . . . ." Keith Aoki, No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment, 40 B.C. L. Rev. 37, 68-69 (1998).

[331] The "Tequila Effect" refers to the flight of capital from emerging market countries following the Mexican peso devaluation. Bob Woodward, Maestro: Greenspan's Fed and the American Boom, Challenge, May 1, 2001 (book review), 2001 WL 13434174. Following currency crises in Southeast Asia in mid-1997, the international financial markets evinced a similar "flight to quality," with capital flowing out of Asia. Bank for Int'l Settlements, International Banking and Financial Markets Developments 1 (Feb. 1998); Bank

A more compelling explanation as to why diasporas invest despite the nonmarket interest rate is altruism. A desire to help the homeland may motivate people in the diaspora to invest in instruments that raise capital for development. State of Israel Bonds clearly demonstrate this altruistic motivation. Altruism explains why the purchases of Israeli Bonds increased, not declined, during the Gulf War.[332] Furthermore, many people who purchase State of Israel Bonds never intend to redeem them, sometimes keeping the Bonds for use only in a personal financial emergency in which redemption becomes necessary.[333] Certain series of the State of Israel Bonds also offer a lower rate of return than would be indicated by the country's sovereign rating. From 1981 to 1997, some State of Israel Bonds were sold with a fixed coupon of 4.0% for a fifteen-year term[334]—lower even than United States Treasury bills, long considered one of the safest investments in the world. Of course, not only the diaspora invests in Diaspora Bonds. People with a special concern for a given country also may be moved to purchase such bonds, at least if the particular issue of Diaspora Bonds permits them to do so.[335]

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for Int'l Settlements, International Banking and Financial Markets Developments 1 (Aug. 31, 1998) (noting "new wave of contagion in other emerging market economies, triggering flights towards the U.S. and Europe, perceived as safe havens").

332 State of Israel Bonds Sales Approach $1 Billion for 1991; Landmark Achievement Is Most Successful Campaign in Organization's History, PR Newswire, Jan. 9, 1992, LEXIS, PR Newswire File (

> The danger Israel faced as a result of the Gulf War, coupled with the emotion and drama of Soviet and Ethiopian Jews seeking new lives in the Jewish homeland, triggered an outpouring of support that thousands of Jews and non-Jews alike chose to express through the purchase of Israel Bonds.

(quoting National Campaign Chairman Michael Siegal)).

The Bond prospectus acknowledges the value of the Bonds in times of crisis: "The State of Israel Bonds have proven to be a reliable source of financing for the State, particularly under adverse circumstances, because many purchasers are individuals and institutions, including the Jewish community over the world, that have an interest in Israel." State of Israel Prospectus, supra note 292, at D-53. R

333 At the end of 1998, $237 million in matured bonds from the Development Issue of State of Israel bonds, no longer earning any interest, remained unclaimed. State of Israel Prospectus, supra note 292, at D-62. R

334 Id.

335 The story of Eric and Pearl Wright offers one example:

> Eric and Pearl Wright, joint pastors of a small church, were looking for ways to help Israel during the recent Persian Gulf War. Their answer was on page 9 of the sports section in a newspaper.
>
> "State of Israel Bonds Launches Emergency Campaign," said the full-page ad, placed by the Jewish state as Iraqi missiles hit Tel Aviv, Soviet immigrants poured into Ben-Gurion Airport and tourism all but vanished. . . .
>
> "It's really the Christian duty of every Christian to befriend and support Israel, because the Bible tells us to do that, and I wanted to do more than just say that I support Israel," said Eric Wright, a retired chemist and electrical engineer. . . .

Because concern for the homeland often drives the purchase of Diaspora Bonds, the purchase of these instruments represents a type of "social investing."[336] John Langbein and Richard Posner have pointed out that "socially responsible" investment will result in an investment portfolio that is less diversified than a portfolio constructed purely on the basis of profit maximization,[337] and other scholars have argued that socially responsible investing results in a less profitable portfolio.[338] Thus, like other socially responsible investments, Diaspora Bonds may be a vehicle for people to express their desire to do good through their investments—at the cost perhaps of a lower rate of return than would have been available without such social criteria.

On the other hand, a pension plan manager should eschew investments in Diaspora Bonds for two reasons: First, such investments generally do not maximize the plan's rate of return; and second, as such investments are often made for the benefit of the homeland issuer, and not exclusively for the benefit of the plan beneficiaries, it may be contrary to trust law for a pension plan manager to make such investments.[339]

4. Offering Diaspora Bonds in the United States

The offer document for the Resurgent India Bonds declares that the instruments are not "securities" under the United States securities laws and that those laws do not apply.[340] It goes on to specify that Indian law will govern all disputes arising out of the instruments. Finally, it limits the fora in which disputes can be heard: Suits can be

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"You realize that this is the biggest check I've ever written in my life?" he asked.

"We love Israel," his wife replied.

Mathis Chazanov, Church Invests in Israel, L.A. Times, Mar. 30, 1991, at S1.

336 See John H. Langbein & Richard A. Posner, Social Investing and the Law of Trusts, 79 Mich. L. Rev. 72, 73 (1980) (defining "social investing" as including or excluding securities from investor's portfolio based on companies' social behavior, not on companies' ability to maximize profits).

337 Id. at 85.

338 E.g., Maria O'Brien Hylton, "Socially Responsible" Investing: Doing Good Versus Doing Well in an Inefficient Market, 42 Am. U. L. Rev. 1, 49-51 (1992) (arguing that socially responsible investing is likely to reduce investment returns in efficient market conditions, but might maximize income in inefficient market conditions).

339 Langbein & Posner, supra note 336, at 96; see also John H. Langbein & Bruce A. Wolk, Pension and Employee Benefit Law 843 (3d ed. 2000) ("Social investing raises questions about the bounds of law and morality."). But see Joel C. Dobris, Arguments in Favor of Fiduciary Divestment of "South African" Securities, 65 Neb. L. Rev. 209, 230 (1986) ("[T]rust law should . . . allow recognition of social gain obtained at a financial cost."); Hylton, supra note 338, at 43 (arguing that socially responsible investing may be legal for trustees "only when practiced in its mildest forms"). **R** **R**

340 See infra note 358 and accompanying text. **R**

brought only in India and Germany, in the case of the deutsche mark-denominated Resurgent India Bonds, or in India and the United Kingdom, in the case of the pound-sterling bonds.[341] But the symmetry between the currency of the Bonds and the jurisdictions in which suit can be brought ends there: Under the terms of the Resurgent India Bonds, suits arising out of the United States dollar-denominated bonds can be brought *only in India*.[342] Thus, India was willing to entertain suits in the United Kingdom or Germany, but not in the United States.

India probably sought to avoid United States courts because they are friendlier to plaintiffs than are courts of other countries. As Roberta Romano explains, "in addition to class action mechanisms to aggregate individual claims not prevalent in other countries, U.S. procedure—including rules on discovery, pleading requirements, contingent fees, and the absence of a 'loser pays' cost rule—are far more favorable to plaintiffs than those of foreign courts."[343] One might also add to the mix the high cost of United States lawyers, which makes litigation in the United States inherently expensive. The combination of these attributes poses a formidable risk to issuers bringing offerings to the United States.

India seeks to avoid not only United States courts, but also United States law. There are at least four reasons that an issuer involved in a global offering might seek to avoid United States law. First, compliance with the requirements of the multiple jurisdictions in which a global offering takes place is likely to be expensive. The issuer must hire legal counsel, pay registration fees, and incur significant costs in satisfying the disclosure requirements in each offering jurisdiction.[344]

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341 Id.

342 Id.

343 Romano, supra note 299. James Cox also has noted the same pro-plaintiff features of U.S. procedure: United States courts offer "somewhat permissive substantive standards on issues of materiality, level of culpability, and causation." James D. Cox, Regulatory Competition in Securities Markets: An Approach for Reconciling Japanese and United States Disclosure Philosophies, 16 Hastings Int'l & Comp. L. Rev. 149, 149-50 (1993) (citations omitted). "More importantly," Cox continues, "aggressive private enforcement of the securities laws is subsidized through America's embrace of class action procedures as well as the contingency fee arrangement." Id. R

344 Merritt B. Fox, Securities Disclosure in a Globalizing Market: Who Should Regulate Whom, 95 Mich. L. Rev. 2498, 2607 (1997). Issuers generally prefer avoiding differential disclosure—i.e., different descriptions in different offering jurisdictions—because of the difficulty in explaining in the course of any subsequent litigation why the issuer felt that investors in one country should be denied information given to investors in another country.

Second, the substantive features of the law may be unfavorable or especially demanding for the particular type of issuer or issue. Countries have "differing definitions of what constitutes a security, the exemptions that apply for their sale and resale, and even what constitutes misrepresentation."[345] Rescission (the unwinding of the transaction) may be available to a victorious securities plaintiff.[346]

Third, compliance with the requirements of multiple regulatory systems may delay the offering, not only because of the extensive legal analysis necessary for such compliance but also because of the time involved in making regulatory filings or obtaining regulatory approvals. Pre-filing disclosure requirements in the United States may impede the efforts of a foreign issuer to access the U.S. market.[347] Schedule B to the Securities Act, which spells out very limited disclosure requirements, governs foreign sovereign offerings.[348] Despite these minimal requirements, however, "a market practice has developed by which sovereign issuers generally provide additional information about their country, its history and political situation, foreign relations, economic and financial information including balance of payments, balance of trade and exchange rate policies, and external debt service statistics."[349] This practice likely reflects two motivations: minimizing the possibility of material omissions, which result in strict liability,[350] and assisting marketing by presenting the political and economic situation in as favorable a light as possible consistent with the Rule 10b-5 standard of making no material misstatements or omissions, in order to avoid fraud suits.[351]

Finally, the application of multiple regulatory systems to a global offering potentially subjects the issuer to suit in multiple jurisdictions. The Supreme Court has recognized that an entity might have a "spe-

345 James D. Cox, Choice of Law Rules for International Securities Transactions?, 66 U. Cin. L. Rev. 1179, 1180 (1998).

346 Randall v. Loftsgaarden, 478 U.S. 647, 655-56 (1986).

347 See Lee C. Buchheit, The Schedule B Alternative, Int'l Fin. L. Rev., Jul. 1992, at 6, 6 (explaining that foreign sovereigns may be reluctant to meet disclosure requirements mandated by United States).

348 Schedule B's disclosure requirements include, inter alia, the purpose of the offering, the amount of debt outstanding, any history of prior default, and a schedule of government revenues classified by source for the prior three years. Securities Act of 1933, 15 U.S.C. §77aa, sched. B (1994).

349 Buchheit, supra note 347, at 6. **R**

350 James Cox refers to this as "the law of half-truths." The minimum facts required by Schedule B might only be half-truths, without supplementation by other information. James D. Cox, Rethinking U.S. Securities Laws in the Shadow of International Regulatory Competition, L. & Contemp. Probs., Autumn 1992, at 177, 192-93.

351 Securities Exchange Act of 1934 R. 10b-5.

cial interest in limiting the fora in which it potentially could be subject to suit."[352]

Noting good reasons why a nation may want to avoid United States law does not, however, establish that it should be allowed to do so. Sections B and C of this Part address this question. It thus suffices for now to point out that issuers may decide to forgo offering securities in the United States altogether because of the United States securities regime and United States procedure and litigation practices.[353] After Ferdinand Marcos was removed by a populist revolution, the new Philippines government considered issuing Diaspora Bonds. "Just as the American Jews helped build a fledgling Israel," one proponent explained, "Philippine-Americans can help rebuild this country by linking their pocketbooks to their hearts."[354] However, the Philippine Government eventually decided against selling "Cory Bonds" to retail investors in the United States in light of the need to comply with U.S. securities (including disclosure) requirements.[355] Indeed, in October 2000, after discussions with the United States regulatory authorities, India decided against offering a new Diaspora Bond, the India Millennium Deposit, in the United States.[356]

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352 Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593 (1991). In this sense, an issuer in a global offering is like the cruise ship with passengers from many countries: "Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora." Id.

353 Of course, other issuers, like Israel, may accept American securities regulation and offer SEC-registered Diaspora Bonds.

354 Anne Keegan, Coming to the Aid of Their Country: Filipinos in U.S. Join Forces to Rebuild Homeland's Economy, Chi. Trib., Mar. 9, 1986, at 4.

355 Interview with Lee C. Buchheit, Legal Advisor to the Philippine Government, New York, Mar. 20, 1999 (on file with the *New York University Law Review*); see also Aquino to Visit U.S. in September, UPI, July 3, 1986, LEXIS, Nexis Library, UPI File (quoting President Corazon Aquino as saying "we are also studying the matter of possibly floating 'Cory bonds' in the United States"). The Philippine decision to forgo a securities offering because of United States securities law and procedure is emblematic of one response foreign issuers have to our regulatory regime: "Many foreign issuers, in fact, purposefully exclude U.S.-based investors to avoid the application of U.S. securities laws." Stephen J. Choi & Andrew T. Guzman, Portable Reciprocity: Rethinking the International Reach of Securities Regulation, 71 S. Cal. L. Rev. 903, 922 (1998). James Cox observes:

> It is not an uncommon practice for bidders to avoid unwanted takeover regulations and their accompanying liability regimes, most notably those of the United States, by excluding U.S.-based investors from its bid. Such a strategy then raises the issue whether the excluded investors are harmed by the very regulations that are intended for their benefit.

Cox, supra note 345, at 1180. R

356 Sanyal & Krishnan, supra note 319; see also Banks Assure $5 B Mop-Up for IMD, Econ. Times (India), Oct. 19, 2000, LEXIS, Economic Times File. R

B. Choosing Law and Court: The Statist Approach

The United States securities laws apply to any offer of a security using an instrumentality or means of interstate commerce.[357] The jurisdictional nexus is met quite easily in the case of the Resurgent India Bonds, which were offered using interstate means. However, the requirement that investment vehicles under the scope of the U.S. regime be "securities" creates the loophole that India sought to exploit in its offering of Resurgent India Bonds within the United States.[358] If an offering does not involve a "security," the United States securities regime does not apply.

A homeland country could take either of two strategies to avoid potential conflict with the laws of its diaspora's adopted countries: First, it could comply fully with those laws; or, second, it could structure the transaction to avoid the application of those laws. Israel adopted the former approach with its State of Israel Bonds, registering the instruments with the SEC, and complying with the relevant requirements for the issuance of securities in the United States.[359] India chose the second strategy and based its avoidance of United States law on the argument that the Resurgent India Bonds, which are offered by its State Bank, are in fact bank certificates of deposit, not securities, therefore escaping the application of the United States securities regime.[360]

Even though "bonds" are included in the list of instruments defined to be "securities" in Section 2 of the 1933 Securities Act,[361] determining whether the Resurgent India Bonds actually constitute securities requires further inquiry.[362] Whether the Resurgent India Bonds should be governed by the United States securities laws turns on whether they fall within the scope of the strict definition of security. United States case law has made clear, through its grappling with

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357 Securities Act of 1933 § 5, 15 U.S.C. § 77e (1994).

358 The Empire Strikes Back, Bus. India, Jul. 27, 1998, at 83 ("The RIB [Resurgent India Bond] is a deposit scheme and not a bond, hence we need not register with the Securities Exchange (SEC).") (quoting State Bank of India official).

359 See supra text accompanying note 303. R

360 See supra note 358. R

361 Securities Act of 1933 § 2, 15 U.S.C. § 77b (1994).

362 The Supreme Court has instructed us not to be formalistic in determining whether an instrument is a security. In United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975), the Supreme Court held that persons who acquired residential apartments in a state-subsidized cooperative did not purchase securities even though their interests were evidenced by shares of stock. In concluding that something called a "stock" was not necessarily a "security," the Court focused on the "economic realities" underlying the transaction: "Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto." Id. at 849.

the issue of "notes," that simply falling literally within the Section 2 listed categories may not be enough for classification as a security and application of the United States securities laws.

In *Landreth Timber Co. v. Landreth*,[363] the Supreme Court held that an instrument bearing the name "stock" is plainly a "security" because it is negotiable, offers the possibility of capital appreciation, and carries the right to dividends contingent on the profits of a business enterprise. However, in *Reves v. Ernst & Young*,[364] the Supreme Court approached the question of whether an instrument bearing the name "note" is a security in a very different manner. There, the Court said that an instrument called a "note" is presumed to be a "security," yet that this presumption could be rebutted by a showing that the note bears a strong "family resemblance" to one of the categories of instruments that is not considered a security.[365] The question in the instant case is whether we should approach a "bond" in the manner we analyze "stocks" (i.e., using the narrow *Landreth Timber* test) or in the manner we analyze "notes" (i.e., using the broader *Reves* test). In *Reves*, the Court distinguished "note" from "stock" on the ground that unlike "stock," "note" is "'a relatively broad term that encompasses instruments with widely varying characteristics, depending on whether issued in a consumer context, as commercial paper, or in some other investment context.'"[366] The term "bond" may encompass a wide variety of instruments, some we would consider "securities," such as a corporate bond, and others we would not consider "securities," such as a performance bond.[367] Because the word "bond" itself, like "note," includes many instruments that are not securities, the *Reves* analysis seems more appropriate than the *Landreth Timber* analysis.

Under *Reves*, we must first ask whether an instrument bears a "family resemblance" to any of the types of instruments already held *not* to be securities.[368] This question is easy to answer for the Resur-

363 471 U.S. 681 (1985).

364 494 U.S. 56 (1990).

365 Id. at 67.

366 Id. at 62 (quoting *Landreth Timber*, 471 U.S. at 694).

367 Among the instruments called "bonds" listed under that term in Black's Law Dictionary, many are not securities. Black's Law Dictionary 178-81 (6th ed. 1990). In contrast, of the long list of instruments called "stocks" listed under that term in Black's, virtually all are securities. Id. at 1415-19.

368 The examination of whether an instrument bears a strong "family resemblance" to an instrument previously held not to be a security is measured using four factors: (1) motivation; (2) plan of distribution; (3) reasonable expectations of the investing public; and (4) the existence of an alternative regulatory regime or some other risk-reducing factor. *Reves*, 494 U.S. at 66-67. If no family resemblance is found, then one must examine whether a new class of instruments should be added to the list of instruments that are not

gent India Bonds because foreign bank certificates of deposit have previously been held not to be securities in certain cases. In *Marine Bank v. Weaver*,[369] the Supreme Court held that a certificate of deposit purchased from a federally regulated bank was not a security under the 1934 Securities Exchange Act.[370] The Court reasoned that since the holders of bank certificates of deposit are "abundantly protected under the federal banking laws," it is unnecessary to subject issuers of bank certificates of deposit to liability under the antifraud provisions of the federal securities laws.[371] Federal appeals courts have extended the *Marine Bank* holding to certificates of deposit issued by a foreign bank. In *Wolf v. Banco Nacional de Mexico*,[372] the United States Court of Appeals for the Ninth Circuit held that a certificate of deposit denominated in Mexican pesos and sold to a United States resident by a Mexican bank (Banamex) was not a "security" for purposes of the federal securities acts.[373] The Ninth Circuit reasoned that foreign banking regulation could protect an investor just as well as United States federal banking regulation.[374] Referencing *Weaver*, it concluded that "when a bank is sufficiently well regulated that there is virtually no risk that insolvency will prevent it from repaying the holder of one of its certificates of deposit in full, the certificate is not a security."[375]

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securities; this examination is again conducted on the basis of the same four factors. Id. at 67.

369 455 U.S. 551 (1982).

370 Id. at 558-59.

371 Id. at 559. The Court, however, instructed that each certificate of deposit "must be analyzed and evaluated on the basis of the content of the instruments in question, the purposes intended to be served, and the factual setting as a whole." Id. at 560 n.11.

372 739 F.2d 1458 (9th Cir. 1984). The Fifth Circuit has since followed the *Wolf* holding, as has a later Ninth Circuit case. West v. Multibanco Comermex, S.A., 807 F.2d 820 (9th Cir. 1987); Grass v. Credito Mexicano, S.A., 797 F.2d 220 (5th Cir. 1986); Callejo v. Bancomer S.A., 764 F.2d 1101 (5th Cir. 1985).

373 *Wolf*, 739 F.2d at 1463-64.

374 Id.

375 Id. at 1463. For all of the judicial assurances of "abundant protection," the investors in the Banamex certificates of deposit lost a good deal of money, without any clear hope of recouping their losses through litigation in Mexican court. It seems likely that the losses did not arise from any fraud on the part of Banamex but rather from adverse economic events in Mexico, so recovery for the losses would be inappropriate. However, the facts of *Wolf* call into question the courts' assurances that foreign banking laws can serve just as well as American laws. The appraisal that there is "virtually no risk of insolvency" proved cold comfort for the investors in Banamex CDs. Instead of insolvency, holders of the foreign-currency-denominated CD faced an equally disastrous event: devaluation. The holders of these peso-denominated CDs received the peso amount in full, but due to the intervening peso devaluation, when converted into dollars, the principal returned was worth about half of the original investment. Id. at 1459.

Resurgent India Bonds resemble foreign bank certificates of deposit in a number of ways. A certificate of deposit is defined as a "receipt for the deposit of funds in a bank."[376] Certificates of deposit can offer interest and may be negotiable.[377] The Offer Document describes the Resurgent India Bonds as "bank instruments representing foreign currency denominated deposits in India."[378] They permit "Non-Resident Indians" to "save and remit funds to India."[379] Like time certificates of deposit, they are evidenced by a certificate that entitles the holder to receive the funds, with interest, at maturity. Also, like certificates of deposit, the Resurgent India Bonds were distributed through commercial banks, not underwriters, and the State Bank of India sought and obtained regulatory clearance for the instruments from some state bank authorities.[380] However, unlike the Banamex CDs, the Resurgent India Bonds are foreign-currency-denominated bank instruments and thus are not subject to local currency risk. In order to qualify as certificates of deposit that are not "securities," the State Bank of India would need to demonstrate to the United States courts that "abundant protection" was available through Indian banking regulation.[381]

C. Choosing Law and Court: The Cosmopolitan Market Approach

Avoiding the United States regulatory regime by this definitional twist in order to defer to a foreign regulatory regime will strike many as unsatisfactory. Our faith in the domestic securities regulatory regime is very strong[382] in comparison to our limited confidence in foreign antifraud, securities, and banking laws. But what if an individual agrees to litigate disputes arising out of an investment under foreign law in a foreign court? Should that choice of law and forum be respected by U.S. courts? The use of choice-of-law and forum-selection clauses in Diaspora Bonds may be another means by which homelands may avoid the United States securities laws. This section will address whether United States courts are likely to find these

376 Glenn G. Munn, Encyclopedia of Banking and Finance 173 (F.L. Garcia ed., 8th ed. 1983).

377 Id.

378 The Instruments "constitute obligations of SBI Central Office, Mumbai, India and are not the obligations of any foreign office of SBI or its subsidiaries." State Bank of India, Offer Document for Resurgent India Bonds 1 (1998), available at http://sbi.co.in/offerdoc.htm.

379 Id.

380 US Regulator Clears Resurgent Bonds, Bus. Standard (India), Aug. 1, 1998, at 12 (noting that New York State regulators had cleared offering of Resurgent India Bonds).

381 See *Marine Bank*, 455 U.S. at 559; see also supra note 371 and accompanying text. R

382 James Cox refers to it as "self satisfaction." Cox, supra note 343, at 150. R

clauses binding under existing precedent, which is consistent with the cosmopolitan approach. Part IV.D will then look at how the diaspora model could help courts reach a hybrid result that satisfies the interests of both investors and homelands.

This Section first develops the market approach, which is consistent with at least one form of cosmopolitanism. The market approach's focus on efficiency, a utilitarian criterion that ignores state boundaries, has a cosmopolitan flavor. Its cosmopolitanism can be seen in that most of the efficiency gains from the privatization of the securities laws may be received by foreign states, not the United States (though the United States should stand to benefit as well). The market approach is not the only cosmopolitan approach, nor necessarily the one that would be the most popular among cosmopolitan scholars. Some might prefer a securities regime that was guided by Rawls's maximizing-the-minimum principle or some other principle of distributive justice.[383]

Adherents of the market approach can find support in recent case law enforcing private choices of law and forum selections. The Supreme Court has established a jurisprudence strongly favoring forum selection and choice of law,[384] though it is unclear whether it would extend that partiality in securities cases outside the arbitration context. Despite this ambiguity, the circuit courts have nevertheless forged ahead during the last decade, upholding forum-selection and choice-of-law clauses in securities cases against Lloyd's insurance entities.[385] While the reasoning of the Lloyd's cases is controversial,[386] the holdings in these cases offer strong support for enforcing the choice-of-law and forum-selection clauses in the terms of the Resurgent India Bonds. Allowing investors to opt out of the United States securities regime, however, radically transforms our regulatory system from one that presumes its unvarying usefulness to one that relies on investor rationality.[387]

1. Facilitating International Transactions: Bremen *and* Scherk

The Court has recognized the utility of choice-of-law and forum-selection clauses in international transactions. In *The Bremen v.*

[383] See supra notes 208-11 and accompanying text. **R**

[384] See infra Part IV.C.1.

[385] See infra Part IV.C.2.

[386] See infra notes 404-07 and accompanying text. **R**

[387] It could be argued that in choosing a disclosure-based system rather than a qualitative assessment-based system, the Securities Acts themselves are founded on the paradigm of a rational investor.

Zapata Off-Shore Co.,[388] an American oil company, seeking to evade the contractual choice of an English forum, and, by implication, English law,[389] filed a suit in admiralty in United States court against the German corporation which it had hired to tow its rig to the Adriatic Sea.[390] The Supreme Court held that the choice-of-forum clause was binding, notwithstanding the possibility that the English court would enforce exculpatory provisions in the contract that an American court would refuse to enforce.[391] It rested its holding on a desire to promote international commerce: "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."[392] The Court eschewed such parochialism: "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."[393]

In *Scherk v. Alberto-Culver Co.*,[394] the Court extended the *Bremen* analysis to the securities context, arguing that such choice-of-law and forum-selection clauses helped create certainty otherwise absent in international transactions.[395] In *Scherk*, an American company sued a German seller in United States court for violating the Securities Exchange Act.[396] The Supreme Court held the American company to its agreement to arbitrate disputes arising under the sale agreement before a Paris tribunal.[397] The remarkable fact about the Court's decision in *Scherk* is that it is precisely contrary to a statutory mandate. Section 14 of the Securities Act voids any clause that seeks

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388 407 U.S. 1 (1972).

389 As Judge Goodwin pointed out in an en banc opinion for the Ninth Circuit: "While the contract in *Bremen* did not contain a choice of law clause, the Supreme Court explicitly recognized that the forum selection clause also acted as a choice of law clause." Richards v. Lloyd's of London, 135 F.3d 1289, 1293 n.1 (9th Cir. 1998). Judge Goodwin cited a footnote in *Bremen* that made the point:

> [W]hile the contract here did not specifically provide that the substantive law of England should be applied, it is the general rule in English courts that the parties are assumed, absent contrary indication, to have designated the forum with the view that it should apply its own law. . . . It is therefore reasonable to conclude that the forum clause was also an effort to obtain certainty as to the applicable substantive law.

Bremen, 407 U.S. at 13 n.15.

390 *Bremen*, 407 U.S. at 1.

391 Id.

392 Id. at 9.

393 Id.

394 417 U.S. 506 (1974).

395 Id. at 516.

396 Id. at 506.

397 Id.

to waive compliance with the Act.[398] But the Court in *Scherk* had good reason to ignore this mandate: Congress had indicated in the Arbitration Act that arbitration clauses should be enforced. As Ninth Circuit Judge Noonan explained the decision later, "[w]ith two federal statutes in conflict, the considerations of international commerce tipped the balance."[399] Notably, the Supreme Court itself did not offer such clear reasoning.

2. Sending Securities Disputes Abroad: The Lloyd's Cases

Seven circuit courts have extended the *Scherk* holding to international securities claims outside the arbitration context. The issue has been raised by American investors (called "Names") in the Lloyd's insurance market who had agreed to underwrite insurance in England backed by a commitment to pay any losses from their personal assets "'down to their last cufflinks.'"[400] When faced with calls to make good on that promise, the Names sued in federal courts all across the country, alleging securities law violations on the ground that Lloyd's had offered the investments without adequate disclosure of the risks involved. And they sued despite the presence of forum-selection and choice-of-law clauses in their underwriting agreements with Lloyd's.[401] The federal circuit courts faced with the issue have all held the forum-selection and choice-of-law clauses to be enforceable.[402] The courts have upheld the agreement to bring claims in England under English law on the ground that England offers adequate remedies for defrauded investors and thus will vindicate the U.S. public policy against fraud.[403]

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398 Securities Act of 1933 § 14, 15 U.S.C. § 77n (1994).

399 Richards v. Lloyd's of London, 107 F.3d 1422, 1427 (9th Cir. 1997).

400 Allen v. Lloyd's of London, 94 F.3d 923, 926 (4th Cir. 1996).

401 Id. at 928.

402 See Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285 (11th Cir. 1998); Richards v. Lloyd's of London, 135 F.3d 1289 (9th Cir. 1998) (en banc); Haynsworth v. The Corporation, 121 F.3d 956 (5th Cir. 1997); *Allen*, 94 F.3d 923; Bonny v. Soc'y of Lloyd's, 3 F.3d 156 (7th Cir. 1993); Roby v. Corp. of Lloyd's, 996 F.2d 1353 (2d Cir. 1993); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir. 1992); see also Shell v. R.W. Sturge, Ltd., 55 F.3d 1227, 1228 (6th Cir. 1995) (displacing state securities law claims).

403 The Ninth Circuit's en banc decision illustrates the reasoning employed by courts in reaching this conclusion. The court began by discerning a Supreme Court mandate, enunciated in *Bremen*, to "enforce choice of law and choice of forum clauses in cases of 'freely negotiated private international agreement[s].'" Richards v. Lloyd's of London, 135 F.3d 1289, 1293 (9th Cir. 1998) (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972)). The Ninth Circuit declared that the antiwaiver provisions in the Securities Acts did not provide an exception to this rule. Id. The court noted that the Supreme Court in *Bremen* had contemplated that a forum-selection clause could conflict with relevant statutes. The court repeated the *Bremen* Court's words: "A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public pol-

However, the Lloyd's cases' extension of judicial partiality to forum selection and choice of law beyond the international arbitration context is dubious. As Judge Sidney Thomas's cogent dissent from the Ninth Circuit's en banc decision in *Richards* points out, the basic error in the court's analyses is that, in applying the policy-weighing approach of *Bremen*, the court "displaces Congress' specific statutory directive" prohibiting waiver of the United States securities laws.[404] Policy weighing by a court is appropriate where, as in *Bremen*, there are no statutory directives at issue or where, as in *Scherk*, there are two opposite statutory directives at issue. The Ninth Circuit, like the other circuits, relied on the Supreme Court's opaque opinion in *Scherk*, which did not clarify that the only basis on which the Court could refuse to apply the antiwaiver provisions of the Securities Acts was the contrary statutory command of the Arbitration Act.

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icy of the forum in which suit is brought, whether declared *by statute* or by judicial decision." Id. (quoting *Bremen*, 407 U.S. at 15). The court found support for its application of the *Bremen* holding to the securities dispute before it, noting that, in a different case, "the Supreme Court explicitly relied on *Bremen* in a case involving a securities transaction." Id.

The Ninth Circuit then turned to the application of *Bremen*. As a preliminary step, because the *Bremen* decision only applies to international transactions, the court inquired whether the contract at issue was "international." Id. at 1294. Having established that an international agreement was at stake, the court then asked whether there were grounds for refusing to enforce forum-selection and choice-of-law clauses. Id. The court observed that in *Bremen*, the Supreme Court had identified three grounds for repudiating a forum-selection clause:

> [F]irst, if the inclusion of the clause in the agreement was the product of fraud or overreaching; second, if the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced; and third, "if enforcement would contravene a strong public policy of the forum in which suit is brought."

Id. (quoting *Bremen*, 407 U.S. at 15).

Like the other courts that had considered the issue in the Lloyd's disputes, the Ninth Circuit in *Richards* found the third ground the most worrisome, but concluded in the end that enforcement of the forum-selection and choice-of-law clauses would not offend American public policy. In analyzing the public policy issues at stake, the court again turned to the forever-twinned cases of *Bremen* and *Scherk*. First, the court noted the strong public policy reasons to enforce the parties' "'solemn agreement.'" Id. at 1295 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 517 n.11 (1974)). It cited the Supreme Court's desire not to be chauvinistic about United States law: "To require that American standards of fairness must . . . govern the controversy demeans the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of United States law over the laws of other countries." Id. (quoting *Scherk*, 417 U.S. at 517 n.11, internal quotations omitted). The court found that English law and English courts provided "reasonable recourse" to the Names for any fraud or misrepresentation. Id. at 1296. The court repeated its observation made two decades earlier that it was "hardly in a position to call the Queen's Bench a kangaroo court." Id. English remedies, in the court's opinion, offered adequate substitutes for United States securities laws. See id.

404 *Richards*, 135 F.3d at 1297 (Thomas, J., dissenting).

Furthermore, there is reason to think that enforcing the forum-selection and choice-of-law clauses violates the public policy Congress sought to further by enacting the Securities Acts.[405] The remedies available through English courts were precisely the ones that Congress had found insufficient before enacting the Securities Acts.[406] Judge Noonan makes this point in his opinion for the panel in *Richards*, subsequently withdrawn and reversed en banc: "We do not believe that we should turn back the clock to 1929 or introduce caveat emptor as the rule governing the solicitation in the United States of investments in securities by residents of the United States."[407]

Despite their fragile intellectual foundation, the Lloyd's cases are good law in the seven circuits in which they were decided. Moreover, prolonged Congressional inaction in responding to these cases with a clarifying statute lends some authority to their interpretations of the law. While a recent commentator holds up the possibility that "[t]he Lloyd's cases might . . . be limited only to Lloyd's use of such clauses,"[408] it is hard to find a justification for this limitation in these cases themselves.[409]

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405 James D. Cox et al., Securities Regulation: Cases and Materials 3-8 (2d ed. 1997) (describing Securities Acts as prompted by Congressional concern—perhaps exaggerated—over market abuses). James Cox worries about the "balkanization" of United States capital markets into U.S.-regulated and non-U.S.-regulated markets, with "private agreements driv[ing] out wiser and more broadly formulated public law." Cox, supra note 345, at 1187. **R**

406 One commentator notes:

> When Congress enacted the securities laws in the 1930s, it was perfectly aware that investors had available common law remedies such as fraud and misrepresentation. Indeed, one important objective of the securities laws was to make it easier for investors to prosecute claims by relaxing the *scienter* (knowledge) and causation requirements of the common law remedies. To conclude that the policy of the US securities laws can be vindicated by remanding American investors to a forum where only such common law remedies are available is therefore to miss much of the point that Congress was trying to make when it enacted the securities laws in the first place.

Lee Buchheit, Choice of Law Clauses and Regulatory Statutes, Int'l Fin. L. Rev., Mar. 1996, at 11, 12.

407 Richards v. Lloyd's of London, 107 F.3d 1422, 1429 (9th Cir. 1997); see also Jennifer M. Eck, Note, Turning Back the Clock: A Judicial Return to Caveat Emptor for U.S. Investors in Foreign Markets, 19 N.C. J. Int'l L. & Com. Reg. 313 (1994) (concluding that "the Supreme Court did not intend for its decisions enforcing international arbitration clauses to result in United States investors losing their statutory claims under the 1933 and 1934 Acts").

408 Jon A. Jacobson, Note, Your Place or Mine: The Enforceability of Choice-of-Law/Forum Clauses in International Securities Contracts, 8 Duke J. Comp. & Int'l L. 469, 509 (1998).

409 Courts have already begun to apply the Lloyd's holdings in other contexts. See, e.g., Batchelder v. Kawamoto, 147 F.3d 915, 919 (9th Cir. 1998) (enforcing Japanese choice-of-law clause in shareholder derivative action, stating, "California's interest would not be defeated by the application of Japanese law to Batchelder's claim. . . . The fact that Japanese

The limited remedies available in English law did not prevent the seven circuit courts from sending the United States plaintiffs to England to argue their grievances. The Second Circuit made this explicit in its decision, expressing its willingness to enforce a choice-of-law and forum-selection clause even if "the foreign law or procedure . . . [is] different or less favorable than that of the United States."[410] It wrote that an agreement's submission to English courts must be enforced "even if that agreement tacitly includes the forfeiture of some claims."[411] It seems likely that a court would hold that India, with a common-law tradition similar to that of England, would also provide adequate investor protections under the Lloyd's cases theory.[412]

But these analyses only take us so far. The positive analysis of how courts (and implicitly, and perhaps more importantly, the SEC) are likely to treat instruments like the Resurgent India Bonds does not resolve the more difficult question of whether instruments like the Resurgent India Bonds *should* be tolerated. The next Section turns to the policies underlying the securities-regulation regime and one important recent suggestion for its reform.

3. The Market Approach to Securities Regulation of Law and Economics

The Lloyd's cases offer a startling possibility: investors choosing to divest themselves of the protections of the United States securities laws in their international investments. This seemingly radical result is broadly consistent with powerful recent scholarship on reforming the international securities regulation regime. Scholars seeking to create a more efficient international securities regulatory system have suggested ways to reform the system so that an international offering

law may differ in this regard from California law does not necessarily signify that application of Japanese law would contravene California's public policy"); Frietsch v. Refco, Inc., 56 F.3d 825 (7th Cir. 1995) (dismissing plaintiffs' federal securities fraud case on ground that forum-selection clause in plaintiffs' investment contracts made Germany exclusive venue for any suit arising out of contracts); Lobatto v. Berney, 98 Civ. 1984, 1999 U.S. Dist. LEXIS 13224, at *17 (S.D.N.Y. Aug. 26, 1999) (dismissing claims against defendant investment company because of forum-selection clause that required arbitration of disputes, subject to exclusive jurisdiction of English courts); P.T. Adimitra Rayapratama v. Bankers Trust Co., 95 Civ. 0786, 1995 U.S. Dist. LEXIS 11961, at *9 (S.D.N.Y. Aug. 16, 1995) (dismissing RICO and commodities claims because English law provides adequate remedies to vindicate plaintiff's substantive rights and protect U.S. public policies).

410 Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1363 (2d Cir. 1993).

411 Id. at 1360-61.

412 This assumes that any Indian sovereign entities that are sued in U.S. courts are required to waive any sovereign immunity they may have in Indian courts before the suit is dismissed in favor of Indian court. Cf. Jota v. Texaco, Inc., 157 F.3d 153, 155 (2d Cir. 1998) (holding that dismissal for forum non conveniens and comity was erroneous in absence of condition requiring oil company to submit to Ecuadorean jurisdiction).

would be governed by the laws of only one jurisdiction. Roberta Romano, for example, endorses a system whereby "[f]oreign issuers selling shares in the United States could opt out of the federal securities laws and choose those of another nation . . . or those of a U.S. state . . . ."[413] Steven Choi and Andrew Guzman propose a similar reform of the international securities regime whereby "issuers may select the law of any participating country regardless of the physical location of the securities transaction."[414] Under their proposal, "[a] Japanese company, for example, could choose German law to cover its securities offerings within the United States and all other participating jurisdictions."[415] Merritt Fox reaches a similar conclusion with respect to the application of the disclosure requirements in international securities offerings: "[E]ach country should be the exclusive regulator of all issuers of its nationality."[416]

These scholars are concerned primarily with the deadweight losses[417] and other inefficiencies that arise from overregulation. A market-oriented approach, such as that offered by Professor Romano, allows investors and issuers to select the appropriate regulatory scheme for any issuance.[418] Professor Romano notes that there is little concern that investors may find themselves forced into accepting a foreign choice of law or forum against their wishes: "[G]iven the multiplicity of investment choices, securities transactions are not adhesion contracts."[419]

Market forces would adjust the price of the security to reflect the choice of regulatory regime. If an issuer chose the law of a jurisdiction with little protection for investors, rational investors would pay a lower price for that security: "As long as investors were informed of the issuer's choice-of-law and choice-of-forum selections, they would be able to price their ability to obtain relief for securities viola-

413 Romano, supra note 299, at 2362. **R**

414 Choi & Guzman, supra note 355, at 907. **R**

415 Id. at 908.

416 Fox, supra note 344, at 2504. **R**

417 Deadweight losses are the reduction in consumer and producer surplus resulting from the restriction of output to less than the optimum efficient level that would prevail under conditions of perfect competition. See Christopher Pass et al., Collins Dictionary of Economics 111 (2d ed. 1993).

418 The market approach (and its variations) advocated by recent scholarship represents a shift from the current mandatory securities-regulation regime. The current regime rests on investors making decisions after receiving full disclosure about the potential investment, whereas the market approach rests on investors making decisions after receiving information on the law that would apply and the courts that would hear cases. The market approach increases the number of variables that the investor must review in making the investment decision.

419 Romano, supra note 299, at 2407. **R**

tions . . . ."[420] The choice of law will affect the price of the security in another way: The fact that the issuer may be subjected to only one jurisdiction's laws and courts may help reduce the costs associated with offering securities internationally and should therefore reduce (perhaps imperceptibly) the cost of the security.[421]

This analysis requires a certain degree of faith in the free market, especially in the proposition that it is characterized by rational, well-informed investors.[422] Is this the nature of the market for Diaspora Bonds? This market appears to be characterized by two forces that push in opposite directions. First, a diaspora is more likely to be well informed about its home country than the average investor. They may have first-hand experience with the homeland's system of justice and with the possibility of redress for fraud. At the same time, however, the diaspora may be guided by its feelings of loyalty to its home country, rather than dispassionate analysis. Like all loyalties, this loyalty may be blinding.[423] Familiarity does not always breed financial sophistication; diasporan people may need protection from their own homelands' financial schemes.

D. Choosing Law and Court: The Diaspora Model's Hybrid Approach

The diaspora model would offer a hybrid approach to the choice-of-law and forum-selection questions, seeking to satisfy the desire to facilitate capital raising by foreign sovereigns but allowing for policing Diaspora Bond issuances to protect unwitting investors. The hybrid approach builds from both the statist and cosmopolitan market approaches.[424] To the extent that the securities regime seeks to protect

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[420] Id. at 2424. Choi and Guzman write: "Rational investors with information on . . . different types of regimes will . . . discount the price they are willing to pay for securities based on the increased risk of fraud and other opportunistic behavior." Choi & Guzman, supra note 355, at 950. See also Cox, supra note 343, at 158 (noting that "securities on the market which enjoy an overall lower likelihood of abusive practices will ex ante trade at prices slightly higher than those of less regulated markets"). R

[421] The Supreme Court offered similar, efficient-markets-based reasoning in *Carnival Cruise*: "[I]t stands to reason that passengers who purchase tickets containing a forum clause . . . benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued." Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594 (1991).

[422] Professor Romano herself relies on the "sophistication of institutional investors" to help price securities governed by foreign laws. Romano, supra note 299, at 2366. R

[423] See Christina Whitman, Whose Loyalties?, 91 Mich. L. Rev. 1266, 1276 (1993) (book review) (observing how national loyalty can be blinding even to author writing on loyalty).

[424] It is not necessary to adopt an "all-or-nothing" approach to the application of one jurisdiction's regulatory regime to an international transaction. Cf. Robert W. Hillman, Cross-Border Investment, Conflict of Laws, and Privatization of Securities Law, 55 Law &

the proper functioning of the general securities market,[425] it seems appropriate to allow territorial sovereigns to enforce that regime for the common good of that society. At the same time, however, to the extent that the securities regime seeks to protect an individual diasporan investor, the diaspora model suggests that the principle of self-reliance (associated with the market mechanism) should be paramount. Thus, in the case of the Resurgent India Bonds, courts should enforce the forum-selection and choice-of-law clauses sending private litigants to Indian court and Indian law, but, at the same time, permit the SEC (and state regulators) to sue the State Bank of India for any violations of United States securities laws. That is, the diasporan investor in Resurgent India Bonds would forgo a private cause of action in United States court, but American authorities would retain the right to enforce the United States securities regime.

This approach can be justified on contractarian grounds. Since the explicit and obvious terms of the Resurgent India Bond include a waiver of the protection of United States law and United States courts, it is appropriate to enforce against the investor the bargain she struck.[426] She should lose her private right of action in United States court and be left to fight her case in an Indian court under Indian law. But it would not be appropriate to hold the SEC to a bargain it never accepted. As international lawyer and scholar Lee Buchheit notes: "[T]he conventional wisdom [is] that governing law clauses cannot shield a party from enforcement actions by the regulators."[427] Thus, the SEC could act if necessary on behalf of the public interest in a securities market free of fraud against the State Bank of India.

The diaspora model's hybrid approach has the virtue that it respects the simultaneously public and private character of the United

Contemp. Probs. 331, 354 (1992) (challenging "prevailing unitary view of the securities acts as public law not amenable to choice of law").

425 This latter interest has been called "the foundation for the United States financial markets and business community." Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1364-65 (2d Cir. 1993).

426 Professors Paul Carrington and Paul Haagen take issue with the Supreme Court's reliance on freedom of contract to support choice-of-law and forum-selection clauses, arguing that freedom of contract can often be used by the powerful to exploit the weak. Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 Sup. Ct. Rev. 331, 333-39; see generally Michael J. Trebilcock, External Critiques of Laissez-Faire Contract Values, in The Fall and Rise of Freedom of Contract 78 (F.H. Buckley ed., 1999) (describing major critiques of freedom of contract). In the case of Diaspora Bonds, this concern seems less compelling, as potential investors in Diaspora Bonds, however weak they may be, seem unlikely to be forced into parting with their money despite their wish to receive the protections of the American securities laws in any investment. Perhaps the more likely difficulty is the lack of sophistication or diligence on the part of the diaspora investor, resulting in her not reading or comprehending the choice-of-law and -forum clauses.

427 Buchheit, supra note 406, at 11. **R**

States securities laws.[428] The private aspect of the securities laws—protecting the individual investors in any particular security—may be properly the subject of choice-of-law/forum-selection clauses that eschew those protections in favor of foreign ones. The public aspect—protecting the market from predatory issuers—may be safeguarded by a vigilant regulatory body.

The bifurcation of the securities laws into public and private may strike long-time observers of the securities regime as odd. Historically, American scholars classified the securities laws as "public" law, thereby denying the possibility of arbitration or choice of law with respect to the securities regime.[429] However, the securities laws' classification as pure public law has been eroded through the Supreme Court's willingness to arbitrate securities disputes.[430] The hybrid approach suggests that there is a private aspect to this "public" law, evident in the private causes of action that can be brought to vindicate individuals' legal rights. Thus, the innovation here is to recognize the securities law as having both public and private purposes, and to separate the two neatly through the entity that has the right of action—either the federal or state attorney general acting through the regulatory agencies or the private individual. Admittedly, that separation is less than perfect. It is conceivable that private actions may be brought to vindicate broader public harms (as is the case in much civil rights litigation), and that public actions be brought to vindicate only private harms, as in the case of agency capture by powerful interest groups.

Adopting the hybrid approach does not require Congressional action, only a subtle reinterpretation of the *Lloyd's* holdings. Under this reinterpretation, the choice-of-law and forum-selection clauses would effectively limit the plaintiff to actions in the foreign court and under foreign law, but they would not annul the requirement that the foreign issuer comply with United States securities regulation. A country planning on issuing a Diaspora Bond would draft appropriate disclosure statements meeting the limited requirements of Schedule B as well as providing any other information that might be material to

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428 In an early article presaging the next decade of thinking, Robert Hillman argues that "[s]ecurities law is neither wholly public nor wholly private, but is instead at times public, at times private, and at times a curious blend of the two." Hillman, supra note 424, at 343. R

429 Romano, supra note 299, at 2423. R

430 Rodriguez de Quijas v. Shearson/Am. Express, 490 U.S. 477, 477 (1989); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 220-21 (1987); see also Romano, supra note 299, at 2423 ("The distinction between public and private law is arcane, and has largely been undone by the Supreme Court in the securities context through its validation of arbitration clauses to resolve disputes, reversing the prior convention that considered arbitration inappropriate for public, as opposed to private, law subjects."). R

an investment decision.[431] The country would file a registration statement including that disclosure with the SEC. In order to gain confidence that the choice-of-law and choice-of-forum clauses would be upheld in United States court, a procedure might be crafted whereby a country planning to issue a Diaspora Bond would attempt to satisfy the SEC that that country's laws and courts offered adequate investor protection. While the SEC's assessment of the adequacy of the foreign substitute would not bind any court facing this issue later, as in the case of no-action letters,[432] it would nevertheless have persuasive authority.[433] If the issuer faced a private securities action in United States court arising out of its Diaspora Bonds, it would seek to dismiss on the ground of the choice-of-law and forum-selection clauses. The country would still need to establish to the court that its law and procedure offered fair and adequate substitutes for the United States regulatory regime,[434] but its argument would be strengthened by a prior SEC determination to that effect.[435]

The hybrid approach comes at the cost of private causes of action in United States courts, upon which "American law relies so heavily."[436] However, because United States investors have conceded their domestic causes of action in certain offerings, the SEC may be especially vigilant with such offerings. Without such increased vigilance, investor inability to sue in the United States could lead to a lower rate of compliance with United States securities laws and a concomitantly higher risk of fraud. An SEC enforcement action brought in a case involving Diaspora Bonds would pit sovereign against sovereign in United States court. With enforcement now in the hands of the government and potential defendants in any actions being sovereign entities, enforcement decisions might be subject to political calculations. For example, the SEC might be reluctant to prosecute

[431] Complying with the securities offering regime would be unnecessary where the instrument being offered is not a security, as in the case of certain bank certificates of deposit. See supra text accompanying notes 357-59. **R**

[432] See Donna M. Nagy, Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework, 83 Cornell L. Rev. 921, 936-38 (1998) (describing SEC no-action letters).

[433] Harold S. Bloomenthal & Samuel Wolff, Securities and Federal Corporate Law § 24:81, at 24-174 (2000) (describing degree of deference accorded by courts to no-action letters); Nagy, supra note 432, at 923-26 (noting that although no-action letters do not constitute binding rulings, courts frequently rely upon them in their decisions). **R**

[434] See supra text accompanying note 403. **R**

[435] A refinement to the diaspora model's hybrid approach would maintain the existing regulation of market professionals (e.g., underwriters and broker/dealers) involved in the offering of Diaspora Bonds. Professor Romano adopts this feature of the current regulatory landscape in her market approach to securities regulation. Romano, supra note 299, at 2419-28. **R**

[436] Carrington & Haagen, supra note 426, at 375. **R**

vigorously a strategically important country that had defrauded investors. At the same time, however, the high profile of such offerings and their small number might lead to greater regulatory scrutiny. In *McMahon* and *Rodriguez de Quijas*, where the Supreme Court enforced the arbitration of securities claims, the Court found comfort in the fact that the SEC had authority to oversee and regulate arbitration procedures.[437] While not offering this extent of procedural oversight,[438] the hybrid approach offers the possibility of SEC oversight of United States offerings of Diaspora Bonds through enforcement actions.

In any event, even despite the greater risk of fraud due to the loss of the private attorney general, the knowing agreement to resolve in a foreign court under foreign law any private grievances that may arise is precisely the kind of bargain that should be enforced by courts. The compensatory and deterrent values of private litigation can be vindicated, though admittedly not as easily for United States plaintiffs as in American courts, through private litigation in foreign courts, especially if those courts have been adjudged to provide adequate remedies.[439] This would, of course, require that the issuer of the Diaspora Bonds not be entitled to any sovereign immunity in the courts of its own country.

The hybrid approach would not fully immunize the foreign sovereign from private suits related to the instruments in the United States. Because of its underlying reliance on contract, the hybrid approach would not bar litigation by parties who did not agree to a foreign governing law and forum or who did agree only through fraudulent inducement. Thus, a potential investor who claimed that he was not permitted to buy the Resurgent India Bonds would still be able to sue the State Bank of India and other banks for violating United States laws or regulations against national origin discrimination.[440]

What are the benefits of this approach for countries issuing Diaspora Bonds? Perhaps most importantly, they remove a serious risk of regulation by the United States securities regime—an aggressive

[437] Rodriguez de Quijas v. Shearson/Am. Express, 490 U.S. 477, 483 (1989); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 231-34 (1987).

[438] It would offend comity for United States courts to exercise such a supervisory role, and the Second Circuit, at least, has resisted it. See In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 204-05 (2d Cir. 1987) (refusing Union Carbide's request that United States court monitor Indian judicial proceedings to ensure their compliance with American due process standards).

[439] Cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985) ("The importance of the private damages remedy, however, does not compel the conclusion that it may not be sought outside an American court.").

[440] See infra note 447. R

plaintiffs' bar that can exact settlement value out of even nonmeritorious claims. Recall that the Resurgent India Bonds denominated in pounds sterling and deutsche marks permit suits in the United Kingdom and Germany, respectively, because India evidently believes that these jurisdictions are less tilted in favor of securities plaintiffs. The United States pro-plaintiff procedural rules described above are less threatening when only the regulator can sue; concerns arising from contingency fees, class actions, overly aggressive discovery and abusive litigation are thereby alleviated.

Hybridity, of course, reflects the nature of diasporas.[441] Often neither fully assimilating to a new way of life nor fully transplanting their old ways of life, diasporas hybridize the cultures and norms of their homelands and their adopted lands. The hybrid model offers the possibility of choosing the norms of the homeland to govern the private interests at stake in the Diaspora Bond investment, yet permits the adopted land's government to regulate the offering to protect the public interest of the adopted land.

E. Rejecting Nondiaspora Investment: Who Belongs to the Nation?

A final feature of the Resurgent India Bonds is instructive regarding the Indian government's views as to its notion of "nation" and "diaspora." India restricts the purchase of these instruments to "Non-Resident Indians,"[442] the term commonly employed to refer to the Indian diaspora.[443] Demonstrating its seriousness about restricting who can own these instruments, India also restricts their transfer. Owners of these instruments can only transfer them to other nonresident Indians or, if given as gifts, to Indian residents, or to Indian charities.[444] To banking and securities industry observers, this Non-Resident Indians-only restriction will seem bizarre: Why reduce the potential market for an instrument?

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441 See Stuart Hall, Cultural Identity and Diaspora, in Identity: Community, Culture, Difference 222, 235 (Jonathan Rutherford ed., 1990) ("The diaspora experience . . . is defined, not by essence or purity, but by the recognition of a necessary heterogeneity and diversity; by a conception of 'identity' which lives with and through, not despite difference; by *hybridity*.") (emphasis in original).

442 State Bank of India, supra note 378, at 5. Under the instruments, a person is deemed to be of Indian origin if "he/she, at any time, held an Indian Passport, or he/she or either of his/her parents or any of his/her grandparents were a citizen of India by virtue of the Indian Constitution or the Citizenship Act, 1955." Id. R

443 Id. Corporate entities established outside India in which nonresident Indians have some interest (called "Overseas Corporate Bodies" in the offer document) may also purchase Resurgent India Bonds, as may banks acting as fiduciaries to nonresident Indians and such Overseas Corporate Bodies. Id.

444 Id. at 6.

This section seeks to examine possible explanations for this restriction and begins to evaluate the merits of those explanations. It does not undertake the important statutory[445] analysis of whether such a restriction is repugnant under existing national origin[446] discrimination law. Indeed, this limitation has already been challenged in a suit brought before the Southern District of New York[447] by an individual who claimed that his attempts to purchase Resurgent India Bonds were rebuffed because he was not of Indian origin.[448]

At least two arguments might be offered to explain this restriction as being favorable to India's economic interests. First, it might be a marketing gimmick to try to attract the Indian diaspora. People will be more inclined to invest, the story might go, if they think it is a special privilege only available to them. Thus, the loss of the nondiasporan investors (who would be few in number given the nonmarket rate offered on the instruments) would be outweighed by the greater number of diaspora investors led by vanity to invest. Second, it might be thought that diaspora investors will be more likely to forbear in times of crisis. They might not require strict adherence to the redemption terms if the Indian economy were in trouble. They might be less likely to sue if problems arose.

These empirical claims seem unconvincing. The diaspora might have been persuaded to support India through the purchase of these instruments simply by appealing to their desire to help a beleaguered homeland rather than by some sense of privilege. Furthermore, it seems unlikely that nondiaspora investors who are willing to accept the nonmarket rate interest offered by the instruments would be no-

445 Since the State Bank of India and the other intermediary institutions offering Resurgent India Bonds are not United States state entities, constitutional limitations based in the Equal Protection Clause likely do not apply.

446 The Supreme Court has defined national origin as "the country where a person was born, or, more broadly, the country from which his or her ancestors came." Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973).

447 Leonard Schoenfeld filed suit in New York state court against Citibank, State Bank of India, and Bank of India on the ground that the defendants had deprived him "of the right to purchase and hold property, in violation of the United States Constitution, the New York State Constitution, and 42 U.S.C. § 1982. Amended Verified Complaint at 7, Schoenfeld v. Citibank, N.A., No. 115403/98 (N.Y. Sup. Ct. filed Aug. 21, 1998). Upon petition by the defendants, the state court removed the case to the federal district court in the Southern District of New York. Schoenfeld v. Citibank, N.A., No. 98 Civ. 6147 (S.D.N.Y. Dec. 29, 1998) (order granting removal from state court).

448 The case was brought as a class action on behalf of all "persons of non-Indian origin residing in the United States who were denied the opportunity to purchase Resurgent India Bonds." Amended Verified Complaint at 1, *Schoenfeld* (No. 115403/98). He sought $387,500,000 in compensatory damages for the class, calculated on the basis of the assumption that the entire issuance of instruments would have been purchased by persons of non-Indian origin; he also sought $100 million in punitive damages. Id. at 7.

ticeably more likely to sue than diaspora investors.[449] Instead, the explanation of the restriction can probably be found elsewhere: in the Indian concept *swadeshi*.[450]

Swadeshi, literally meaning "belonging to one's own country,"[451] was championed by the liberator Mahatma Gandhi at the beginning of the twentieth century to try to create demand for indigenous manufacturing and thereby support domestic industry, and the doctrine has been used as justification for the boycott of all foreign goods, though Gandhi himself was careful not to fall into the reflexive rejection of all foreign manufacture.[452] The Bharatiya Janata Party, which heads the Indian government that issued the Resurgent India Bonds, has taken up, albeit inconsistently, the *swadeshi* theme for its economic policies.[453] The party interprets the doctrine as promoting "self-reliance" and "self-respect."[454]

The Resurgent India Bonds appeal to this concept of self-reliance but force us to reexamine what India views as its "self."[455] By turning to nonresident Indians, the "self" upon whom the government relies is not the citizenry of India, but rather a more encompassing notion of a people whose parents or grandparents originated in India.[456] The definition of "Non-Resident Indian" tells us much about whom the Indian government views as "Indian." Notably, the definition explicitly excludes citizens of Bangladesh and Pakistan. Furthermore, the definition requires that one have a parent or grandparent who was a citizen of India, thereby excluding the descendants of the Indian indentured laborers who were brought to British colonies in the Car-

449 Indeed, Indian American purchasers of the Indian Development Bonds recently sued India in United States court for claims arising out of those instruments. Poddar v. State Bank of India, 79 F. Supp. 2d 391, 393 (S.D.N.Y. 2000) (considering defendant State Bank's motion to dismiss for forum non conveniens and denying it on ground that defendant had agreed to have disputes heard in United States courts).

450 See Shefali Rekhi, NRI Bonds: Resurgence at a Price, India Today, Aug. 31, 1998, at 46 (noting connection between *swadeshi* and Resurgent India Bonds).

451 The Oxford Hindi-English Dictionary 1049 (R.S. McGregor ed., 1993) (defining *swadeshi* as "of or belonging to one's own country; specif. manufactured in one's own country, not imported").

452 Mani Shankar Aiyar, Saffron Swadeshi: Does the BJP's Economics Derive from Gandhi or Golwalkar?, India Today, Apr. 20, 1998, at 29 (quoting Gandhi as saying, "[t]o reject foreign manufactures merely because they are foreign and to go on wasting national time and money to promote manufactures in one's country for which it is not suited would be a criminal folly and a negation of the swadeshi spirit").

453 Durga Ray, How Economists and Businessmen Define Swadeshi, India Abroad, May 15, 1998, at 6.

454 Id.

455 The literature on Indian nationalism is vast. A recent essay describes this nationalism's self-conscious construction. Sudipta Kaviraj, Modernity and Politics in India, Daedalus, Winter 2000, at 137, 149, 152-54.

456 See supra note 442. R

ibbean and elsewhere after the abolition of slavery in the British Empire in 1833.[457] Thus, Pakistanis, Bangladeshis, and Indo-Caribbeans are excluded from the Indian diaspora, at least as recognized by the Indian government.[458]

If we understand the nonresident-Indian-only restriction as being based on an expansive conception of the Indian nation, we can link that restriction to other, more common restrictions on foreign investment into a country. Most, and perhaps all, countries impose special restrictions on certain categories of foreign investment. The United States, for example, imposes restrictions on (though not necessarily outright proscriptions against) foreign ownership in land,[459] broadcasting companies,[460] communications satellites, nuclear facilities, mining industries, hydroelectric power licenses, and oil, gas, and mineral leases.[461]

However, these restrictions, like those limiting who can purchase Resurgent India Bonds, can hurt the economy more than they help it.

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[457] See Lal, supra note 85, at 168. R

[458] One sees the definitional issue of "who belongs to our nation?" arising in the Chinese context as well. In 1978, for example, an editorial in an official Chinese newspaper questioned whether people of Chinese origin who had acquired a foreign nationality could any longer be considered "overseas Chinese." Bolt, supra note 32, at 474. R

[459] Mark Shapiro, Note, The Dormant Commerce Clause: A Limit on Alien Land Laws, 20 Brook. J. Int'l L. 217, 223 (1993) ("Today, almost half of the states have laws that, to varying degrees, restrict the rights of aliens to own real property."). Alien land laws have a long history in the United States. See, e.g., Oyama v. California, 332 U.S. 633, 640 (1948) (holding that California Alien Land Law deprived petitioners of equal protection of State's laws); Keith Aoki, No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment, 40 B.C. L. Rev. 37, 37-38 (1998) (recounting strong nationalist basis of Alien Land Laws in western United States during 1920s and 1930s); James Frechter, Note, Alien Landownership in the United States: A Matter of State Control, 14 Brook. J. Int'l L. 147, 147 (1988) ("Fear of foreign investment in the United States is not a new phenomenon."); James R. Mason, Jr., Note, "Pssst, Hey Buddy, Wanna Buy a Country?" An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate, 27 Vand. J. Transnat'l L. 453, 454-55 (1994) (examining policies underlying alien land ownership laws).

[460] See David H. Benz, Comment, The Little Network That Could: FCC Restrictions on Foreign Ownership, 6 Ind. Int'l & Comp. L. Rev. 239, 247 (1995) (describing FCC regulations restricting foreign ownership); see also Adeno Addis, Who's Afraid of Foreigners? The Restrictions on Alien Ownership of Electronic Media, 32 Colum. Hum. Rts. L. Rev. 133, 141, 199 (2000) (arguing that foreign-ownership restrictions in Communications Act are outmoded).

[461] John E. Blyth, Disclosure Requirements for Foreign Investors in the United States, 11 Int'l. L. Practicum 53, 54-55 (1998). Historically, foreign investment has been restricted in merchant shipping, financial institutions, lands and minerals, broadcast communications, air commerce, and transactions with the government. Detlev F. Vagts, The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise, 74 Harv. L. Rev. 1489, 1497-1523 (1961); see also Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 421-22 (1948) (invalidating California law prohibiting "alien Japanese" from obtaining commercial fishing license).

Such restrictions violate the neoclassical economic preference for free allocation of capital. India might be able to reduce the cost of raising capital by removing such restrictions.[462] Furthermore, debt does not carry a right of control in the same way that equity ownership does.[463] A country that comes to rely on Diaspora Bonds for funding does, however, bear the risk that its diaspora may refuse to purchase bonds out of dissatisfaction with that country's government.[464]

CONCLUSION

In a world characterized by ever-increasing globalization, not only of capital and goods but also of people, diasporas seek a link to a past that is removed not only in time but also in space.[465] At times, this link can manifest itself in an atavistic racialism. Diaspora Bonds, on the other hand, demonstrate one possibility where this link to the past may be put in the service of economic development in the present. People sustaining diaspora ties must do so critically, eschewing moral relativism yet respecting difference.

In accordance with this critical project, we might ask: Why introduce diaspora as another category of individual identity relevant to the law?

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[462] Some Indian economists criticized the Indian expatriate-only restriction on this ground. Krishna Guha, Resurgent Bond Issue to Stay Open, Fin. Times (London), Aug. 18, 1998, at 24 ("Some economists question the wisdom of offering debt to non-resident Indians only, arguing that an open offer would deliver cheaper funds.").

[463] Controlling the identities of the holders of a sovereign bond, however, may be an important value for the sovereign. Because bonds often require unanimous consent for certain changes, a "maverick creditor" can pose a grave impediment to, or extract special concessions in the event of, a debt restructuring. The maverick creditor can take advantage of the indulgence shown by a majority of a sovereign's creditors. As one lawyer colorfully describes, "It is like giving up your seat on a crowded bus to an elderly woman only to watch a teenager jump on it." Christopher Stoakes, Beware the Maverick Sovereign Creditor, Euromoney, Sept. 1996, at 42 (quoting Lee Buchheit, attorney and international sovereign debt expert).

[464] See, e.g., Camlot, supra note 330 ("Israel Bonds encountered political difficulties last year when several U.S. rabbis canceled their appeals and refused to distribute the [PIO] cards. They were protesting the Labor government's approach to the peace process."). R

[465] There is historical contingency in this attitude. First, diasporas depend on transportation and communication technologies that make it possible to divorce territory from nation. Appadurai, supra note 94, at 161. Second, assimilation may prove a compelling force, and diasporan feelings may dissipate over generations. Third, we may give up national feelings in favor of regional ones, identifying ourselves as pan-Asian, European, or Latino. Franck, Empowered Self, supra note 28, at 79-80. The Treaty of Maastricht, for example, declares all citizens of European Union member states to be citizens of the European Union itself. Treaty on European Union, Feb. 7, 1992, art. 8, O.J. (C 191) 7 (1992). See generally European Citizenship: An Institutional Challenge (Massimo La Torre ed., 1998) (examining challenges of new legal status of European citizenship); Cohen, supra note 221. But for the world at the turn of the millennium, the diaspora model recognizes the ontological standing of notions of citizen, nation, and state. R R R

In a globalized world, mutation, hybridity, and intermixture represent the prevailing norm. Thus, the diaspora model, which allows people to maintain hybridized and hybridizing bonds to homeland and hostland, better approximates how people now imagine their relationship to the state than either the statist or cosmopolitan models. Moreover, while it rejects the statist demand that all persons pledge fealty to one state or the cosmopolitan desire that we forswear any primary fealty to country, the diaspora model is broad enough to accommodate persons who register support only for one state or for no state at all. Rather than seeking to change people, the diaspora model suggests that we revisit our conception of the international order. By recognizing the possibility of a wide array of allegiances, especially to homeland and transnational community, the diaspora model promotes authenticity and allows people to flourish.

Second, the diaspora model offers a view of citizenship that reconciles globalization with the desire for a sense of rootedness. It understands the traveling nature of contemporary culture.[466] The diaspora approach embraces globalization, but does not mistake it for a renunciation of nation or state. The diaspora model embraces the multiculturalism of cosmopolitanism while still respecting the very thing that animates such multiculturalism—the individual's search for belonging.

Third, accepting diaspora as a legitimate basis for community affirms a connection between rich and poor nations that can support economic development. We find exactly this dynamic in the case of Diaspora Bonds, which enable homeland governments to tap the wealth of their expatriates to fund economic development in the homeland.[467] Admittedly, cosmopolitanism offers a distributive justice approach[468] that is more demanding and systematic than the voluntary homeland-regarding actions of the diaspora. However, the diaspora model is more likely to harness existing forces for economic development than cosmopolitanism is likely to find the altruistic, enlightened persons who embrace its nondiscriminatory principles.[469]

Fourth, recognizing diasporan relationships allows us to better understand the contemporary world order. It allows us to grasp the connections between distant events and to place these events into a broader global framework. Recognizing the diaspora helps locate in-

466 See James Clifford, Routes: Travel and Translation in the Late Twentieth Century 17-46 (1997) (discussing emergence of traveling culture-makers).

467 See infra Part IV.

468 See supra note 202 and accompanying text. R

469 Cf. Nussbaum, supra note 200, at 24 (observing American "indifference to the well-being of the whole world"). R

dividual events in a broader narrative.[470] Of course, we must still bear in mind that diasporan events will differ from each other in important ways.

Finally, the intermingling of the people of the world across states and nations may reduce interstate violence and human rights abuse. Diasporas blur the distinction between "us" and "them." It will be harder to demonize another people when one's own compatriots hail from that same place and maintain strong bonds to it. Because diasporas muddy the purity of nations, they offer a possible escape from what Samuel Huntington describes as a post-Cold War "clash of civilizations."[471] While it would be Panglossian to suggest that the diaspora's adopted land will be unlikely to declare war on the diaspora's home country or vice versa,[472] it may be the case that the diaspora will help the two countries understand each other better, thereby potentially reducing the likelihood of hostilities. Additionally, should war in fact break out, it would be more likely targeted at the foreign government, not its people, since its people may well include our neighbors and friends.

But diasporas do not offer all good news. James Clifford worries that "theories and discourses that diasporize or internationalize 'minorities' can deflect attention from long-standing, structured inequalities of class and race."[473] By diverting attention to one's membership in a diaspora, the model risks ignoring the crucial features of class and race.[474] In addition, valorizing diaspora might have the effect of strengthening claims of traditional patriarchal societies over the lives

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470 This allows responses to a particular event to be framed in terms of more general principles. See text accompanying supra note 109. **R**

471 See generally Samuel P. Huntington, The Clash of Civilizations and the Remaking of World Order (1996) (discussing how culture and cultural identities shape patterns of conflict and cohesion in post-Cold War order). Stanley Tambiah makes this point, observing that diasporas may serve as a "corrective formulation" to Huntington's "gothic" vision. Tambiah, supra note 16, at 189. Tambiah quotes Diana Eck: "Today, the Islamic world is **R** no longer somewhere else, in some other part of the world; instead Chicago, with its 50 mosques and nearly half a million Muslims, is part of the Islamic world." Id. at 190 (quoting Diana Eck, Neighboring Faiths: How Will Americans Cope with Increasing Religious Diversity, Harv. Mag., Sept.-Oct. 1996, at 38, 44).

472 Compare the Kantian claim that liberal states do not go to war against other liberal states. Immanuel Kant, Eternal Peace (1795), reprinted in The Philosophy of Kant: Immanuel Kant's Moral and Political Writings 430-76 (Carl J. Friedrich ed., 1949); see also Anne-Marie Burley, Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine, 92 Colum. L. Rev. 1907, 1914 (1992) ("The 'liberal peace' that Kant predicted has in fact been established. Liberal states do not war *with one another*.").

473 Clifford, supra note 6, at 313. **R**

474 For example, Frank Wu worries that a person's identification with the Chinese diaspora may inhibit her participation in "coalition movements with other Asian Americans or anyone else for that matter." Frank H. Wu, Chinese Destinations, 9 Asian Am. Pol'y Rev. 124, 127 (2000) (book review).

of diaspora women.[475] As Clifford notes, "[c]ommunity can be a site both of support and oppression."[476]

The diaspora model does not suggest that diasporas are good per se; rather it allows that diasporas can be good because they may enhance our quest for authenticity in a world where economics and violence—not desire—may dictate where we live, and because they can be a source for the economic capital and information necessary for economic development.

There are other risks. Strengthened ties between diasporas and homelands can also fuel irredentist campaigns.[477] Before World War II, for example, Germany sought to stir up German nationalism in its neighboring states.[478] In addition, Clifford observes that "feelings of diasporan identity can encourage antagonism, a sense of superiority to other minorities and migrant populations."[479] Finally, any notion of diaspora should not serve to enshrine a monolithic view of the culture or values of that diaspora, protecting it against challenge and change.[480] The diaspora model seeks to find the point of balance between erasing culture and history altogether and essentializing culture and history in rigid stereotypes.

At times hope—and at other times fear—compels many people to leave their homeland and settle abroad. But leaving home does not necessarily eliminate one's regard for that land or its people. The nation-state system imposes a physicality on individuals that does not

475 Gayatri Gopinath, "Bombay, U.K., Yuba City": Bhangra Music and the Engendering of Diaspora, 4 Diaspora 303, 306, 310-11 (1995) (exploring reinforcement of patrilineal and male-centered narrative in diasporan popular music).

476 Clifford, supra note 6, at 314 (emphasis omitted). R

477 "Irredentism entails the retrieval of ethnically kindred people and their territory across an international boundary, joining them and it to the retrieving state." Donald L. Horowitz, Self-Determination: Politics, Philosophy, and Law, 39 Nomos 421, 423 (1997). See generally Donald L. Horowitz, Irredentas and Secessions: Adjacent Phenomena, Neglected Connections, in Irredentism and International Politics 9 (Naomi Chazan ed., 1991) (comparing and contrasting irredentas and secessions). It should be noted, however, that irredentist claims have received "very little" international support. Kingsbury, supra note 109, at 487. R

478 Shalom Reichman & Arnon Golan, Irredentism and Boundary Adjustments in Post-World War I Europe, in Irredentism and International Politics, supra note 477, at 51, 52-57 (describing German irredentist movement in Poland). R

479 Clifford, supra note 6, at 315. It should be noted, however, that all exclusionary rhetoric, including that of state citizenship, shares these same negative possibilities. The cosmopolitans offer this critique of the statist conception of citizenship. R

480 Hall, supra note 441, at 226 (stating that "cultural identity is not a fixed essence at all, lying unchanged outside history and culture . . . . Of course, it is not a mere phantasm either"); Sunder, supra note 11, at 90 (observing how cultural protectionist approach to culture and diaspora "tends to prefer an orthodox view of culture over a progressive one, and may become a tool for conservatives or those in power to suppress dissenting voices within a culture"). R

correspond precisely to their emotional attachments. Whether by choice or not, we live in one country, even though our hearts might belong to two.[481] In some sense then, this Article has been an effort to grapple with the existential question Salman Rushdie finds himself asking as a writer of the Indian diaspora: "How are we to live in this world?"[482]

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[481] The Irish poet Paul Durcan offers this lament:

> Yet I have no choice but to leave, to leave,
> And yet there is nowhere I more yearn to live
> Than in my own wild countryside,
> Backside to the wind.

Paul Durcan, Sam's Cross 16 (1978).

[482] Rushdie, supra note 227 at 18.