

# HOMeward BOUND

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*In Home and Away: The Construction of Citizenship in an Emigration Context, Kim Barry argues that more attention must be paid to the emigrant and to the policies of emigration states. Taking up her suggestion, this Article closely describes the array of devices that emigration states have used to nurture bonds with their expatriates. The taxonomy offered here subdivides these bonding mechanisms into political, economic, and cultural devices. Governments seeking to cement political ties have offered dual citizenship, voting from abroad, direct representation of expatriates, special visas for the diaspora, and government-issued diaspora membership documents. States have sought to capitalize on the economic strength of their overseas members by soliciting their support for sovereign "diaspora bonds," development programs, and direct investment. They have also sought to attract returnees, who will often bring with them significant financial and human capital, and to ease return by negotiating for returnees' pensions to be transferred to them from the nation in which they worked. Finally, nations have sought to reshape their own collective image to include the diaspora, achieving this through explicit state recognition of the diaspora, establishment of agencies to serve the diaspora, legal protections for their overseas citizens, and special outreach to youth and retirees living abroad. The second half of the Article turns to the question of whether there are any instances when host states' laws would prevent emigration states from pursuing these sorts of bonding mechanisms with their overseas citizens. Working with U.S. law as a test case, it appears that constitutional safeguards for civil liberties limit the U.S. government's ability to regulate emigration states' efforts to maintain ties with their diaspora members residing in the United States. However, these limits are relaxed when U.S. foreign policy concerns, particularly ones relating to national security, are at stake. Further, U.S. laws of general applicability, such as securities laws, and U.S. courts' unwillingness to enforce foreign revenue laws may make it more difficult for emigration states to pursue certain bonding mechanisms. Despite these limits, though, the domestic laws of immigration states like the United States should provide sufficient space for emigration states to bond with their diasporas. The Article concludes with a tribute to Kim Barry and the power of her voice.*

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## INTRODUCTION

On January 9, 1915, the man who would be Mahatma returned to his homeland after his years in South Africa. On that same day, nearly a century later, India inaugurated the "Pravasi Bharatiya Divas," an annual celebration to honor its diaspora.<sup>1</sup> In his autobiography, Gandhi writes, "It was such a joy to get back to the homeland after an exile of ten years."<sup>2</sup>

In *Home and Away*,<sup>3</sup> Kim Barry powerfully reminds us of a lesson that we should have learned in 1915—that the emigrant, however far she travels, often carries an attachment to the homeland that

<sup>1</sup> The Indian government chose this date quite self-consciously, noting that on that date Gandhi had "finally returned to India to become one of the greatest bridge-builders in history." FOREIGN SECRETARY'S OFFICE, MINISTRY OF EXTERNAL AFFAIRS, REPORT OF THE HIGH LEVEL COMMITTEE ON THE INDIAN DIASPORA 379 (2002) [hereinafter SINGHVI REPORT], available at <http://indiandiaspora.nic.in/contents.htm>. The government translates "Pravasi Bharatiya Divas" as "Indian Diaspora Day." Ministry of Overseas Indian Affairs, Glossary, <http://www.indiaday.org/glossary/glossary.asp> (last visited Nov. 4, 2005).

<sup>2</sup> M.K. GANDHI, GANDHI'S AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH 442 (M. B. Schnapper ed., Mahadev Desai trans., Public Affairs Press 1954) (1948).

<sup>3</sup> Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11 (2006).

spans both time and space. As Barry richly details, that attachment is increasingly reciprocal—the homeland state now sees the emigrant as crucial to its project of national advancement.

While once the emigrant was remembered in her homeland through yellowing photographs and eventually, perhaps, forgotten to history or even cursed as a traitor,<sup>4</sup> the emigrant today is celebrated, reconfigured as heroine. *Los olvidados* became *los heroes*.<sup>5</sup> This reconfiguration has arisen through a confluence of events, some technological, some economic, and some political.<sup>6</sup>

As Barry describes, the principal force driving this reconfiguration is economic.<sup>7</sup> The financial success of the diaspora<sup>8</sup> has led to its increasing importance to the homeland. Remittances from abroad to family at home in developing countries exceed official development aid by many times. Figure 1 shows the remarkable growth of remittances over the last few decades, even while official development assistance has stagnated. In 2003, remittances to developing countries

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<sup>4</sup> Jesús Martínez-Saldaña, *Los Olvidados Become Heroes: The Evolution of Mexico's Policies Towards Citizens Abroad*, in INTERNATIONAL MIGRATION AND SENDING COUNTRIES: PERCEPTIONS, POLICIES AND TRANSNATIONAL RELATIONS 33, 44 (Eva Østergaard-Nielsen ed., 2003) ("To many people in Mexico, but obviously not to remaining family members dependent on remittances, the migrants and their descendants were traitors who abandoned the homeland to live in the US.").

<sup>5</sup> *Id.* at 34 (noting Mexican President Vicente Fox's March 2002 trip to Fresno, California where he declared that Mexican-Americans were "heroic countrymen" of Mexico).

<sup>6</sup> See THOMAS M. FRANCK, *THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM* 2 (1999); Barry, *supra* note 3, at 12–14; Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1011 (2001).

<sup>7</sup> Barry, *supra* note 3, at 12–13.

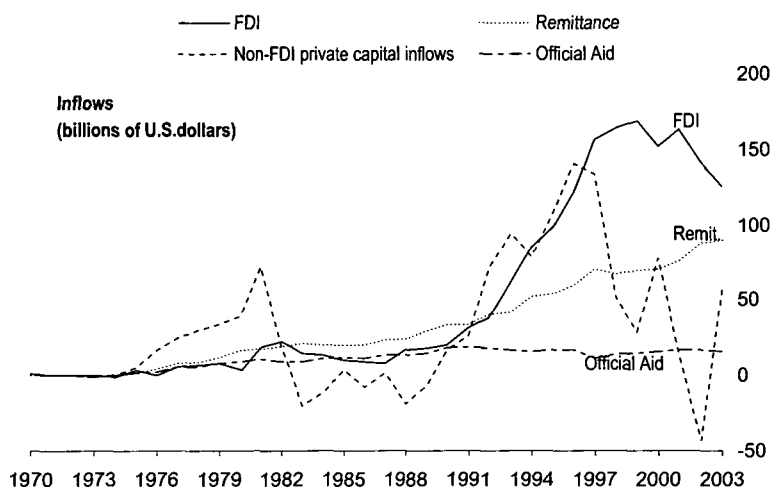
<sup>8</sup> The economic success of its diaspora is touted on the second page of the Indian government's report through the words of the Mauritian poet Vishwamitra Ganga Aashutosh:

No Gold did they find  
Underneath any stone they  
Touched and turned  
yet  
Every stone they touched  
Into solid gold they turned

SINGHVI REPORT, *supra* note 1, at vi. This romantic description elides the fact that many emigrants in fact help constitute the underclass of many Western nations. Even though immigrants to advanced countries are often poor relative to others in those countries, they may still be, on average, better off than those in the homeland; for example, in 2000, "average annual household income for Mexicans living in the United States exceed[ed] US\$31,500, [while] in Mexico the average [stood] at around US\$10,000." Guillermina Rodríguez, *Mexican Residents in the USA*, 80 REV. ECON. SITUATION MEXICO 440, 442 (2004), available at [http://www.banamex.com/esp/pdf\\_bin/esem/resemnoviembre04.pdf](http://www.banamex.com/esp/pdf_bin/esem/resemnoviembre04.pdf).

totaled \$91 billion.<sup>9</sup> The World Bank, by contrast, provided \$20 billion in new loans in its fiscal year running from July 1, 2003 to June 30, 2004,<sup>10</sup> while the United States provided \$16.3 billion in net overseas development assistance in 2003, including its World Bank contributions.<sup>11</sup> For some small nations such as Lebanon, Samoa, Jordan, and Bosnia and Herzegovina, remittances constitute one-fifth of their gross domestic product.<sup>12</sup>

FIGURE 1: CAPITAL INFLOWS TO DEVELOPING COUNTRIES<sup>13</sup>  
WORKERS' REMITTANCES AND OTHER FOREIGN EXCHANGE FLOWS  
TO DEVELOPING COUNTRIES (1970–2003)



Remittances are only part of the story. Investments and information networks between the diaspora and the homeland have helped drive economic development in many parts of the world.<sup>14</sup>

Just as immigration policy is deployed by Western countries “as a tool of industrial policy” to “attract the cream of global human cap-

<sup>9</sup> INT’L MONETARY FUND, *WORLD ECONOMIC OUTLOOK: GLOBALIZATION AND EXTERNAL IMBALANCES* 71 (2005), available at <http://www.imf.org/external/pubs/ft/weo/2005/01/index.htm>.

<sup>10</sup> WORLD BANK, *THE WORLD BANK ANNUAL REPORT* 2004, at 8 (2005), available at [http://www.worldbank.org/annualreport/2004/download\\_report.html](http://www.worldbank.org/annualreport/2004/download_report.html) (combining \$11 billion in loans from International Bank for Reconstruction and Development and \$9 billion in loans from International Development Association, both members of World Bank Group). For the recipient, loans are not the equal of remittances, which do not generally carry any obligation for repayment.

<sup>11</sup> Jeffrey D. Sachs, *The Development Challenge*, *FOREIGN AFF.*, March/Apr. 2005, at 78, 79.

<sup>12</sup> INT’L MONETARY FUND, *supra* note 9, at 72 fig.2.3.

<sup>13</sup> *Id.* at 70 fig.2.1.

<sup>14</sup> See Chander, *supra* note 6, at 1012 & n.32.

ital,”<sup>15</sup> emigration policy is deployed by developing countries to promote development at home. National policies today promote invigorated bonds with diasporas, hoping thereby to enhance national development projects by tapping the resources held by their diasporas.

In my comment on Barry’s brilliant paper, I take up her suggestion that we focus on the figure of the emigrant by examining closely the increasingly vigorous efforts of homeland governments to nurture bonds with their diasporas. Working through a set of examples, I offer a taxonomy of such practices. Examination of these practices provokes the question of their legality, which I take up. Lawyers have paid surprisingly little attention to the legal infrastructure within which such diaspora relations take place and the possibility of regulatory actions on the part of the diasporas’ states of residence. I begin that discussion here.

Barry employs the language of citizenship to refer not just to “state-ascribed legal status” but also to “participation in national life.”<sup>16</sup> As Barry recognizes, affective bonds of membership exist even outside the formal international law—and domestic law—status of citizenship. As we shall see, countries with large diasporas increasingly recognize this. Many homeland attempts to engage the diaspora do not turn on the individual’s continuation of homeland legal citizenship. Until recently, many countries required their expatriates to renounce citizenship upon taking up a foreign citizenship. Furthermore, affective bonds may survive even over generations. I will accordingly use the more inclusive term “diaspora” to refer to the portion of a people scattered outside its homeland, yet retaining ties to that land and its people.

A focus on the formalities of citizenship alone might lead one to conclude erroneously that plural membership is not in fact a popular alternative. After Mexico offered dual nationality, “[s]urprisingly few Mexicans naturalized in the United States have returned to Mexican consulates in the United States to reclaim Mexican nationality.”<sup>17</sup> But just as citizenship may sometimes say little about one’s loyalty—consider the case of tycoons who acquire citizenship in tax havens<sup>18</sup>—the

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<sup>15</sup> Devesh Kapur, *Diasporas and Technology Transfer*, 2 J. HUMAN DEV. 265, 266 (2001).

<sup>16</sup> Barry, *supra* note 3, at 20.

<sup>17</sup> T. Alexander Aleinikoff & Douglas Klusmeyer, *Plural Nationality: Facing the Future in a Migratory World*, in CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 63, 85 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

<sup>18</sup> *Id.* at 84 (describing acquisition of nationality for commerce or convenience). Traitors, by definition, are yet another group of persons for whom citizenship does not imply loyalty.

lack of a link of citizenship does not necessarily imply a lack of interest or affection.

Even those who trace their ancestry to a foreign land, however, do not necessarily feel kinship with that land's people. Not everyone in a diaspora is homeward bound. The bonds are, in an important sense, voluntary on the part of the individual emigrant or descendant of emigrants.

None of this denies the continuing importance of the formal legal status of citizenship. Citizenship regulates where one can live, which is one of the greatest single factors in determining a person's likelihood of literacy, child morbidity, and even life expectancy.<sup>19</sup> Citizenship matters, from birth to death.

I do not here take up the normative issues implicated in the transnational ties I describe. Samuel Huntington has raised important questions about the difficulties diasporic communities present for their host states, centered on the loyalties of a diaspora and the possibility of dividing a national melting pot into a transnational patchwork quilt.<sup>20</sup> Less remarked upon are the challenges diasporas pose to homeland states. Diaspora relations might distort economic development in favor of certain regions of the homeland country; diasporas might fund terrorism or favored political parties; and dependence on diaspora financial flows might reduce local incentives or inflate local exchange rates or prices (including the possibility of "Dutch disease").<sup>21</sup> Reliance on diasporas for economic development poses yet another difficulty: Those developing countries without substantial diasporas will not share in the capital and technology often transferred by a diaspora. A number of scholars have responded effectively to some of these concerns, especially as they relate to the impact of diasporas on the Western world.<sup>22</sup> With respect to the developing

<sup>19</sup> Citizenship matters as well for those illegally in a country because it reduces the wage they likely will command and their legal right to access a variety of public services.

<sup>20</sup> See generally SAMUEL P. HUNTINGTON, *WHO ARE WE?: THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* (2004).

<sup>21</sup> INT'L MONETARY FUND, *supra* note 9, at 72–73 (summarizing concerns over development impact of remittances). "Dutch disease" occurs when a "boom in the resource sector leads to an appreciation of the real exchange rate . . . which in turn renders the traded good sector (manufacturing and agriculture) relatively unprofitable. As a result, the economy faces a loss of competitiveness of its export sector, a phenomenon referred to as deindustrialization." Haideh Salehi-Esfahani, *Informationally Imperfect Labour Markets and the 'Dutch Disease' Problem*, 21 CAN. J. ECON. 617, 618 (1988).

<sup>22</sup> See generally PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 229–42 (1998) (evaluating benefits and costs of dual nationality); Aleinikoff & Klusmeyer, *supra* note 17, at 78–87 (discussing consequences of recent increase in dual nationality); Peter J. Spiro, *Embracing Dual Nationality, in DUAL NATIONALITY, SOCIAL RIGHTS AND FEDERAL CITIZENSHIP IN THE U.S. AND EUROPE: THE REINVENTION OF CITIZENSHIP* 19 (Randall Hansen & Patrick Weil eds., 2002) [herein-

world, as I have argued elsewhere, increased diaspora bonds have the possibility of promoting economic development and even international harmony,<sup>23</sup> though they do not offer an unambiguously salutary approach to international economic development.

This paper proceeds as follows. Part I surveys strategies employed by countries to strengthen their bonds with their diasporas and constructs a taxonomy of such strategies. By collecting mechanisms from different countries, I show that countries are forging common paths in their outreach to diasporas but are also innovating. Part II asks whether these strategies are legal under U.S. law. This discussion demonstrates the wide latitude available—in part mandated by the Constitution—for transnational activities of homeland states, but also the possibility of regulation should the United States so desire. My conclusion reflects on the immeasurable loss to the academy of Kim Barry's voice.

## I

### BONDING

Many decades ago, Jagdish Bhagwati proposed a tax on the "brain drain" faced by developing countries.<sup>24</sup> "The tax would be [a] surtax on the incomes of the professional migrants from the less developed countries (LDCs) into the developed countries (DCs) and the revenue proceeds would be routed to the LDCs for developmental spending."<sup>25</sup> As Bhagwati saw it, the tax would be justified on moral grounds:

[T]hose who manage, in a world of imperfect mobility (chiefly constrained by DC restrictions), to leave the LDCs and move to DCs, with substantial improvements in their incomes, should share a fraction of their gains with the LDCs so as to enable their development and further the welfare of those not able to improve their economic fortunes by emigration.<sup>26</sup>

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after DUAL NATIONALITY] (arguing that "[f]ull, express acceptance of dual nationality" would advance U.S. national interest).

<sup>23</sup> Chander, *supra* note 6, at 1096–97; *see also* INT'L MONETARY FUND, *supra* note 9, at 72 (summarizing development-enhancing aspects of remittances).

<sup>24</sup> Jagdish Bhagwati, *The Brain Drain Tax Proposal and the Issues*, in *TAXING THE BRAIN DRAIN I: A PROPOSAL* 3 (Jagdish N. Bhagwati & Martin Partington eds., 1976).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 12.

Bhagwati's proposal did not generate sufficient support for implementation,<sup>27</sup> though Eritrea has sought to implement a similar tax unilaterally.<sup>28</sup>

Bhagwati was responding to the increasing alarm over a "brain drain" of skilled professionals from the developing world. But, over time, countries gradually came to see emigrants less as an immediate loss, and more as a potential long-term gain. While the "brain drain" still continues to draw skilled workers from poor to rich countries, thereby denying poor countries the talent they need for development,<sup>29</sup> some countries have sought to take advantage of their expatriates. As economic and trade liberalization brought increased prosperity to the world in the 1990s, developing countries saw their diasporas as a key to opening their economies to international trade and investment. But they also came to recognize that the diaspora did not automatically maintain relationships with its homeland and that such relationships required cultivation. Rather than seek to adopt coercive measures such as taxing the diaspora, states sought to nurture connections to the diaspora through other means.<sup>30</sup> I will call these "bonding" mechanisms.

Today, national policies train people to be emigrants. The Philippines requires exit lessons of its emigrants, even supplying a handbook, now in its sixth edition.<sup>31</sup> People now rank among many nations' most important exports. A public policy towards emigrants is

<sup>27</sup> The Soviet Union imposed for a time an "emigration tax," falling largely on Jewish émigrés, ostensibly to cover the cost of the emigrant's public education. Émigrés were required to pay in order to leave the country. *Union of Soviet Socialist Republics*, in THE COLUMBIA ENCYCLOPEDIA (6th ed. 2001), available at <http://www.bartleby.com/65/un/UnionSov.html>.

<sup>28</sup> Enforcement of the tax occurs at the point that the emigrant or her children seek to return to Eritrea: "[C]itizens had to show proof that they paid the 2 percent tax on their income to the Government while living abroad to be eligible for some government services on their return to the country." BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2004: ERITREA (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41602.htm>.

<sup>29</sup> Celia W. Dugger, *Study Finds Small Developing Lands Hit Hardest by 'Brain Drain'*, N.Y. TIMES, Oct. 25, 2005, at A9 (citing 2005 World Bank study, "International Migration, Remittances and the Brain Drain," concluding that small, poor nations lose a much larger fraction of talented workers to wealthy countries than do large, developing nations).

<sup>30</sup> The consultants at McKinsey offer governments a three step plan for "harness[ing] the knowledge and capital of the diaspora . . . : the creation of networks of emigrants, an infrastructure that allows them to exchange information easily with people in the home country, and targeted incentives that generate productive business investments there." Janamitra Devan & Parth S. Tewari, *Brains Abroad*, MCKINSEY Q., No. 4 Special Edition, 2001, at 51, 56.

<sup>31</sup> COMM'N ON FILIPINOS OVERSEAS, HANDBOOK FOR FILIPINOS OVERSEAS (6th ed. 2002) [hereinafter FILIPINO HANDBOOK], available at <http://www.cfo.gov.ph/handbook6th.pdf>.



even more important for countries such as the Philippines; one out of every eleven Filipinos lives abroad.<sup>32</sup>

In this Part, I describe the bonding measures taken by homeland governments through examples from a number of countries. I focus especially on India, Mexico, and the Philippines, the developing states with, respectively, the largest receipts of remittances.<sup>33</sup> This review is far from comprehensive. There are more existing methods for retaining bonds as well as room for future innovation. In developing its own approach to its diaspora, India first examined the practices of nations around the world.<sup>34</sup> Any such survey suggests the broad array of bonding devices available to any country contemplating such actions.<sup>35</sup>

Though my focus is on the developing world, the cultivation of diaspora bonds has precedents in the activities of Western countries. Certain European countries such as Spain, Italy, France, Portugal, Greece, and Turkey have long taken a proactive stance towards their emigrants.<sup>36</sup> Greece, Spain, and Italy at one time relied partly on remittances to support their economies.<sup>37</sup> The developing world today thus follows a well-trodden path, though technological improvements enable a continually reinvigorated bond between homeland and expatriate.<sup>38</sup>

For convenience, I separate the bonding practices under three general headings—political, economic, and cultural—though the practices often include aspects of all three. For example, the debt instruments I call diaspora bonds are clearly economic, but they also have a political element (witness the Indian diaspora bond's claim of a "Resurgent India" after that country's 1998 nuclear tests)<sup>39</sup> and a cultural element (witness the sari-clad woman depicted in the print advertising).<sup>40</sup>

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<sup>32</sup> *Id.* at 13 (estimating 7.41 million Filipinos living abroad compared to 76.5 million in Philippines).

<sup>33</sup> INT'L MONETARY FUND, *supra* note 9, at 72 fig.2.3.

<sup>34</sup> SINGHVI REPORT, *supra* note 1, at 301–56 (examining diaspora policies of several states from China to Ireland).

<sup>35</sup> Of course, to report that a country offers a particular program is not to say that its program is either widely implemented or successful.

<sup>36</sup> Eur. Parl. Ass., *Links Between Europeans Living Abroad and Their Countries of Origin*, 1999 Sess., 2d Part, Doc. No. 8339, ¶ 16 (1999).

<sup>37</sup> Nicholas P. Glytsos, *The Role of Migrant Remittances in Development: Evidence from Mediterranean Countries*, 40 INT'L MIGRATION 5, 8, 10–11 tbl.1A (2002) (providing data on receipts of remittances for Southern European and North African states from 1960s through 1990s).

<sup>38</sup> See *supra* note 6.

<sup>39</sup> Chander, *supra* note 6, at 1065–66.

<sup>40</sup> *Id.* at 1006 n.2.

### A. Political Bonding Mechanisms

Homeland states have begun re-imagining their diasporas as continuing members of their homeland political communities. They have accordingly begun to supply a limited set of political rights to their diaspora, generally turning on the maintenance of homeland citizenship.

#### 1. Dual Nationality

Over the course of less than ten years, three of the world's largest emigration countries have revised their laws to permit dual nationality. The Philippine Constitution declares dual allegiance of its citizens to be an anathema: "Dual allegiance of citizens is inimical to the national interest and shall be dealt with by law."<sup>41</sup> But in 2003, the Philippines offered its diaspora the possibility of dual citizenship.<sup>42</sup>

Mexico's distaste for dual citizenship had an even longer history, one that Barry traces to 1821.<sup>43</sup> But in 1998, Mexico introduced dual nationality.

In 2004, India offered dual citizenship to its diaspora, titling the status "overseas citizenship."<sup>44</sup> In its original version, India's offer of dual citizenship was to be restricted to the nationals of sixteen countries, all of which were, not coincidentally, economically advanced countries.<sup>45</sup> Prime Minister Manmohan Singh reversed this earlier noxious restriction, permitting dual citizenship to all nationals except those of Bangladesh and Pakistan.<sup>46</sup>

Many Latin American countries, including Brazil (1996), Colombia (1991), Costa Rica (1995), Dominican Republic (1994), Ecuador (1995), El Salvador (1983), Panama (1972), and Peru (1980), have begun offering dual citizenship.<sup>47</sup>

<sup>41</sup> CONST. (1986), Art. IV, § 5 (Phil.).

<sup>42</sup> An Act Making the Citizenship of Philippine Citizens Who Acquire Foreign Citizenship Permanent, Amending for the Purpose Commonwealth Act. No. 63, as Amended and for Other Purposes, Rep. Act No. 9225, § 3 (2003), V.L. Doc. (2nd), Book 18, p. 4 (Phil.). The Constitution was not simultaneously amended, presumably because the sponsors of the legislation do not believe that dual citizenship implies dual allegiance.

<sup>43</sup> Barry, *supra* note 3, at 43–44.

<sup>44</sup> Ministry of Overseas Indian Affairs, Dual Citizenship, [http://www.indiaday.org/government\\_policy/dual\\_citizenship.asp](http://www.indiaday.org/government_policy/dual_citizenship.asp) (last visited Nov. 4, 2005).

<sup>45</sup> See Barry, *supra* note 3, at 50 & n.159.

<sup>46</sup> Chirdeep Bagga, *Dual Citizenship: Who Will Benefit?*, TIMES OF INDIA, Jan. 9, 2005, at 5.

<sup>47</sup> Michael Jones-Correa, *Under Two Flags: Dual Nationality in Latin America and Its Consequences for Naturalization in the United States*, in RIGHTS AND DUTIES OF DUAL NATIONALS 303, 305 tbl.1 (David A. Martin & Kay Hailbronner eds., 2003) [hereinafter RIGHTS AND DUTIES].

## 2. Voting

In 2003, the Philippines offered “equal opportunity to all qualified citizens of the Philippines abroad in the exercise of this fundamental right.”<sup>48</sup> As Barry describes, non-resident citizens of the Philippines and the Dominican Republic both voted for the first time in their respective presidential elections in 2004.<sup>49</sup> This summer, Mexico changed its laws to permit its citizens abroad to cast absentee ballots in presidential elections.<sup>50</sup> Encouraging this rule change, Salvador Garcia, president of the Council of Mexican Federations in Los Angeles, declared that the absentee ballot would make Mexican-American immigrants “feel more a part of Mexico.”<sup>51</sup>

But the introduction of voting for citizens residing abroad remains controversial. In Mexico’s case, some argued against the introduction of an absentee ballot facilitating the exercise of the franchise by non-resident citizens, concerned that it would subject local politics to foreign (especially American) governmental pressure exerted through the expatriate population.<sup>52</sup> Some nativist Americans, too, are upset by the development. Diana Hull, president of Californians for Population Stabilization, denounced the move, which she sees as “part of erasing the borders in North America . . . I’m opposed to the intrusion of the Mexican government into the United States,” Hull declared.<sup>53</sup>

With its own recent offer of “overseas citizenship,” India does not extend the franchise. Members of the Indian diaspora who maintain non-Indian citizenship simultaneously with their “overseas citizenship” of India are not entitled to vote in Indian elections. Barry notes that this leaves nations like India in the awkward position of encour-

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<sup>48</sup> An Act Providing for a System of Overseas Absentee Voting by Qualified Citizens of the Philippines Abroad, Appropriating Funds Therefor, and for Other Purposes, Rep. Act No. 9189, § 2 (2003) V.L. Doc. (2nd), Book 17, p. 92, (Phil.); see also Cicero A. Estrella, *Low Local Turnout for Philippine Election*, S.F. CHRON., Jun. 21, 2004, at B1.

<sup>49</sup> See Barry, *supra* note 3, at 53 & n.173; Yahaira Castro, *Dominican Republic: Dual Citizens*, FRONTLINE/WORLD, Oct. 26, 2004, <http://www.pbs.org/frontlineworld/elections/dominicanrepublic/>.

<sup>50</sup> Lupita Figueiredo, *Mexico to Allow Citizens to Cast Ballots from Abroad*, THE ARGUS (Freemont-Newark, Cal.), Oct. 5, 2005, at Local 10; Enrique Andrade González, *Mexico Debates Absentee Vote for Citizens Abroad*, MEXIDATA.INFO, Jul. 5, 2004, <http://www.mexidata.info/id227.html>; Chris Kraul & Sam Quinones, *Mexican Voting May Extend into U.S.*, L.A. TIMES, Jun. 29, 2005, at A1, available at <http://www.latimes.com/news/nationworld/nation/la-fg-mexico29jun29,0,3284089.story?coll=LA-home-headlines>.

<sup>51</sup> Kraul & Quinones, *supra* note 50.

<sup>52</sup> Martínez-Saldaña, *supra* note 4, at 46 (describing argument of Jorge Carpizo, formerly Attorney General of Mexico, against extending franchise to Mexican citizens abroad because it would subject Mexican politics to American pressures); see also Peter J. Spiro, *Political Rights and Dual Nationality*, in RIGHTS AND DUTIES, *supra* note 47, at 135.

<sup>53</sup> Kraul & Quinones, *supra* note 50.

aging the diaspora to exercise its political clout abroad but not at home.<sup>54</sup>

### 3. *Direct Representation*

Some countries have gone beyond absentee voting to create legislative seats for their citizen expatriates. In 2002, Colombia created a congressional seat solely for its expatriates. In the first election for that seat, seven of the twenty-five candidates lived in New York or New Jersey.<sup>55</sup>

The Mexican state of Zacatecas sets aside two of thirty state congressional seats for its migrants and allows them to be occupied by part-time residents.<sup>56</sup> But this is perhaps less than adequate when one recognizes that roughly half of the population of that state lives in the United States.<sup>57</sup>

Just this past summer, Mexico took the remarkable step of holding elections among its expatriates north of the border. The elections fill an advisory council of 115 persons within the Institute for Mexicans Abroad; the council will offer advice to the Mexican government.<sup>58</sup> This summer, for example, thirty candidates ran for six seats set aside for representation from Illinois.<sup>59</sup> Voting was restricted to adults who were born in Mexico or who had a Mexican-born parent.<sup>60</sup> About one thousand people met at a Chicago high school to vote.<sup>61</sup> As they seek to influence policy, the chosen representatives will be able to rely on their election for legitimacy as spokespeople for the Mexican diaspora.

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<sup>54</sup> Barry, *supra* note 3, at 51–54.

<sup>55</sup> Seth Kugel, *Candidates and Voters Are Here, But It's a Colombian Election*, N.Y. TIMES, Mar. 17, 2002, § 14, at 6.

<sup>56</sup> Barry, *supra* note 3, at 55–56.

<sup>57</sup> *Id.* at 56; Chris Kraul, *Tapping Generosity of Emigrants; Some Mexican Towns Bridge Funding Gap with Help from Clubs in U.S.*, L.A. TIMES, June 8, 2000, at A1; Ginger Thompson, *Candidate Lives in U.S., But So Does Half the State*, N.Y. TIMES, June 19, 2001, at A4.

<sup>58</sup> Oscar Avila, *Cicero Lawmaker's Hat in Mexico Race; Senator Seeks Role as Adviser to Fox*, CHI. TRIB., Sept. 22, 2005, at C1.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Oscar Avila, *Legislator Fails in Mexican Council Bid*, CHI. TRIB., Sept. 28, 2005, at N4.

#### 4. *Diaspora Visas*

India makes special long-term, multi-visit visas available to its non-citizen diaspora.<sup>62</sup> This facilitates tourism and investment, and renews familial and other ties to the homeland.

#### 5. *Diaspora Membership Documents*

In 1999, India introduced the possibility of being a card-carrying member of its diaspora. Upon the payment of a fee, anyone who was formerly an Indian citizen or who was the child, grandchild, or great-grandchild of Indian citizens, can become a "Person of Indian Origin" (PIO). According to the Indian government, "[b]esides making their journey back to their roots simpler, easier and smoother, this Scheme entitles the PIOs to a wide range of economic, financial, educational and cultural benefits."<sup>63</sup> A PIO does not need a visa to visit India, is permitted admission to Indian public higher education institutions, and is permitted to acquire nonagricultural land.<sup>64</sup>

In 1995, Turkey introduced the "Pink Card" entitling Turkish émigrés who had naturalized abroad to certain privileges in Turkey.<sup>65</sup> Among other things, the card gave the holder the "right to buy and inherit land in Turkey."<sup>66</sup>

### B. *Economic Bonding Mechanisms*

Recognizing the disparity in wealth between the average diaspora member and the average homeland citizen, homeland governments have sought to increase economic relationships with their diasporas. The diaspora's potential contribution to homeland economic develop-

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<sup>62</sup> CONSULATE GEN. OF INDIA, SAN FRANCISCO, INSTRUCTIONS FOR VISA APPLICANTS, available at [http://www.cgisf.org/visa/visa\\_services.html](http://www.cgisf.org/visa/visa_services.html) (last visited Nov. 4, 2005) (restricting "entry visas," a special category of visas valid for five years, to "people of Indian origin").

<sup>63</sup> Embassy of India: Consular Services, Information on PIO Card Scheme, [http://www.indianembassy.org/policy/PIO/Introduction\\_PIO.html](http://www.indianembassy.org/policy/PIO/Introduction_PIO.html) (last visited June 30, 2005).

<sup>64</sup> *Id.* According to the Indian government:

The above steps would go a long way in renewing and strengthening the emotional bond amongst PIOs with the land of their origin. The attractive features of the Scheme will further exhort them to play an increasingly constructive role in the socio-economic and cultural development of the country of their origin.

*Id.*

<sup>65</sup> Ayse S. Caglar, "Citizenship Light": *Transnational Ties, Multiple Rules of Membership, and the "Pink Card,"* in *WORLDS ON THE MOVE: GLOBALIZATION, MIGRATION, AND CULTURAL SECURITY* 273, 278 (Jonathan Friedman & Shalini Randeria eds., 2004). Reports indicated that the scheme was not very popular. *Id.* at 283 (noting that by June 2000, there were only 2302 "pink card" holders in Berlin).

<sup>66</sup> *Turkey: A Special Report*, MIGRATION NEWS, Mar. 2001, [http://migration.ucdavis.edu/mn/more.php?id=2330\\_0\\_4\\_0](http://migration.ucdavis.edu/mn/more.php?id=2330_0_4_0).

ment occurs not only through financial contributions in the form of charity or investment, but also through the transfer of knowledge, including access to capital and information networks important for success in a globalized economy.

### 1. *Diaspora Bonds*

Israel pioneered the modern diaspora bond,<sup>67</sup> raising money from its diaspora and other well-wishers to support its fledgling state. Even half a century later, its latest offering documents acknowledge the unique nature of such instruments, in boldface on the first page of the prospectus: "This offering may have a special appeal to persons with an interest in the State of Israel rather than the general public."<sup>68</sup> One of Israel's latest series of bonds is denoted the "Mazel Tov Bonds,"<sup>69</sup> offering denominations as low as \$100 to facilitate its use as a gift for Bar/Bat Mitzvahs, weddings, birthdays, and Hanukkah.<sup>70</sup> Since 1951, sales of State of Israel Bonds have raised \$23.9 billion.<sup>71</sup>

India's offering of its Resurgent India Bonds in the wake of its nuclear tests in 1998 demonstrated the capacity of a diaspora to supply financing to a homeland country that had made itself, at least temporarily, an international pariah.<sup>72</sup> Faced with international economic sanctions imposed following its nuclear tests, India quickly raised \$4.2 billion, enhancing its foreign currency reserves to help withstand the sanctions.<sup>73</sup>

### 2. *Direct Support for Development Programs*

Mexico has sought to attract contributions from its diaspora for individual development projects through a matching contribution pro-

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<sup>67</sup> I offer a detailed description of these instruments in Chander, *supra* note 6, at 1060–95.

<sup>68</sup> DEV. CORP. FOR ISR., PROSPECTUS: STATE OF ISRAEL \$125,000,000 THIRD LIBOR NOTES OFFERED IN MINIMUM SUBSCRIPTIONS OF \$150,000 (LIBOR PLUS 40 BASIS POINTS) 1 (2001), available at <http://www.israelbonds.com/pro/Old%20prospectuses/notesMay05.pdf>. The Annual Report similarly indicates: "The State of Israel Bonds have proven to be a reliable and important source of financing for the State, particularly under adverse circumstances, because many purchasers are individuals and institutions, including the worldwide Jewish community, that have an interest in Israel." STATE OF ISR., ANNUAL REPORT D-76 (2004), available at <http://www.sec.gov/Archives/edgar/data/52749/000095012304007902/y98433exv99wd.htm>.

<sup>69</sup> DEV. CORP. FOR ISR., PROSPECTUS SUPPLEMENT: STATE OF ISRAEL \$30,000,000 MAZEL TOV BONDS S-1 (2004), available at <http://www.israelbonds.com/pro/Old%20prospectuses/mazeltovJuly05.pdf>.

<sup>70</sup> "Mazel Tov" to the Birth of a New State of Israel Bond, BULL. HAR ZION TEMPLE, May 2004, <http://harziontemple.org/harzion/bulletin/v67n9/p10s3.asp>.

<sup>71</sup> STATE OF ISR., *supra* note 68, at D-76.

<sup>72</sup> Chander, *supra* note 6, at 1065–67.

<sup>73</sup> *Id.* at 1066.

gram. Under the “*Tres por Uno*” (Three for One) program, the federal and state governments each match the individual contribution to state development projects such as the building of schools.<sup>74</sup> During 2003, in the state of Guanajuato, the program financed ninety-two projects totaling \$3.7 million in thirty-two towns.<sup>75</sup> Mexican states such as Zacatecas, Michoacan, and Jalisco are reaching out to “hometown associations” in the United States to contribute to their particular places of origin.<sup>76</sup> A hometown club, for example, helped Mayor David Sanchez Guerra of the city of Talpa de Allende fund the construction of a new town hospital.<sup>77</sup>

The Philippines’s Lingkod sa Kapwa Pilipino (LINKAPIL) program seeks to channel assistance from overseas Filipinos, either financial or in-kind, to support education, health and welfare, livelihood, and small-infrastructure projects.<sup>78</sup>

### 3. *Foreign Direct Investment*

India has sought to encourage foreign direct investment from its diaspora.<sup>79</sup> It is considering establishing Special Economic Zones for “Overseas Indians,”<sup>80</sup> offering favorable tax and other advantages to its diaspora. Unlike the programs aimed at eliciting diaspora support for development projects, these programs are directly aimed at earning a market (or higher) rate of return. China has relied heavily on foreign direct investment from overseas Chinese to support its recent growth.<sup>81</sup>

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<sup>74</sup> Daniel González, *Immigrants in U.S. Send Billions Back to Mexico*, ARIZ. REPUBLIC, Sept. 20, 2004, available at <http://www.azcentral.com/specials/special03/articles/0920phx-remit.html>.

<sup>75</sup> *Id.*

<sup>76</sup> Eduardo Porter, *Mexico Woos Its Citizens Living in U.S.*, WALL ST. J., Oct. 24, 2002, at B1.

<sup>77</sup> Kraul, *supra* note 57.

<sup>78</sup> Republic of the Phil. Comm’n on Filipinos Overseas, Lingkod sa Kapwa Pilipino Program, <http://www.cfo.gov.ph/linkapil.htm> (last visited Oct. 26, 2005). Lingkod sa Kapwa Pilipino translates as “Link for Philippine Development.” *Id.*

<sup>79</sup> See, e.g., *FICCI Targets \$5-b FDI from Indian Diaspora*, HINDU BUS. LINE, Feb. 18, 2003, <http://www.thehindubusinessline.com/bline/2003/02/18/stories/2003021802470500.htm> (describing plan by Federation of Indian Chamber of Commerce and Industries (FICCI) to increase foreign direct investment by ten times by 2008, in part by launching new division to work with Indian diaspora).

<sup>80</sup> GOV. OF INDIA CABINET SECRETARIAT, THE SECOND SCHEDULE (RULE 3): DISTRIBUTION OF SUBJECTS AMONG THE DEPARTMENTS (VIBHAG) (2005), <http://cabsec.nic.in/abr> (follow “The Second Schedule to the Rules” hyperlink).

<sup>81</sup> Yasheng Huang & Tarun Khanna, *Can India Overtake China?*, FOREIGN POL’Y, July–Aug. 2003, at 74, 75; see also Chander, *supra* note 6, at 1012 n.32.

#### 4. *Encouraging Return*

Both Taiwan and China have successfully attracted overseas Chinese back to establish new business ventures. The hope is that returnees will bring with them both human and financial capital. As AnnaLee Saxenian argues: "By becoming transnational entrepreneurs, these immigrants can provide the critical contacts, information, and cultural know-how that link dynamic—but distant—regions in the global economy."<sup>82</sup> These links, she writes, "facilitate access to foreign sources of capital, technical skills, and markets."<sup>83</sup>

Taiwan created the Hsinchu Science-Based Industrial Park to attract foreign investments, especially from overseas Chinese.<sup>84</sup> China, too, has adopted this model, successfully inducing engineers to return home through recruitment efforts of local and provincial governments.<sup>85</sup> The Guangzhou City Government even reportedly offers a grant of \$12,000 to each returnee.<sup>86</sup> China has embarked on an effort to create world-class universities by recruiting foreign-trained Chinese and Chinese-American specialists.<sup>87</sup>

#### 5. *Pension Transfers*

Mexican workers employed in the United States contribute billions to the United States Social Security system, but cannot collect on their contributions if they retire in Mexico.<sup>88</sup> Mexico has been pressing in recent years for an accounting of such contributions through a "Totalization Agreement" between the two countries. Totalization agreements are "executive agreements intended to remedy inequities in the pension systems for employees working

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<sup>82</sup> AnnaLee Saxenian, *Transnational Communities and the Evolution of Global Production Networks: The Cases of Taiwan, China and India*, 9 *INDUSTRY & INNOVATION* 183, 185 (2002).

<sup>83</sup> *Id.*

<sup>84</sup> AnnaLee Saxenian, *Taiwan's Hsinchu Region: Imitator and Partner for Silicon Valley*, in *BUILDING HIGH-TECH CLUSTERS: SILICON VALLEY AND BEYOND* 190, 197–99 (Timothy Bresnahan & Alfonso Gambardella eds., 2004) ("[R]eturnees were responsible for starting more than 40% of the 284 companies located in the park in 1999.").

<sup>85</sup> Saxenian, *supra* note 82, at 195–97.

<sup>86</sup> Xiang Biao, *Emigration from China: A Sending Country Perspective*, 41 *INT'L MIGRATION* 21, 30 (2003).

<sup>87</sup> Howard W. French, *China Luring Foreign Scholars to Make Its Universities Great*, *N.Y. TIMES*, Oct. 28, 2005, at A1.

<sup>88</sup> Mexicans who are not citizens of the United States are not eligible for social security benefits for more than six months if they retire to Mexico. 20 C.F.R. § 404.460 (2005); *SOC. SECURITY ADMIN., YOUR PAYMENTS WHILE YOU ARE OUTSIDE THE UNITED STATES* 4–9 (2004), available at <http://www.ssa.gov/pubs/10137.html>. Illegal immigrants provide an important source of revenue to the United States Social Security system. Eduardo Porter, *Illegal Immigrants Are Bolstering Social Security with Billions*, *N.Y. TIMES*, Apr. 5, 2005, at A1.



outside of their country of origin.”<sup>89</sup> The United States has twenty-one such agreements in force, mostly with European countries, as well as with Australia, Canada, Chile, Japan, and South Korea.<sup>90</sup> In June 2004, the two governments reached a tentative agreement that would permit Mexican retirees who worked *legally* in the United States to claim some benefits arising out of their contributions to the United States Social Security system.<sup>91</sup> As of this writing, the agreement has yet to be signed by the U.S. President or ratified by the U.S. Senate.<sup>92</sup>

### C. Cultural Bonding Mechanisms

Ultimately, perhaps the most important bonding mechanism that countries can undertake is to nurture ongoing cultural relationships between the homeland and its diaspora. Emigrants’ sense of connection to the past must be renewed through an investment into the present and the future. Accordingly, countries have sought to re-imagine their nation as encompassing a far-flung diaspora.

#### 1. Recognition

India’s introduction in 2003 of the annual Pravasi Bharatiya Divas marked the turn of state policy to recognizing the importance of the diaspora to India. The Philippines has declared December to be the “Month of Overseas Filipinos.”<sup>93</sup> Official recognitions of the value of the diaspora are now commonplace, and afford an opportunity to invite leaders of diaspora communities back to the homeland to reconnect and compare experiences with others elsewhere. The construction of a nation that trespasses territorial borders requires careful cultivation.<sup>94</sup>

Some homeland governments have instituted special awards to diaspora individuals. India offers national awards named the “Pravasi Bharatiya Samman” to recognize members of its diaspora.<sup>95</sup> The

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<sup>89</sup> Bryan Y. Funai, *Immigration Law for Multinational Employers*, 681 PRACTISING L. INST./LITIG. 111, 211 (2002).

<sup>90</sup> SOC. SECURITY ADMIN., STATUS OF TOTALIZATION AGREEMENTS, <http://www.ssa.gov/international/status.html> (last visited Oct. 26, 2005).

<sup>91</sup> Kathy M. Kristof & Richard Simon, *U.S., Mexico Sign Deal on Social Security*, L.A. TIMES, June 30, 2004, at C1. Mexican retirees who worked illegally in the United States, however, are not eligible to claim any benefit from the Social Security taxes they paid. *Id.*

<sup>92</sup> SOC. SECURITY ADMIN., *supra* note 90.

<sup>93</sup> FILIPINO HANDBOOK, *supra* note 31, at 17.

<sup>94</sup> The Irish Constitution now explicitly references the country’s diaspora: “[T]he Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.” IR. CONST., 1937, art. 2.

<sup>95</sup> Ministry of Overseas Indian Affairs, Celebration of Pravasi Bharatiya Divas, <http://moia.gov.in/showinfo1.asp?linkid=156> (last visited Oct. 5, 2005).

Philippines offers a host of awards to recognize members of its diaspora both for contributions to their homeland and to their host land.<sup>96</sup>

## 2. *Diaspora Ministries*

In 1980, the Philippines created the Commission on Filipinos Overseas “to promote the interests and well being of Filipino emigrants, and to harness their full potentials as partners in national development.”<sup>97</sup> The Commission’s mandate included reaching not just Filipino citizens overseas, but also Filipino emigrants who are citizens of foreign countries, as well as their descendants (until 2003, citizenship in a foreign country required the relinquishing of Philippine citizenship).<sup>98</sup>

In 1983, Greece established a General Secretariat for Greeks Abroad to coordinate policy regarding Diaspora Hellenes.<sup>99</sup> India has established a Ministry of Overseas Indian Affairs.<sup>100</sup> The Mexican states of Zacatecas and Michoacan have established their own offices for diaspora relations: the Zacatecas State Institute of Migration and the General Office for the Michoacanean Migrant.<sup>101</sup>

## 3. *Legal Protection of Citizens Abroad*

Mexico appeared this spring before the Supreme Court of the United States in the case of *Medellin v. Dretke*.<sup>102</sup> In *Medellin*, Mexico acted on behalf of a Mexican national who was sentenced to death without adequate notice to Mexican consular officials, as required by the Vienna Convention on Consular Relations. This followed its recent appearances before the International Court of Justice<sup>103</sup> and even the Oklahoma courts.<sup>104</sup> In its brief to the Supreme

<sup>96</sup> FILIPINO HANDBOOK, *supra* note 31, at 17–18; *Search for Outstanding Filipino Individuals and Organizations Overseas Launched*, FILIPINO TIES (Comm’n on Filipinos Overseas, Manila, Phil.), Jan.–Apr. 2004, at 1, available at <http://www.cfo.gov.ph/filtiesjanuaryapril2004.pdf>.

<sup>97</sup> COMM’N ON FILIPINOS OVERSEAS, LINKAPIL: LINGKOD SA KAPWA PILIPINO PROGRAM: LINK FOR PHILIPPINE DEVELOPMENT, OPERATIONS MANUAL 39 (5th ed. 2001).

<sup>98</sup> *Id.* at 39–40.

<sup>99</sup> See General Secretariat for Greeks Abroad, Homepage (English), <http://www.ggae.gr/default.en.asp> (last visited Oct. 26, 2005).

<sup>100</sup> See Ministry of Overseas Indian Affairs Homepage, <http://moia.gov.in/> (last visited Nov. 1, 2005); The Indian Diaspora, <http://indiandiaspora.nic.in/> (last visited Nov. 1, 2005).

<sup>101</sup> Rodolfo de la Garza & Jerónimo Cortina, *Redefining National Boundaries: Changing Relations Between Diasporas and Latin American States* 5–6 (Real Instituto Elcano de Estudios Internacionales y Estratégicos, ARI No. 16/2005, Feb. 3, 2005).

<sup>102</sup> *Medellin v. Dretke*, 125 S. Ct. 2088 (2005).

<sup>103</sup> Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31), available at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm>.

<sup>104</sup> *Torres v. Oklahoma*, 2005 OK CR 17 ¶ 1, 2005 WL 2130195 (Okla. Crim. App., Sept. 6, 2005).

Court in *Medellin*, Mexico declared its "commitment to the protection of its nationals."<sup>105</sup>

Mexico also offers a "*matrícula consular*," or consular identification card, to give its foreign workers proof of identification useful for a variety of purposes, including "open[ing] bank accounts and enter[ing] the formal economy,"<sup>106</sup> or even proving one's age for an R-rated movie.<sup>107</sup> To reach its expatriates, Mexico offers forty-six consular offices in the United States,<sup>108</sup> even providing for "mobile consulates."<sup>109</sup>

Greece and Spain enshrine obligations toward their diasporas in their constitutions. The Greek constitution declares: "The State must take care for emigrant Greeks and for the maintenance of their ties with the Fatherland."<sup>110</sup> The Spanish constitution directs attention to workers abroad: "The State shall be especially concerned with safeguarding the economic and social rights of Spanish workers abroad, and shall direct its policy towards their return."<sup>111</sup>

The importance of legal protection for emigrant workers suggests that such workers may not be satisfactorily protected in their host countries. This claim receives support in the recent report that Sri Lankan maids are sometimes subject to physical abuse in Middle Eastern countries in which they are employed.<sup>112</sup> The Philippines, which is the world's leading source of migrant labor, has entered into forty-two bilateral agreements for the protection of its workers abroad.<sup>113</sup>

#### 4. *Youth and Retirement Programs*

The Lakbay-Aral Program enables children of Filipino immigrants to trace their roots through a two week travel-study pro-

<sup>105</sup> Brief of Amici Curiae Government of the United Mexican States at 13, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928).

<sup>106</sup> *Mexico Studies How to Make Better Use of Remittances*, ARIZ. REPUBLIC, NOV. 17, 2004, available at <http://www.azcentral.com/specials/special03/articles/1117remittance-ON.html>.

<sup>107</sup> Emily Bazar, *Mobile Office Issues Key ID*, SACRAMENTO BEE, Apr. 24, 2005, at B1.

<sup>108</sup> Secretaría de Relaciones Exteriores, Directorio Consulados, <http://www.sre.gob.mx/acerca/directorio/consulados/dirconsulados.htm> (last modified Sept. 2, 2005).

<sup>109</sup> Bazar, *supra* note 107.

<sup>110</sup> 2001 SYNTAGMA [SYN] [Constitution] 108 (Greece).

<sup>111</sup> CONSTITUCIÓN [C.E.] art. 42 (Spain).

<sup>112</sup> Amy Waldman, *Sri Lankan Maids' High Price for Foreign Jobs*, N.Y. TIMES, May 8, 2005, § 1, at 1.

<sup>113</sup> ILO: *RP Is World's Top Source of Labor Migrants*, FILIPINO TIES (Comm'n on Filipinos Overseas, Manila, Phil.), Sept.-Dec. 2004, at 3, available at <http://www.cfo.gov.ph/filtiesssepdec2004.pdf>. The content of these agreements has not been well-publicized.

gram.<sup>114</sup> Additionally, wherever there are large communities of Filipinos, the Committee on Philippine Schools Overseas encourages the establishment of schools that adhere to a Philippine curriculum.<sup>115</sup>

The Philippine Retirement Authority facilitates the retirement to the Philippines of former citizens and other foreigners.<sup>116</sup> Whereas persons not of Filipino descent must make a significant financial deposit in the country in order to retire there, persons of Filipino descent are required to deposit only a relatively nominal sum.<sup>117</sup>

Figure 2 summarizes the bonding mechanisms described above.

FIGURE 2: BONDING MECHANISMS

BONDING METHOD	EXAMPLES
<i>Political</i>	
Dual Nationality	<i>India</i> (2004); <i>Mexico</i> (1998); <i>Philippines</i> (2002)
Absentee Voting	<i>Dominican Republic</i> (1997); <i>Philippines</i> (2003); <i>United States</i>
Direct Representation of Non-Residents	<i>Colombia</i> : One seat in Congress for expatriates; <i>Mexico</i> : Institute for Mexicans Abroad advisory council; <i>Zacatecas, Mexico</i> : Two seats in state legislature
Diaspora Visas	<i>India</i>
Diaspora Membership Documents	<i>India</i> : Person of Indian Origin designation; <i>Turkey</i> : Pink Card
<i>Economic</i>	
Diaspora Bonds	<i>India</i> : Resurgent India Bonds, Millennium Development Deposit; <i>Israel</i> : State of Israel Bonds
Direct Support of Development Projects	<i>Mexico</i> : Tres por Uno and relationships with hometown associations; <i>Philippines</i> : LINKAPIL
Foreign Direct Investment	<i>India</i> : Preferential treatment for Non-Resident Indian investments
Encouraging Return	<i>China</i> : Financial incentives for return, including business loans
Pension Transfers	<i>Mexico</i> (currently in negotiation)
<i>Cultural</i>	
Recognition	<i>India</i> : <i>Pravasi Bharatiya Divas</i> celebration; <i>Philippines</i> : December declared "Month of Overseas Filipinos"
Diaspora Ministries	<i>Greece</i> : General Secretariat for Greeks Abroad (1983); <i>India</i> : Ministry of Overseas Indian Affairs; <i>Mexican states</i> ; <i>Philippines</i> : Commission on Filipinos Overseas
Protection of Citizens Abroad	<i>Mexico</i> : <i>Medellin</i> case, Social Security, <i>Matricula Consular</i> ; <i>Philippines</i> : Bilateral agreements for worker protection
Youth and Retirement Programs	<i>Philippines</i> : Lakbay-Aral Program, Philippine Retirement Authority

<sup>114</sup> FILIPINO HANDBOOK, *supra* note 31, at 90.

<sup>115</sup> *Id.* at 91–92.

<sup>116</sup> *Id.* at 119.

<sup>117</sup> *Id.* at 120. While persons of Filipino descent are required to post a six-month deposit in a Philippines bank of only \$1500, others must deposit at least \$50,000 or \$75,000, depending on the individual's age. *Id.*

## II

### LEGALITY

Many of the bonding mechanisms described above involve the circulation of ideas, people, and capital across national borders. Might some of these extraterritorial efforts on the part of homeland countries run afoul of the laws of the diaspora's host states? In this Part, I examine the legality of the bonding practices of homeland governments under the domestic law of receiving states. I focus on the United States, an admittedly parochial perspective but one that can be justified in part by the singularly large role the United States plays as a destination for emigrants.<sup>118</sup>

I conclude that American constitutional democracy creates a legal environment generally amenable to transnational associations, even with foreign governments. First Amendment guarantees of freedom of speech and association, Fifth Amendment guarantees of due process and the freedom to travel, and Fourteenth Amendment guarantees of due process and citizenship all serve to limit U.S. governmental authority to regulate relations between Americans (including non-U.S. citizens) and foreign organizations and governments. Yet, constitutional tolerance of transnational associations by U.S. residents is not without bound. The Supreme Court has upheld restrictions on travel to Cuba<sup>119</sup> and presidential power (with congressional acquiescence) to suspend claims of American nationals against foreign governments.<sup>120</sup> The extraterritorial efforts of foreign states are limited also by the general law, including, for example, securities regulation. To the extent that a homeland state seeks to enforce its laws in the United States, it will find only limited receptivity to such efforts. In particular, American courts will refuse to enforce foreign revenue or penal laws and will not give deference to foreign acts of state taking place within the United States.

I take up these issues in the following sections.

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<sup>118</sup> Huntington describes it as "the world's number one diaspora hostland." HUNTINGTON, *supra* note 20, at 285.

<sup>119</sup> *Regan v. Wald*, 468 U.S. 222, 244 (1984) (holding that restrictions on travel to Cuba are both constitutional and proper exercise of presidential power); *Zemel v. Rusk*, 381 U.S. 1, 15-18 (1965) (holding Secretary of State's refusal to validate passports for travel to Cuba constitutional and valid under 1926 Act).

<sup>120</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (holding that President did not lack power to suspend claims of American nationals against Iran especially when Congress had not disapproved of action taken). The Court did not rule on whether suspending a claim would require just compensation under the Fifth Amendment. *Id.* at 688-89.

A. *Freedom of Transnational Association, Speech, and Travel*

Governmental efforts to restrain transnational ties have often met with constitutional challenge. Over the post-war period, United States governmental efforts to restrain such ties have arisen typically out of Cold War tensions or concerns over terrorism. I first take up speech cases, then association cases, and finally travel cases, though this is only a rough approximation as the cases defy such neat division. While the cases discussed below do not directly present relationships between a foreign government and its diaspora in the United States, they help illustrate the contours of constitutional limits to governmental restraints on transnational activities generally.

In 1963, a copy of the *Peking Review* was mailed from abroad to a Dr. Corliss Lamont, a pamphleteer in the United States. The mail was detained pursuant to a 1962 statute that required the U.S. Postmaster General to seize “communist political propaganda” prepared in a foreign country.<sup>121</sup> Asked by the post office whether he wanted the mail delivered, Dr. Lamont challenged the detention policy in court. In *Lamont v. Postmaster General*, the Supreme Court sided unanimously with Dr. Lamont, declaring the policy a violation of his speech rights.<sup>122</sup> Concurring, Justice Brennan observed: “That the governments which originate this propaganda themselves have no equivalent guarantees only highlights the cherished values of our constitutional framework; it can never justify emulating the practice of restrictive regimes in the name of expediency.”<sup>123</sup> The Court held that even requiring individuals to send in a written request for such materials would impermissibly burden their freedom of speech. Justice Douglas explained that the requirement would “have a deterrent effect” on access to materials condemned by the government.<sup>124</sup> In *Lamont*, then, the Supreme Court affirmed the right of a citizen to receive materials from abroad, including material designated by the U.S. government as Communist propaganda.

The ability to hear foreign speech does not extend to all methods for the delivery of such speech. For example, it may include the right to receive foreign materials as held in *Lamont*, but not necessarily foreign persons. In *Kleindienst v. Mandel*, the Supreme Court upheld a denial of a visa to a Belgian Communist invited to speak in the

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<sup>121</sup> *Lamont v. Postmaster General*, 381 U.S. 301, 302–04 (1965).

<sup>122</sup> *Id.* at 305.

<sup>123</sup> *Id.* at 310 (Brennan, J., concurring).

<sup>124</sup> *Id.* at 307.

United States.<sup>125</sup> The Court held that Congressional power over immigration supported the denial.<sup>126</sup>

Official foreign representatives might also be barred, according to a federal circuit court holding. In *Palestine Information Office v. Schultz*,<sup>127</sup> the D.C. Circuit upheld the right of the Secretary of State, acting pursuant to the Foreign Missions Act, to close a Washington, D.C. mission of the Palestine Liberation Organization (PLO).<sup>128</sup> The court held that closing the mission did not violate Americans' freedom of speech or association.<sup>129</sup> But even while upholding the closing of the PLO mission, the Court observed that the order did not prevent like-minded supporters of the PLO from "band[ing] together to achieve a common end";<sup>130</sup> they simply could not do so as a "mission" of the PLO. The court noted that the Secretary's action was motivated in part by "concerns over terrorism."<sup>131</sup>

Governmental policies against terror have also been tested in a number of other recent cases. These cases generally uphold governmental power to restrict financial or material support to a foreign terrorist organization. The D.C. Circuit has also upheld the power of the Secretary of State to designate specific foreign entities as terrorist organizations, a designation that criminalizes financial support to such entities.<sup>132</sup> A federal district court in California has held that a bar on material support to entities designated by the federal government as foreign terrorist organizations does not violate freedoms of speech or association.<sup>133</sup> In another case, John Walker Lindh challenged, on free association grounds, his convictions for joining a foreign terrorist organization.<sup>134</sup> The District Court of the Eastern District of Virginia decisively rejected his claim: "The First Amendment's guarantee of associational freedom is no license to supply terrorist organizations

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<sup>125</sup> 408 U.S. 753 (1972).

<sup>126</sup> *Id.* at 769–70; see Peter H. Schuck, *Kleindienst v. Mandel: Plenary Power v. the Professors*, in *IMMIGRATION STORIES* (David A. Martin & Peter H. Schuck eds., 2005).

<sup>127</sup> 853 F.2d 932 (D.C. Cir. 1988).

<sup>128</sup> *Id.* at 934.

<sup>129</sup> *Id.* at 940–42.

<sup>130</sup> *Id.* at 941.

<sup>131</sup> *Id.* at 942 (citation omitted).

<sup>132</sup> *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) (upholding power of Secretary of State to designate foreign entities "without property or presence in this country" as "foreign terrorist organizations" against due process challenge).

<sup>133</sup> *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1196–97 (C.D. Cal. 1998), *aff'd*, 205 F.3d 1130 (9th Cir. 2000).

<sup>134</sup> *United States v. Lindh*, 212 F. Supp. 2d 541, 569 (E.D. Va. 2002).

with resources or material support in any form, including services as a combatant.”<sup>135</sup>

The right of Americans to travel abroad has been at issue in a number of cases. In *Aptheker v. Secretary of State*, the Supreme Court reviewed a prohibition on travel abroad by Communists.<sup>136</sup> The Court held that a provision of the Subversive Activities Control Act of 1950 forbidding the issuance of a passport to a member of the Communist Party violated the Fifth Amendment right to travel.<sup>137</sup> The Court held that the prohibition could not be properly justified: “The prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe.”<sup>138</sup>

But while a general ban on travel by American Communists was struck down, a specific ban on travel to Cuba has been upheld. In 1962, Louis Zemel, a U.S. citizen, sought to travel to Cuba in order to, as he put it, “satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen.”<sup>139</sup> When the U.S. government barred his request for travel, he challenged the ban on both speech and travel grounds. In *Zemel v. Rusk*, the Supreme Court upheld the prohibition, holding that the First Amendment speech right was not implicated by a ban on travel even though such a ban interfered with the free flow of information about the country.<sup>140</sup> Furthermore, travel could be curtailed, the Court held, given the “weightiest considerations of national security” at stake in the case, citing “the Cuban missile crisis of October 1962 [which] preceded the filing of appellant’s complaint by less than two months.”<sup>141</sup> Two decades later, in 1984, the Supreme Court revisited the issue in the context of somewhat reduced hostilities between the two countries. In *Regan v. Wald*, the Supreme Court again upheld a regulation enacted under the Trading with the Enemy Act that limited travel to Cuba.<sup>142</sup> The Court held that “there is an adequate basis under the Due Process Clause of the

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<sup>135</sup> *Id.* at 570. For a critique arguing that Lindh had a right to associate with and support the Taliban under the First Amendment and current law, see James P. Fantetti, *John Walker Lindh, Terrorist? Or Merely a Citizen Exercising His Constitutional Freedom: The Limits of the Freedom of Association in the Aftermath of September Eleventh*, 71 U. CIN. L. REV. 1373 (2003).

<sup>136</sup> 378 U.S. 500 (1964).

<sup>137</sup> *Id.* at 514.

<sup>138</sup> *Id.*; see also *Kent v. Dulles*, 357 U.S. 116, 129–30 (1958) (striking down regulations prohibiting American Communists from traveling abroad as exceeding Congressional authorization).

<sup>139</sup> *Zemel v. Rusk*, 381 U.S. 1, 15–18 (1965).

<sup>140</sup> *Id.* at 16.

<sup>141</sup> *Id.*

<sup>142</sup> 468 U.S. 222 (1984).



Fifth Amendment to sustain the President's decision to curtail the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism—by restricting travel.”<sup>143</sup> Even though it cited the tradition of “deference to the political branches in matters of foreign policy,” the Court found it necessary to observe that the travel restriction was “justified by weighty concerns of foreign policy.”<sup>144</sup>

These cases paint a complex picture. Courts have generally upheld the constitutionality of restraints on transnational speech, association, and travel when justified by weighty foreign policy concerns, especially those of national security.<sup>145</sup> As we have seen, courts have upheld constraints on entry into the country by a foreign Communist, the maintenance of a PLO mission in the United States, aid to foreign terrorist organizations, and travel to Cuba. The cases upholding such restraints involve executive action upon Congressional authorization. The foreign policy implications of the regulation of transnational activities lead courts to be especially wary of intervention.<sup>146</sup> Economic sanctions, of course, remain a crucial, if controversial, part of a country's foreign policy tool kit. Such sanctions almost always target certain relations between Americans and foreigners.

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<sup>143</sup> *Id.* at 243; see also *Walsh v. Brady*, 927 F.2d 1229 (D.C. Cir. 1991) (upholding regulation under Trading with the Enemy Act precluding payment for travel to Cuba to obtain posters).

<sup>144</sup> *Wald*, 468 U.S. at 242.

<sup>145</sup> Within the country, diasporas enjoy a large degree of constitutionally-protected freedom. A Supreme Court case from 1923 makes this plain. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court considered a state statute designed to promote assimilation through education. Nebraska forbade the teaching in any school in any language other than English until the ninth grade. The Nebraska Supreme Court had upheld the statute, lauding its goals:

To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country.

*Meyer v. State*, 187 N.W. 100, 102 (Neb. 1922). The Supreme Court of the United States noted its appreciation of the “desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters . . .” *Meyer*, 262 U.S. at 402. Nevertheless, it held that the statute violated the liberty guaranteed by the Fourteenth Amendment. *Id.* at 400.

<sup>146</sup> See, e.g., *Pathfinder Fund v. Agency for Int'l Development*, 746 F. Supp. 192, 199 (D.D.C. 1990) (noting difficulty courts face in weighing issues of foreign affairs); cf. *Palestine Info. Office v. Shultz*, 853 F.2d 932, 941 (D.C. Cir. 1988) (“The right to free association, however, is not an absolute; nowhere is that clearer than when measuring the rights of an American citizen to serve as an official representative of a foreign nation or other entity.”).

While courts have upheld such sanctions,<sup>147</sup> they have not completely abdicated judicial scrutiny, as *Lamont* and *Aptheker* demonstrate.

While the Constitution permits certain constraints on crossborder activities, such permissible constraints generally do not allow the government to strip an American of her citizenship. In *Afroyim v. Rusk*, the Court held that a statute stripping American citizenship from anyone who votes in a political election in a foreign state contravened the Citizenship Clause of the Fourteenth Amendment.<sup>148</sup> Afroyim was a naturalized American citizen<sup>149</sup> who lived in Israel for ten years, where he voted in an election. The U.S. government's efforts to strip him of citizenship were held unconstitutional.<sup>150</sup> The Court has repeatedly insisted that an American cannot be stripped of her citizenship against her will.<sup>151</sup>

Taken together, these cases yield maneuvering room for the U.S. government to regulate crossborder activities in cases representing threats to national security. This helps address the security concerns some have raised about the dual loyalties often implicit in dual citizenship.<sup>152</sup> Yet the cases also suggest significant latitude for foreign states to maintain relationships with their diasporas. While bans on investment in, and travel to, a country sponsoring terrorism would likely be upheld against constitutional challenge, a general prohibition on economic relations with countries that pose no threat to the United States may well not survive such a challenge.

Even during the sanctions imposed on India following its 1998 nuclear tests, Indian Americans were not banned from supporting

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<sup>147</sup> See, e.g., *Wald*, 468 U.S. at 244 (upholding regulation restricting "the scope of permissible travel-related transactions with Cuba and Cuban nationals"); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (upholding President's power to suspend and settle claims of U.S. citizens against foreign sovereign); *Zemel v. Rusk*, 381 U.S. 1, 15–18 (1965) (holding restrictions on travel to Cuba constitutional).

<sup>148</sup> 387 U.S. 253 (1967) (overruling *Perez v. Brownell*, 356 U.S. 44 (1958)).

<sup>149</sup> In *Schneider v. Rusk*, the Supreme Court had held that naturalized citizens, even ones residing abroad, should be presumed to have the same allegiance as natural-born ones. 377 U.S. 163, 168–69 (1964).

<sup>150</sup> *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967). A recent circuit court case stripping American citizenship from a naturalized citizen does not undermine *Afroyim*. In *Jean-Baptiste v. United States*, 395 F.3d 1190, 1196 (11th Cir. 2005), the citizenship was removed because it had been fraudulently obtained, as the person who had been allowed to naturalize had committed disqualifying crimes prior to naturalization.

<sup>151</sup> See, e.g., *Vance v. Terrazas*, 444 U.S. 252, 261 (1980) (holding that individual must have specific intent to expatriate, but concluding that individual had perhaps demonstrated intent).

<sup>152</sup> See HUNTINGTON, *supra* note 20, at 287–88 (discussing how members of a diaspora may become potential sources of agents for their homeland governments). Of course, the security concerns should be real, not motivated by racial animus. See *infra* note 165 and accompanying text.

their homeland economically. Indeed, this lacuna permitted the diaspora to supply capital to India during the sanctions period through the purchase of its "Resurgent India Bonds."

### B. *Legal Constraints in Generally Applicable Law*

The case of diaspora bonds demonstrates one other consideration as a country seeks to reach its diaspora: the importance of generally applicable law. Consider the Resurgent India Bonds. India offered its bonds to Americans without registering them with the Securities and Exchange Commission. While India might have believed that it was exempt from the requirements of the Securities Acts because the bonds were bank debt instruments much like certificates of deposit, this was a controversial claim.<sup>153</sup> The consequences of losing that claim could have been dire. It is not a coincidence that India's subsequent diaspora offering, its "Millennium Deposit," was not sold in the United States.<sup>154</sup> This was a costly decision; India had received almost \$600 million in proceeds from American purchasers of its Resurgent India Bonds.<sup>155</sup> But the pitfalls of American securities regulation and securities litigation counseled restraint as India sought capital from its diaspora. The lesson is clear: Whatever the efforts of the homeland state to reach its diaspora, it behooves that state to respect the generally applicable laws of its diaspora members' adopted states.

### C. *Doctrinal Constraints on Intraterritoriality*

Various statutory and common law doctrines limit the reach of foreign governments into the United States. Let us refer to these foreign governmental efforts as the *intraterritorial* exercise of authority. (From the perspective of the foreign state, of course, these are limitations on its extraterritorial exercise of jurisdiction.) The intraterritorial exercise of authority is constrained by the limited ability of a foreign government to execute its laws intraterritorially. Lacking executive branch assistance, foreign governments may find it difficult to turn to U.S. courts to enforce foreign claims. This is the issue generally described as "enforcement of foreign judgments." Moreover, U.S. courts are not obliged by the act of state doctrine to refuse to

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<sup>153</sup> Chander, *supra* note 6, at 1075–78.

<sup>154</sup> Amitava Sanyal & Janaki Krishnan, *India Millennium Deposit Not to Be Sold in the US*, REDIFF.COM, Oct. 9, 2000, <http://www.rediff.com/money/2000/oct/09imd.htm>. Note also that the title of the instrument, "Deposit," rather than "Bond," further suggests that the offering was not a capital markets security but rather a banking instrument. *Id.*

<sup>155</sup> *Id.* (noting that India "had raked in \$590 million, or 14 per cent of its entire collection of \$4.2 billion, from the US market in 1998").

review the validity of a foreign governmental action occurring intraterritorially. I take up both of these issues here.

### 1. *Enforcement of Foreign Judgments*

Foreign governments seeking to compel actions intraterritorially face hurdles with respect to enforcement. While they are certainly free to seek diplomatic assistance from the U.S. executive branch, courts offer only limited recourse to enforce foreign judgments.<sup>156</sup> While U.S. courts are generally willing to enforce foreign judgments, they may not do so with respect to judgments violating local public policy<sup>157</sup> or resting in foreign revenue or penal law.<sup>158</sup> The prohibition against enforcing foreign judgments in certain cases is most strict for revenue law, less strict for penal law, and least strict for public law. A foreign government's effort to tax its diaspora<sup>159</sup> would accordingly face a difficult hurdle, at least in the absence of a tax treaty that would require enforcement. Because the case law on enforcement of foreign judgments implicating either foreign penal law or domestic public policy is divided,<sup>160</sup> whether any particular attempt by a homeland government to enforce its local court judgment in a U.S. court will be successful will depend on the circumstances.

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<sup>156</sup> See *Hilton v. Guyot*, 159 U.S. 113, 227 (1895) (holding that foreign judgments are "not entitled to full credit and conclusive effect when sued upon in [the United States], but are *prima facie* evidence only of the justice of the plaintiffs' claims"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481–82 (1987) [hereinafter RESTATEMENT (THIRD)].

<sup>157</sup> U.S. courts are especially reluctant to enforce foreign judgments that seem to compromise their commitment to free speech. See *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1192–93 (N.D. Cal. 2001) (refusing to enforce French decision on grounds that it was inconsistent with First Amendment), *rev'd on other grounds*, 379 F.3d 1120 (9th Cir. 2004); *Telnikoff v. Matusевич*, 702 A.2d 230 (Md. 1997) (refusing to enforce English libel judgment because Maryland defamation law was rooted in different policies than English defamation law); *Bachchan v. India Abroad Publ'ns Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (refusing to enforce United Kingdom declaration because English libel law was insufficiently sensitive to protection of free speech). In a number of other recent cases, courts have been more willing to accept deviations from American policy judgments. See, e.g., *Soc'y of Lloyd's v. Turner*, 303 F.3d 325 (5th Cir. 2002); *Sw. Livestock & Trucking Co. v. Ramón*, 169 F.3d 317 (5th Cir. 1999); *Larwex Enters., Inc. v. Bacharach*, No. 11503/00, 2001 N.Y. Misc. LEXIS 1031 (N.Y. Sup. Ct. Dec. 11, 2001).

<sup>158</sup> See RESTATEMENT (THIRD), *supra* note 156, § 483; Linda J. Silberman, *Enforcement and Recognition of Foreign Country Judgments in the United States*, in PRACTISING LAW INST., INTERNATIONAL BUSINESS LITIGATION AND ARBITRATION 2005, at 434 (2005) ("The penal-revenue-fiscal exception reflects a reluctance of courts to subject foreign public law to judicial scrutiny as well as concerns about differences in public policy with the forum state.").

<sup>159</sup> See *supra* notes 24–28 and accompanying text.

<sup>160</sup> Silberman, *supra* note 158, at 403, 418–23, 431–36 (collecting cases).

Enforcement of a foreign judgment will, however, always be denied if the issuing court lacked jurisdiction over the defendant.<sup>161</sup> However, U.S. courts have recognized nationality as a basis for the exercise of jurisdiction.<sup>162</sup> Thus, at least with respect to a foreign state's exercise of jurisdiction over nationals, enforcement will not be denied for lack of jurisdiction.

## 2. *Act of State Doctrine*

Under federal common law, courts typically refuse to review actions of a foreign state performed within its own territory. This act of state doctrine helps insulate foreign governmental actions from American judicial review. However, this doctrine limits its deference to foreign authority to actions taking place within that foreign state's territory.<sup>163</sup> "In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory."<sup>164</sup> Thus, a challenge to a foreign state action performed within the United States (intraterritorially, from the American perspective) would not fail because of the act of state doctrine.

### D. *The Legality of Diaspora-Homeland Relations*

In sum, United States law does not generally prohibit the broad array of bonding mechanisms currently employed by homeland nations to reach their diasporas. However, in conditions of war, either hot or cold, between the United States and a foreign country, the U.S. government can prohibit bonding practices that provide material support to the foreign state.

While the law may permit the U.S. government to interfere with such relations during crises, our own country's history should lead us to be extremely cautious in exercising such a right. History teaches that, during crises, alleged security grounds for targeting immigrants

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<sup>161</sup> RESTATEMENT (THIRD), *supra* note 156, § 482(1)(b).

<sup>162</sup> RESTATEMENT (THIRD), *supra* note 156, § 421(2)(d) (permitting exercise of jurisdiction where "the person, if a natural person, is a national of the state"). The Restatement's reference to "nationality" instead of "citizenship" becomes relevant when one considers that Mexico speaks in terms of extending "dual nationality" to Mexican-Americans, not "dual citizenship." See *supra* note 43 and accompanying text.

<sup>163</sup> See *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985) ("Acts of foreign governments purporting to have extraterritorial effect—and consequently, by definition, falling outside the scope of the act of state doctrine—should be recognized by the courts only if they are consistent with the law and policy of the United States.").

<sup>164</sup> *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990).

may often be flimsy disguises for underlying racial prejudice. Some four decades after the ignoble internment of Japanese Americans, the United States Congress concluded that the internment was “carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and [was] motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership.”<sup>165</sup>

### CONCLUSION

My grandfather, who was born in India, died in the United States. After his cremation on Long Island, my father took the urn to India so that he could spread his father’s ashes over the Ganges. Kim Barry, who was born in the Bahamas, died in the United States, her new home. After her tragic passing, her parents brought her home to be buried in the islands where she was born.

Like my grandfather, Kim Barry followed the transnational circuit of life and death that becomes ever more common in a diasporic world. But Kim Barry’s parents completed the journey that her children should have traversed someday long into the future.

I did not know Kim Barry during her life. Yet, in her words, I can feel her power, vitality, brilliance, creativity, and eloquence.

Individual voices still matter in our profession. A law review article will, on occasion, identify a new problem, or a new way of seeing a problem, or a better solution. Sometimes it will lie pregnant in the minds of law students who read it in their twenties or thirties, to germinate in unexpected ways many years later. Even in dissent, the scholar will force others to better explain, defend, or configure the governing rule. I do not know if Kim Barry would have been in the majority or in the dissent, but her voice would have been important, as “Home and Away” proves.

A voice like Kim Barry’s will be missed dearly.

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<sup>165</sup> Civil Liberties Act of 1988, 50 U.S.C. app. § 1989a(a) (2000). The Internment had been preceded by decades of unabashed anti-Asian prejudice. JOHN TATEISHI, *AND JUSTICE FOR ALL: AN ORAL HISTORY OF THE JAPANESE AMERICAN DETENTION CAMPS* xiv (1984).