

THE DISSIDENT CITIZEN

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We have arrived at a crossroads in terms of the intersection between law, sexuality, and globalization. Historically, and even today, the majority of accounts of LGBT migration tend to remain focused, in one scholar's words, on "a narrative of movement from repression to freedom, or a heroic journey undertaken in search of liberation." Within this narrative, the United States is usually cast as a land of opportunity and liberation, a place that represents freedom from discrimination and economic opportunity. But this narrative also elides the complexity that erupts from grappling with the reality that many other jurisdictions outside of the United States can be even more forward-looking when it comes to recognizing the need for LGBT civil rights and the fact that many immigrants may confront a much more complex reality for many people of color, particularly in a post-9/11 world.

This Article attempts to provide one vantage point in theorizing the bipolar classifications that characterize globalization narratives regarding sexuality. In this Article, I draw on the notion of a diaspora as a theoretical tool with which to highlight some key constitutional hybridities in the terrain of law and sexuality. The notion of a diaspora, I argue, represents a useful way of thinking of the intersection between sexuality, law, and globalization by forcing us to confront hybrid possibilities, particularly in recalibrating and reimagining the lines that we draw between North and South, East and West, home and elsewhere.

*Towards that end, this Article introduces two conceptions of a diaspora, one cultural, another constitutional, by engaging in a close comparison between *Lawrence v. Texas* and the recent *Naz Foundation v. Government of NCT* opinion overturning sodomy laws in India. Part I introduces the cultural notion of an LGBT diaspora among peoples and the communities, real or imagined, that flow from it. In Part II, I broaden this concept to introduce a secondary conception of a "constitutional diaspora" in evaluating the role of hybridity in the wake of *Lawrence's* international implications. Part III takes a more normative approach than the previous Parts and*

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discusses what these two types of diaspora offer us in terms of reimagining the terrains of nationhood and citizenship.

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INTRODUCTION

Sixty-two years after the birthday of Indian independence (which took place on August 15, 1947, to be exact), on a hot summer afternoon in New York City in 2009, a group of South Asians—clad in saris, sunglasses, T-shirts, and colorful kurtas—stood behind a set of iron barricades as the annual India Day parade unfolded in front of them along Fifth Avenue. As they stood, one dance sequence after another moved past, blaring music, circulating promotional materials, and offering sweets and observations in honor of “Mother India.” To anyone who has been to the India Day parade, it is a sight to behold: a multiplicity of languages, religions, cultures; a cacophony of histories and legacies—all complicated, all diverse, and all wrapped up into one glorious package, multicolored and multicultural. The India Day parade marks a powerful moment each year in which the South Asian diaspora—with all of its cleavages, classes, and political affiliations—comes together to celebrate the largest democracy in the world.

As the parade route ended, however, it was impossible to miss a particular group standing prominently and fixedly in place behind a series of iron barricades that prevented them from marching. The group was the South Asian Lesbian Gay Association (SALGA), and its members had, for at least the fifth time in a decade, been formally denied entry to the parade celebrating the origin

of the same nation that had given birth to so many of them.¹ On several prior occasions, the Federation of India Associations (FIA), which organizes the parade, had denied SALGA and a women's anti-domestic violence group, Sakhi, the right to march on the grounds that both groups were "antinational."² In 2009, when contacted by an acquaintance for an explanation, Dipak Patel, the president of the tri-state FIA, stated that "anyone is welcome to march," but quickly added that there is an application process for organizations, and, like college admissions, "some people get in, some people don't."³ The FIA vice-president, Nirav Mehta, clearly embarrassed by the situation, told the press, "We as a country welcome each individual and person; this parade is to celebrate India's Independence Day and not for demonstrations."⁴

Like most stories that involve civil rights, there are some spectacular moments of irony in SALGA's exclusion from the 2009 India Day parade in New York City. Just weeks before, the very same group had been invited to march, front and center, in the city's annual gay pride parade. SALGA's presence at the pride event was punctuated by an event that most South Asians had not expected: the overturning of sodomy laws by the Delhi High Court, four days later, in a soaring, comprehensive declaration of equality in a case called *Naz Foundation v. Government of NCT*,⁵ which became one of the most popular stories in the *New York Times* that week.⁶

1. Although the Federation of India Associations (FIA) claimed it had not received South Asian Lesbian Gay Association's (SALGA) application to march, SALGA provided journalists with an email from the FIA confirming that SALGA's application had been received weeks earlier and that the request had been forwarded to the board, which would get back to the group with a decision. SALGA's leaders waited, and then called repeatedly, until it finally became clear, just days before the parade, that a permit would not be forthcoming. Minal Hajratwala, "Gay Hind": NY India Day Parade Draws Protesters, <http://www.apaforprogress.org/%E2%80%9Cgay-hind%E2%80%9D-ny-india-day-parade-draws-protesters> (Aug. 16, 2009, 18:10 EST); Scott Stiffler, *Controversy Erupts Over Exclusion of LGBT Group From NYC's India Day Parade*, EDGE, Aug. 19, 2009, <http://www.edgeboston.com/index.php?ch=news&sc=&sc2=news&sc3=&id=95244>.

2. Several articles have explored the history of SALGA's exclusion from the India Day parade. See, e.g., Gayatri Gopinath, *Local Sites/Global Contexts: The Transnational Trajectories of Deepa Mehta's Fire*, in QUEER GLOBALIZATIONS 149 (Arnaldo Cruz-Malavé & Martin F. Manalansan IV eds., 2002); Svati P. Shah, *Out and Out Radical: New Directions for Progressive Organizing*, SAMAR MAG., Fall/Winter 2001, <http://www.samarmagazine.org/archive/article.php?id=60>; Minal Hajratwala, *Gays Shut Out of the Parade*, COLORLINES, Aug. 19, 2009, <http://www.colorlines.com/mfriendly.php?ID=588>.

3. Hajratwala, *supra* note 1.

4. Stiffler, *supra* note 1.

5. (2010) Cri. L.J. (Del.) 94 (2009), (2009) 160 DLT 277, available at http://www.nazindia.org/judgement_377.pdf.

6. See Vikram Raghavan on *Naz Foundation*—Part 1, http://lassnet.blogspot.com/2009/07/vikram-raghavan-on-naz-foundation-part_10.html (Oct. 7, 2009, 9:09 EST) (noting that the *New York Times* story on *Naz Foundation* was among the top ten most popular stories on the newspaper's website).

In stark contrast, just a month after the opinion was handed down, at the India Day parade, SALGA members held signs and chanted behind barricades to draw attention to their exclusion. One sign held by a young woman read, "Indian. Gay. Proud." Another person stood firmly in the middle while wearing a blush pink T-shirt with the words "Legalize Gay" marked on the front in purple. Another picture perhaps said it best: "Queers (heart) Equality," the sign read, in large magic marker lettering, with an enlarged "Past Due" stamp placed conspicuously at the bottom.

For a moment, imagine the symbolism created by the juxtaposition of these two events. Both moments are about how themes of inclusion and exclusion operate as undercurrents in citizenship. SALGA's absence at the India Day parade takes place at the very same moment that the Indian Constitution has been interpreted in the *Naz Foundation* case to demand just the opposite. At the India Day parade just one month later, queer South Asians are relegated to the sidelines in New York City. One moment celebrates the international trajectory of LGBT civil rights, whereas another traffics heavily in the domain of cultural disenfranchisement.

The juxtaposition of these events provides a painful, lagging reminder of the limits of law in changing the face of culture and citizenship. For some of us, the summer of 2009 will probably remain the unique moment that both areas collided, requiring us to contemplate the role of the dual trajectories of inclusion and exclusion in, respectively, both constitutional law and culture. The confluence of events—a very public slap in the face by the South Asian community on Indian Independence Day in New York City, coupled with a landmark judgment on gay rights in India that same summer—is well worth considering, not merely for the civil rights issues that it embodies, but also because it highlights the fluidity of concepts like migration, citizenship, and diaspora in forming—and reforming—those issues for a broader legal community.

As the Symposium panel at which I presented this Article suggests, we have arrived at a crossroads in terms of the intersection between law, sexuality, and globalization. Within the United States, whereas in prior decades, gays and lesbians offered radical critiques of family and marriage, today many have abandoned those positions in favor of a liberal demand for state-sponsored recognition of same-sex marriage and all of the rights and privileges associated with the conventional nuclear family.⁷ The claims for LGBT rights and equality, as tied as they are to the state and to state-sanctioned equality within the legal system, also

7. For an excellent discussion of this point, see David L. Eng, *Freedom and the Racialization of Intimacy: Lawrence v. Texas and the Emergency of Queer Liberalism*, in *THE BLACKWELL COMPANION TO LGBT/Q STUDIES* 38–59 (George Haggerty & Molly McGarry eds., 2007).

thus indirectly extend the state's regulation into the private sphere, unquestionably reifying the state's primary role in liberating the LGBT citizen.⁸ Globally speaking, inasmuch as these claims are tied to the formal language of rights and recognition, they also run the risk of overlooking some of the limitations that embody legal claims toward equality, obscuring some of the deeper, distributive inequalities with respect to gender, ethnicity, class, and race that persist despite the opportunities that citizenship has to offer.

The rise of liberal claims to rights and recognition thus carries with it some important global considerations. Historically, and even today, scholars observe that "the majority of accounts of queer migration tend to remain organized around a narrative of movement from repression to freedom, or a heroic journey undertaken in search of liberation."⁹ Within this narrative, the United States is usually cast as a land of opportunity and liberation, a place that represents freedom from discrimination and economic opportunity. But this narrative also elides the complexity that erupts from grappling with the reality that many other jurisdictions outside of the United States can be even more forward-looking when it comes to recognizing the need for LGBT civil rights, as the Delhi Court opinion demonstrates, and the fact that many immigrants to the United States may confront a political reality (either at the hands of fellow immigrants or others) that is far less embracing than the enduring plasticity of the metaphorical "American dream" itself.

Thus, to some extent, although it is certainly important to explain the threads that compel migration, it is also important to avoid attaching a single narrative to those events alone. When this happens, the complexity of migration becomes reduced to an oversimplified dynamic that focuses only on the United States as a "land of freedom and democracy," and thus overlooks the struggles and resistances that subordinated groups often engage in, both within the United States and also elsewhere.¹⁰ The narrative of the United States as a land of liberation can also sometimes risk overlooking a much more complex reality for many people of color, particularly in a post-9/11 world.¹¹

8. *Id.* at 41.

9. Eithne Luibhéid, *Introduction* to QUEER MIGRATIONS: SEXUALITY, U.S. CITIZENSHIP, AND BORDER CROSSINGS, at xxv (Eithne Luibhéid & Lionel Cantú Jr. eds., 2005).

10. *Id.*; see also Chandan Reddy & Javid Syed, *I Left My Country for This!?: Queer Immigrant Organizing and the Politics of Indifference*, TRIKONE, Oct. 1999, at 8.

11. Luibhéid, *supra* note 9, at xxvi. For discussion of the impact of 9/11, see JASBIR K. PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES* (2007) [hereinafter PUAR, *TERRORIST ASSEMBLAGES*]; Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence As Crimes of Passion*, 92 CAL. L. REV. 1259 (2004); Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, 72 SOC. TEXT 101 (2002); Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215 (2005); Jasbir K. Puar & Amit S. Rai, *Monster, Terrorist,*

Perhaps, however, we might consider these caveats, not as limitations on a singular theme of citizenship, but instead as formidable opportunities for undertaking a cultural reimagining of citizenship altogether. Towards this end, this Article attempts to provide one vantage point in theorizing the bipolar classifications that characterize globalization narratives. It argues that the concept of a diaspora offers us a powerful theoretical lens with which to unpack the polarizing themes that often characterize the intersection of law, sexuality, and citizenship. It takes as its starting point this observation by Stuart Hall:

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. Diaspora identities are those which are constantly producing and reproducing themselves anew, through transformation and difference.¹²

As Hall suggests, the notion of a diaspora forces us to confront the reality of cultural hybridities in motion, but his insights also help us contemplate how these cultural hybridities might aid us in reenvisioning citizenship itself.

Recent scholarship both inside and outside of the law has elucidated the way in which the diaspora destabilizes the fixedness of the nation-state, the concept of citizenship, and even the idea of a cultural identity itself. Pico Iyer writes, the diaspora—the concept—covers “people [who are] are strangers to everywhere including their homes.”¹³ As a result, they “are rooted in ideas rather than places.”¹⁴ The notion of relying on diasporic outsiders to evaluate the utility of identity-based categories—precisely because they defy these classifications altogether—is not a new innovation.¹⁵ However, the concept of a diaspora has had only a limited influence in the law. Elsewhere, diasporic studies have been

Fag: *The War on Terrorism and the Production of Docile Patriots*, 20 SOC. TEXT 117 (2002); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

12. Stuart Hall, *Cultural Identity and Diaspora*, in *IDENTITY: COMMUNITY, CULTURE, DIFFERENCE* 235 (Jonathan Rutherford ed., 1998), available at <http://www.lwbooks.co.uk/ReadingRoom/public/IdentityDiaspora.pdf> (emphasis omitted).

13. Pico Iyer, *Living in the Transit Lounge*, in *UNROOTED CHILDHOODS: MEMOIRS OF GROWING UP GLOBAL* 11 (Faith Eidse & Nina Sichel eds., 2004).

14. *Id.*

15. For a discussion on the notion of diaspora, see ROBIN COHEN, *GLOBAL DIASPORAS: AN INTRODUCTION* (1997); PAUL GILROY, *THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS* (1993); GABRIEL SHEFFER, *MODERN DIASPORAS IN INTERNATIONAL POLITICS* (1986); Rogers Brubaker, *The 'Diaspora' Diaspora*, 28 *ETHNIC & RACIAL STUD.* 1 (2005); James Clifford, *Diasporas*, 9 *CULTURAL ANTHROPOLOGY* 302 (1994); John Lie, *From International Migration to Transnational Diaspora*, 24 *CONTEMP. SOC.* 303 (1995); Bhikhu Parek, *Some Reflections on the Indian Diaspora*, 3 *J. CONTEMP. THOUGHT* 105 (1993).

rooted in conflict and contradiction, even more so with the additional, complicating element of sexuality.

More recently, however, a few legal scholars have offered us a wealth of insights about the function of law and the diaspora in regulating and idealizing the concept of citizenship, and also about the function of culture in transcending legal fixtures.¹⁶ Yet, for the most part, very little diasporic legal scholarship contemplates the global growth of the LGBT civil rights movement. A search of the term “queer diaspora,” for example, while heavily cited and discussed in humanities scholarship,¹⁷ is nowhere to be found in the corresponding legal literature.¹⁸ A search of Westlaw reveals not even a single citation to the term.

In this Article, I argue that the idea of a diaspora represents a useful vantage point for theorizing the intersection between sexuality, law, and globalization. I attempt to interrogate what the concept of the diaspora might hold for legal

16. For some examples of this work, see Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11, 26–27 (2006); Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1006 (2001); Robin Cohen, *Diasporas and the Nation State: From Victims to Challengers*, 72 INT’L AFF. 507, 517 (1996); Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597, 621–25 (1999) (reviewing ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997)); Symposium, *A Tribute to the Work of Kim Barry: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 1 (2006).

17. There is a large body of scholarship on the concepts of queer diaspora, migration, and globalization. For an excellent collection of essays, see Eithne Luibhéid, *Queer/Migration: An Unruly Body of Scholarship*, 14 GLQ 169 (2008); and QUEER MIGRATIONS, *supra* note 9. See also M. JACQUI ALEXANDER, *PEDAGOGIES OF CROSSING: MEDITATIONS ON FEMINISM, SEXUAL POLITICS, MEMORY, AND THE SACRED* (2005); LIONEL CANTÚ, JR., *THE SEXUALITY OF MIGRATION: BORDER CROSSING AND MEXICAN IMMIGRANT MEN* (Nancy A. Naples & Salvador Vidal-Ortiz eds., 2009); OLIVA M. ESPÍN, *WOMEN CROSSING BOUNDARIES: A PSYCHOLOGY OF IMMIGRATION AND TRANSFORMATION OF SEXUALITY* (1999); ANNE-MARIE FORTIER, *MIGRANT BELONGINGS: MEMORY, SPACE, IDENTITY* (2000); LAWRENCE LA FOUNTAIN-STOKES, *QUEER RICANS: CULTURES AND SEXUALITIES IN THE DIASPORA* (2009); JOHN HART, *STORIES OF GAY AND LESBIAN IMMIGRATION: TOGETHER FOREVER? (2002); INVENTED IDENTITIES? LESBIANS AND GAYS TALK ABOUT MIGRATION* (Bob Cant ed., 1997); MARTIN F. MANALANSAN IV, *GLOBAL DIVAS: FILIPINO GAY MEN IN DIASPORA* (2003); *PASSING LINES: SEXUALITY AND IMMIGRATION* (Brad Epps et al. eds., 2005); *POSTCOLONIAL AND QUEER THEORIES: INTERSECTIONS AND ESSAYS* (John Hawley ed., 2001); ELSPETH PROBYN, *OUTSIDE BELONGINGS* (1996); *QUEER DIASPORAS* (Cindy Patton & Benigno Sánchez-Eppler eds., 2000); M. Jacqui Alexander, *Not Just (Any) Body Can Be a Citizen: The Politics of Law, Sexuality and Postcoloniality in Trinidad and Tobago and the Bahamas*, 48 FEMINIST REV. 5 (1994); Anne-Marie Fortier, *‘Coming Home’: Queer Migrations and Multiple Evocations of Home*, 4 EUR. J. CULTURAL STUD. 405 (2001) [hereinafter Fortier, *‘Coming Home’*]; Anne-Marie Fortier, *Queer Diaspora*, in *HANDBOOK OF LESBIAN AND GAY STUDIES* 183 (Diane Richardson & Steven Seidman eds., 2002) [hereinafter Fortier, *Queer Diaspora*]; Gopinath, *supra* note 2; Martin F. Manalansan IV, *In the Shadows of Stonewall: Examining Gay Transnational Politics and the Diasporic Dilemma*, in *THE POLITICS OF CULTURE IN THE SHADOW OF CAPITAL* 485 (Lisa Lowe & David Lloyd eds., 1997); Martin F. Manalansan IV, *Queer Intersections: Sexuality and Gender in Migration Studies*, 40 INT’L MIGRATION REV. 224 (2006); Simon Watney, *AIDS and the Politics of Queer Diaspora*, in *NEGOTIATING LESBIAN AND GAY SUBJECTS* 53 (Monica Dorenkamp & Richard Henke eds., 1995).

18. The term queer diaspora “refers to the transnational and multicultural network of connections of queer cultures and ‘communities.’” Fortier, *Queer Diaspora*, *supra* note 17.

scholars contemplating both the cultural and constitutional architecture of citizenship, particularly as the diaspora intersects with global sexualities. In attempting to capture some of the new conflicts that have arisen in these realms, this Article uses the notion of a diaspora both as a theoretical device and as a doctrinal tool with which to analyze some key constitutional developments in the global legal and cultural regulation of sexuality. Further, not only do considerations of sexuality transform the concept of a diaspora, but considerations of the concept of a diaspora transform our thinking on sexuality as a result. The concept's particular utility stems from its privileging of hybrid possibilities, particularly in recalibrating and reimagining the lines that we draw between North and South, East and West, home and elsewhere, and the inside and outside of the law.

Towards that end, this Article introduces two conceptions of a diaspora, one cultural, another constitutional, and then explores their implications for redefining LGBT citizenship in an age of increasing globalization. In Part I, I explore, first, the cultural notion of an LGBT or queer diaspora among *people*, and the communities, real or imagined, that flow from it. In Part II, I analyze a secondary, broader conception of diaspora: a *constitutional* or doctrinal diaspora created by borrowing legal principles across jurisdictions. The idea of a constitutional diaspora captures a series of multiple sites of conformity across jurisdictions, and it can take multiple forms, some that embrace principles of LGBT equality, and others that do not. Drawing upon international LGBT disputes in a post-*Lawrence v. Texas* era, I sketch out two examples, one analyzing recent events in Uganda (where American evangelists reportedly offered legal technical assistance in crafting a vociferously antigay piece of legislation); and the second, focusing on the recent *Naz Foundation* opinion, which adopted some of the reasoning of *Lawrence* in overturning sodomy laws in India, but went much further in articulating a more inclusive vision of LGBT equality. *Naz Foundation*, I argue, further demonstrates how the idea of a constitutional diaspora can also embody the interplay across jurisdictions in crafting a diverse array of views of LGBT equality, as the *Naz Foundation* (and SALGA's dissenting presence in the India Day parade) demonstrated.

Part III takes a more normative approach than the previous Parts and discusses what these two types of diaspora offer us in terms of reimagining the terrains of nationhood and transnational citizenship. Here, I attempt to interrogate what the concept of a diaspora might hold for the promise of equality within the law and also to demonstrate how the limitations of law and legality open up broader possibilities of interpretation within culture and citizenship.

I. DIASPORA AND DISSENT

In making their demonstration at the India Day parade, SALGA sought to use the power of its political presence to make an important point about how those left outside, how the disenfranchised, actually play a formative role in crafting a dissenting community by occupying the interstices of the uninvited. Rebecca Solnit writes, in *Wanderlust*, that “a procession is a participants’ journey, while a parade is a performance with an audience.”¹⁹ Yet in crafting either a procession or a parade, the organizers, in their own small ways, craft their own microperspectives of what a nation includes and excludes, in ways only perceptible to those who are present to watch the spectacle unfold. The India Day parade is no small example. In excluding SALGA from marching, the FIA offered its own interpretation of Indian citizenship by “purifying” Indian nationhood of sexual diversity. Yet the FIA’s interpretation took place within the diaspora in the United States and not within India itself, a factor that seems particularly ironic given the *Naz Foundation* opinion. On a deeper level, for this reason, SALGA also sought to introduce its own dissenting critique of the ways that the FIA’s logic of nationalism defied the *Naz Foundation* court’s more profound commitment to inclusion.

On this point, SALGA’s struggle was similar to that faced by the Irish gay and lesbian organizations in the United States, which are precluded from marching every Saint Patrick’s Day in Boston. The Irish organizations filed suit in a landmark civil rights case before the U.S. Supreme Court, sparked by the one time they tried to march in 1992.²⁰ People present at the parade recall how the crowd hurled invectives, bottles, and rocks at the small contingent of gays and lesbians, and how parents told their children to turn their backs on the group as they approached.²¹ The groups lost their civil rights case before the Supreme Court, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,²² and, even today, no gays and lesbians are permitted to march in the parade.

Writing on *Hurley*, Madhavi Sunder observed how classic First Amendment claims—in this case, the right to march in a parade—became marred by an exaggerated view of “speaker autonomy” that, in her eyes, not only resembled the classic romanticized picture of the “author” in intellectual property

19. REBECCA SOLNIT, *WANDERLUST: A HISTORY OF WALKING* 215 (2001).

20. See generally Madhavi Sunder, Note, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 49 STAN. L. REV. 143 (1997).

21. Matthew Casey, *Casey: Having a Gay Old Time in South Boston*, WICKED LOCAL, Mar. 17, 2009, <http://www.wickedlocal.com/medford/homepage/x108129256/Casey-Having-a-gay-old-time-in-South-Boston>.

22. 515 U.S. 557 (1995).

law, but also insulated ideas from dissent and change.²³ For Sunder, these property-like entitlements granted, to some, an absolute power to create and maintain meaning at the exclusion of others.

But now, fifteen years after *Hurley*, we actually see that dissent was not so easily foreclosed. Ratna Kapur, in her own work on sex and sexuality in India, writes of “law’s role in simultaneously reinforcing an essentialist story about culture as well as providing space for resisting this construction.”²⁴ Here, the exclusion of LGBT individuals—from a parade, from a political process—inevitably creates a space for dissent and dynamic confrontation, thus allowing those within and outside of the homeland to respond.

In other words, *Hurley*’s exclusion generated two opposing forces. One trend, as we see exemplified in the India Day parade, continued the thread of “purifying culture” by not allowing LGBT members to march as a group, a classic reenactment of *Hurley*’s exclusion. Notice how this exclusion then interacts with the themes of nationhood and citizenship. By arguing that being an LGBT minority is antithetical to being Indian (or Irish), nationalism becomes synonymous with homophobia, and the nation becomes read as heterosexual as a result. Through this process, the visibly queer become, essentially, likened to undocumented outsiders—disenfranchised and excluded by these legal and cultural attempts to invisibilize their existence.²⁵

But if the LGBT citizen then becomes synonymous with the undocumented, the excluded, the other trend the exclusion propagates is an even more forceful recitation of protest, a refusal to give in to the political fracturing that such exclusions might cause. The excluded are, in effect, transformed into dissidents, destabilizing the concept of presumed heterosexuality among Indians (or the Irish, respectively), and also, in some ways, destabilizing the fixedness of a concept of citizenship as well. Like so many other outsider groups facing such challenges, the LGBT marchers at the India Day Parade were spurred into crafting a more complex—indeed, a much more transnational—statement of dissent. Not only did they choose to publicize their predicament in the public

23. See Sunder, *supra* note 20, at 145.

24. Ratna Kapur, *Postcolonial Erotic Disruptions: Legal Narratives of Culture, Sex, and Nation in India*, 10 COLUM. J. GENDER & L. 333, 334 (2001).

25. See Sally R. Munt & Katherine O’Donnell, *Legalizing Compulsory Heterosexuality in New York’s Annual St. Patrick’s Day Parades*, 10 SPACE & CULTURE 94 (2007).

The Ireland being celebrated in the parades is a historical sentiment, a nation made static in the minds of its ethnic descendants by exile and loss. What identity-based marches such as the annual St. Patrick’s Day parade make abundantly clear is that the traditional segmentation of the urban space, visualized and auralized through the compartments of the protest march with flags, banners, and bands, is not so much a performative sign of strategic inclusion (as with Gay Pride marches) but a very moving and vital force of exclusion.

Id. at 95.

space of the sidelines surrounding the parade, but they also made a powerful formal statement in the press that explicitly linked their loyalties with Indian jurisprudence and the *Naz Foundation* opinion. “The [Delhi] court stated powerfully and succinctly that intolerance is not an Indian value,” SALGA said in its statement. “Despite such a monumental victory for sexual minorities in India, we are outraged and disappointed that . . . the FIA is once again trying to make Indian sexual minorities invisible through its discriminatory acts.”²⁶

Borders of national, cultural, and juridical identity become transformed as a result of such dissenting actions. SALGA’s statement explicitly links its vision of inclusion and citizenship to one that is offered, not by an American court, but by an Indian one. In other words, a moment of exclusion in the diaspora can compel greater ties of transnationalism, enabling a burst of emotional, cultural, and even sociolegal connections between diaspora and homeland. Indeed, the same observation can also be made for the events that followed *Hurley*. Anne Macguire, one of the founders of the Irish Gay and Lesbian Organization (ILGO), a party to the case, wrote similarly of individuals in Ireland publicly reaching out to those in New York after they were excluded from the parade. She writes, “The greeting, ‘Hello New York’ jumped out at us from a photograph of the thirty lesbians and two gay men who marched in the St. Patrick’s Day parade in Cork in 1992, an act of solidarity and support that caused both joy, pride, amusement, and a little sadness among the ILGO.”²⁷

Like the story that I told in the Introduction, there is something quite poetic about LGBT groups marching, full of celebration, in the homeland, even when members of the diaspora refuse to acknowledge them elsewhere. As many newspapers recounted, as the *Naz Foundation* decision was being filed in 2008, several cities across India—New Delhi, Bangalore, and Kolkata—played host to their own gay pride parades, for the first time in history. “Up until now, we’ve been in the public space protesting a violation, or someone being beaten up,” stated Gautam Bhan, one of the New Delhi parade organizers in 2008. “Now we feel like we have enough of a foothold to celebrate a positive presence.”²⁸ After the opinion was handed down a year later, hundreds of gay rights supporters marched, again in New Delhi, Chennai, Bangalore, and elsewhere. In cities across the United States and in other countries, members of the South Asian

26. Hajratwala, *supra* note 2.

27. See Anne MacGuire, *The Accidental Immigrant*, in *LESBIAN AND GAY VISIONS OF IRELAND* (Ide O’Carroll & Eoin Collins eds., 1999).

28. Heidi J. Shrager, *India’s Gay Rights Movement Comes Out*, S.F. CHRON., July 2, 2008, available at http://articles.sfgate.com/2008-07-02/news/17171306_1_gay-activists-new-delhi-bangalore.

queer diaspora, like SALGA, gathered in watchful celebration of the singular legal moment that *Naz Foundation* produced.²⁹

As both the Irish and Indian stories suggest, the very space of an LGBT diaspora is marked by a dynamic hybridity between nations, sexualities, and loyalties that often elides simple classifications.³⁰ By creating a space between an immigrant and a place of origin, a diaspora also creates the opportunity to reimagine the boundaries of a nation altogether. Diasporas are located somewhere between the global and the local.³¹ The classic literature defines a diaspora in terms of three main elements: (1) dispersion across space, usually comprising the crossing of a group of individuals across state borders; (2) some form of “homeland orientation,” which posits a country of origin as a source of ancestry, identity, collective memory, and connection; and (3) some preservation of boundaries or separation from mainstream society, which usually takes the varied form of resistance to complete assimilation (at times, but not always as a result of social exclusion).³² Diasporic individuals live in the in-between, the liminal, the “third space” according to Homi Bhabha,³³ such that individuals who live “here” and “there” are “caught in the discontinuous time of translation and negotiation.”³⁴

But a diaspora is itself a contradiction in terms. It relies on a fixed conception of the nation-state for its very identity between home and homeland, even as it challenges the concept of the nation-state altogether.³⁵ Somewhat similarly for the individual, the concept of belonging to a diaspora can be a positive or a negative experience, and sometimes simultaneously so. James Clifford notes that the concept of the diaspora can be forged in a negative fashion, through the

29. At the parade, young Indians chanted “Long Live Queeristan,” and sang “Gay Ho” to the tune of “Jai Ho,” the megahit from the Oscar-winning movie *Slumdog Millionaire*. Emily Wax, *A ‘Common Front’ for the Marginalized in India*, WASH. POST, July 6, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/05/AR2009070502516.html>.

30. See sources cited *supra* note 15.

31. AVTAR BRAH, *CARTOGRAPHIES OF DIASPORA: CONTESTING IDENTITIES* (1996).

32. See CHARLES KING & NEIL MELVIN, *NATIONS ABROAD: DIASPORA POLITICS AND INTERNATIONAL RELATIONS IN THE FORMER SOVIET UNION* (1998); ANTHONY SMITH, *THE ETHNIC ORIGINS OF NATIONS* (1986); John Armstrong, *Mobilized and Proletarian Diasporas*, 70 AM. POL. SCI. REV. 393 (1976); Brubaker, *supra* note 15, at 5–6; Clifford, *supra* note 15, at 302–08; Charles King & Neil Melvin, *Diaspora Politics*, 24 INT’L SECURITY 108 (1999); Lie, *supra* note 15, at 303–06; William Safran, *Diasporas in Modern Societies: Myths of Homeland and Return*, 1 DIASPORA 83 (1991); David Laitin, *Marginality: A Microerspective* 7 RATIONALITY & SOC’Y 31 (1995).

33. See HOMI K. BHABHA, *THE LOCATION OF CULTURE* 1–5 (1994).

34. Homi K. Bhabha, *Cultural Diversity and Cultural Differences*, in *THE POST-COLONIAL STUDIES READER* 208 (Bill Ashcroft et al. eds., 1995).

35. See Fortier, *Queer Diaspora*, *supra* note 17, at 184 (“Defined as decidedly anti-nationalist within critical cultural theory, it has been widely argued that the presence and experiences of diasporic subjects puts any normative notion of culture, identity, and citizenship in question by their very location *outside* of the time-space of the nation.”).

experiences of discrimination and exclusion in the destination state, but can be forged positively too through an increased identification with global cultural or political forces.³⁶

Although the concept of a diaspora has become an integral part of immigration law and of citizenship studies, few legal scholars have attempted to mine the insights gleaned from diasporic studies in the humanities. This absence is somewhat puzzling, especially given that every moment of migration is heavily inscribed by the role of both international and domestic law in creating and regulating a diasporic identity. Almost ten years ago, Anupam Chander wrote a piece that was published in the *New York University Law Review* called “Diaspora Bonds,” which studied the variety of ways in which diasporas maintain political, economic, social, and cultural ties to their homeland.³⁷ While Chander’s main focus lay in the economic ties between the diaspora and the homeland, his article served to elucidate some of the keen longings and connections that the diaspora acutely felt in connection with the homeland. As Chander writes, “[t]he 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.”³⁸

When we apply the concept of diaspora to the notion of an LGBT or queer identity, we face even more complications and complementarities. One must simultaneously, then, engage in the act of “queering the diaspora,” as well as “diasporizing the queer.”³⁹ The lesbian and gay civil rights movement has historically operated under the dual influence of opposites.⁴⁰ One trends towards a minoritizing discourse that looks towards an ethnic model of largely fixed LGBT identity; and the other, conversely, focuses on a universalizing view of sexuality that recognizes the fluidity and breadth of same-sex desires within all individuals.⁴¹ And yet, the ethnic model, particularly because it is so deeply steeped in the scripts of civil rights claims, and so attractive for this reason, often requires a delicate crafting and rescripting of identities.

An ethnic model of LGBT identity, which necessarily focuses on sameness rather than difference, can be useful in casting the legitimacy of group-based claims to civil rights, particularly in the wake of *United States v. Carolene*

36. See Chander, *supra* note 16, at 1024 (citing James Clifford, *Diasporas*, 9 CULTURAL ANTHROPOLOGY 302, 311 (1994)).

37. See generally *id.*

38. *Id.* at 1049.

39. See Jasbir K. Puar, *Transnational Sexualities: South Asian (Trans)nation(alism)s and Queer Diasporas*, in Q&A: QUEER IN ASIAN AMERICA 405 (David L. Eng & Alice Y. Hom eds., 1998).

40. See Alan Sinfield, *Diaspora and Hybridity: Queer Identities and the Ethnicity Model*, 10 TEXTUAL PRAC. 271 (1996) (citing EVE SEDGWICK, EPISTEMOLOGY OF THE CLOSET 84–90 (1991)).

41. See *id.*

Products.⁴² However, this model, as many have noted, tends to underestimate individual variations in the formation of identity, particularly where sexual identity is concerned. Alice Miller's powerful work on asylum points out how law's privileging tendency most often prefers "fixed identities," that is, identities that "map neatly and recognizably onto conduct."⁴³ "The fluidity of sexuality," she writes, "causes problems for determinations not only because of its mutable character, but also because of the need to distinguish the worthy identity from the unworthy sexual practice."⁴⁴ The rights-based framework that law imposes often requires LGBT people to compartmentalize identities in order to allow for claims to be considered viable under existing civil rights discourses.⁴⁵ Somewhat similarly, David William Foster has written about the difficulty of applying the concept of a diaspora—originally used to refer to the forced dispersion of Jews, and later to any type of forced exile of a particular group—to the kind of individualized paradigm of solitary flight that usually characterizes the experiences of LGBT people.⁴⁶

In one sense, then, it seems difficult to apply the idea of a "diaspora" to an LGBT identity, particularly given the diversity and variance that each identity comprises. Where is the "homeland" that the queer citizen aspires to, when each country is fraught with limitations on LGBT equality, and when so many individuals have identities that diverge from a fixed and stable notion of LGBT identity within each? The Indian and Irish parade examples demonstrate that transnational loyalties to the homeland can be borne from moments of exclusion in the destination country. The moments of exclusion in each paradigm offer meaningful opportunities for cultural dissent for those excluded from participation, but they also facilitate the creation of new transnational connections between the place of migration and the homeland. As the sign from the parade in Cork demonstrated, LGBT citizens in Ireland extend their loyalty to excluded LGBT citizens in the United States, just as queer South Asians, also excluded in the United States, articulate their connection to recent jurisprudence from India.

42. 304 U.S. 144 (1938).

43. See Alice M. Miller, *Gay Enough: Some Tensions in Seeking the Grant of Asylum and Protecting Global Sexual Diversity*, in *PASSING LINES: SEXUALITY AND IMMIGRATION* 137, 137–38 (Brad Epps et al. eds., 2005).

44. *Id.* at 165. As Alan Sinfield has explained, "it is not that existing categories of gay men and lesbians have come forward to claim their rights, but that we have become constituted *as gay* in the terms of a discourse of ethnicity-and-rights." Sinfield, *supra* note 40, at 272.

45. Sinfield, *supra* note 40, at 272 (quoting Didi Herman).

46. David William Foster, *The Homoerotic Diaspora in Latin America*, 29 *LATIN AM. PERSP.* 163, 163 (2002) ("[T]heir exile tends to occur in terms of the flight of individuals rather than as the sort of mass deportation of exile that we customarily associate with the concept of diaspora.").

Here, the notion of a diaspora, by denaturalizing the centrality of the nation-state, offers a powerful undercurrent of reconciliation between the destination country and the homeland, because the very character of a diaspora is characterized by dispersion and variation across transnational loyalties and differences. Indeed, as applied to sexuality, the concept of a queer diaspora, in its multinational, multicultural architecture, can also offer the LGBT citizen a way to craft an identity that does not necessarily require adoption of a singular, fixed identity connected to citizenship. Thus, just as the idea of a diaspora challenges the fixedness of a nation-state and place of origin,⁴⁷ the notion of a *queer* diaspora thus challenges the idea of a diaspora that presumes heterosexuality within its community. As the political theorist Simon Watney explains, the metaphor of a diaspora is “seductively convenient to contemporary queer politics.”⁴⁸ He continues:

Unlike the tendency of seventies and eighties lesbian and gay theory to develop overly monolithic notions of identity and cultural politics, the concept of diaspora is suggestive of diversification, of scattering, fracturing, separate developments, and also, perhaps of a certain glamour. It also suggests something of a sense of collective interest, however difficult this may be to pin down. It implies a complex divided constituency, with varying degrees of power and powerlessness.⁴⁹

In this sense, the concept of a diaspora can operate both as a site of legal regulation but also as a site of theoretical resistance and contestation of a unitary LGBT identity.⁵⁰

Furthermore, the very idea of the diaspora might provide us with a better framework to understand the racial and sexual identity formation of immigrants of color, who are often shaped between the domestic and the diasporic worlds that they inhabit.⁵¹ Consider SALGA as one example. It was an unusual, but

47. See Fortier, *Queer Diaspora*, *supra* note 17, at 189 (“Queer diasporas, for their part, decidedly ‘propagate’ outside of the nation-building narrative where the heterosexual family is the essential building-block in the construction and elevation of the nation.”).

48. *Id.* at 185 (quoting Watney).

49. *Id.* (internal quotations omitted).

50. See Luibhéid, *supra* note 9, at xi.

51. For writings on the notion of a queer diaspora, particularly regarding Asian sexualities, see MONISHA DAS GUPTA, *UNRULY IMMIGRANTS: RIGHTS, ACTIVISM, AND TRANSNATIONAL SOUTH ASIAN POLITICS IN THE UNITED STATES* (2006); A LOTUS OF ANOTHER COLOR: AN UNFOLDING OF THE SOUTH ASIAN GAY AND LESBIAN EXPERIENCE (Rakesh Ratti ed., 1993); Q&A: QUEER IN ASIAN AMERICA, *supra* note 39; David L. Eng, *Out Here and Over There: Queerness and Diaspora in Asian American Studies*, 15 SOC. TEXT 31 (1997); Gayatri Gopinath, *Funny Boys and Girls: Notes on a Queer South Asian Planet*, in *ASIAN-AMERICAN SEXUALITIES* 119 (Russell Leong ed., 1996); Martin F. Manalansan IV, *In the Shadows of Stonewall*, 2 GLQ: J. LESBIAN & GAY STUD. 425 (1995); Sonia Otalvaro-Hormillosa, *The Homeless Diaspora of Queer Asian Americans*, 26 SOC. JUST. 103 (1999); Puar, *supra* note 39.

perfectly scripted, confluence of moments—a deeply personal connection to the lesbian and gay civil rights struggles that had begun to take hold—that compelled SALGA’s repeated requests in the 1990s to march at the India Day parade. Far more was at stake for SALGA and its progressive participants than simply the inclusion of a queer group into a parade. There were two audiences for what SALGA was doing.

On one hand, SALGA sought to challenge the ways in which a particular sector of the Indian immigrant population—conservative, Hindu, patriarchal, heteronormative—framed themselves as representative of the Indian community writ large.⁵² As Svati Shah explains, back in the early 1990s, the FIA explained its refusal of SALGA’s request by claiming that “homosexuality does not exist in India,” suggesting that the group’s “participation would not accurately depict the reality of Indian communities.”⁵³ At that time, then, SALGA’s inclusion in the parade was about redefining these political scripts, by insisting on other ways of defining and understanding community, culture, and affiliation, outside of a logic of religious nationalism. Shah writes, “[i]f SALGA’s exclusion was emblematic of the ways in which the Indian Right had attempted to dictate a unilateral notion of ‘authentic’ Indian culture, SALGA’s participation represented the undeniable existence of the life that exists outside the bounds of that representation.”⁵⁴

The second audience, however, involved a certain puncturing of the conventional image of the “gay” citizen—the largely white, upper-class image of the gay community in the United States. Queer South Asian activists drew for inspiration, not purely from the mainstream U.S. gay and lesbian civil rights movement, with all of its marginalization of issues of class and race—but on a broader, transnational platform that placed a spectrum of issues of international disenfranchisement on the table, whether they involved race, national origin, religion, class, AIDS, or sexuality. By enabling SALGA’s overall mission to preface these concerns alongside other issues of sexual orientation, SALGA, along with other groups, articulated a profound divergence with more

52. Up until that point, according to author Madhulika Khandelwal, the FIA had largely embraced a far more nationalist, upper-class platform. It had regarded the growing progressive South Asian movement as a minor discomfort, but had still allowed Sakhi, a feminist group, to take part in its celebration. But in 1995, it inexplicably refused both organizations’ requests on the grounds that “South Asian”—identified groups had no place at a parade that was meant to celebrate Indian independence alone. See MADHULIKA S. KHANDELWAL, *BECOMING AMERICAN, BEING INDIAN: AN IMMIGRANT COMMUNITY IN NEW YORK* 176–77 (2002).

53. Shah, *supra* note 2 (internal quotations omitted).

54. *Id.*

mainstream (but certainly not all) gay and lesbian civil rights organizations in the United States.⁵⁵

As these two audiences demonstrate, the sort of compartmentalization that is required to build a constituency among gay- or lesbian-identified people also limits it in important ways as well.⁵⁶ Especially for queer people of color, the prominence of a single model—are you in or are you out?—makes it more difficult to negotiate ways of thinking about sexualities that are compatible with the various subcultures of family, neighborhood, ethnicity, and culture.⁵⁷ Yet this difficulty can also be a source of fertile possibilities, as these cultural hybridities enable a person to belong to a variety of different communities—a mainstream host culture, a diasporic community, a dominant queer community, and a diasporic LGBT community—simultaneously challenging the stereotypes associated with each one.⁵⁸ As an Asian American activist has written:

We who occupy the interstices—whose very lives contain disparate selves—are, of necessity, at home among various groups that know little of each other . . . We have a deep hunger for a place in which we can be, at one and the same time, whole, and part of something larger than ourselves.⁵⁹

Ten or more years after these words were written, the concept of the diaspora still provides a great deal of fruitful terrain for scholars writing on the margins of identity and globalization.

The notion of a queer diaspora captures an oppositional set of themes stemming from the intersection of transnationality and sexuality, one involving homogenization and another involving differentiation. The homogenization theme, one might say, involves the idea of a “gay diaspora,” the idea that LGBT individuals stem from a place that is more akin to sameness than difference, and thus circulate throughout the world with cultural or kinship ties to one another. Lawrence Schimel writes of the idea of a “queer cultural homeland,” such as San Francisco’s Castro, New York City’s Greenwich Village, and so on, noting “our visits feel like a return home, even if we’ve never set foot there before.”⁶⁰ The

55. See *id.*

56. Sinfield, *supra* note 40, at 272.

57. See *id.*

58. See Ahmet Atay, *Identities in Motion: Cyberspace and Diasporic Queer Male Bodies in the Context of Globalization* 48 (May 4, 2009) (unpublished Ph.D. dissertation, Southern Illinois University) (on file with UCLA Law Review).

59. Karin Aguilar San Juan, *Going Home: Enacting Justice in Queer Asian America*, in *Q&A: QUEER IN ASIAN AMERICA*, *supra* note 39, at 25, 37.

60. Lawrence Schimel, *Diaspora, Sweet Diaspora: Queer Culture to Post-Zionist Jewish Identity*, in *POMOSEXUALS: CHALLENGING ASSUMPTIONS ABOUT GENDER AND SEXUALITY* 163 (Carol Queen & Lawrence Schimel eds., 1997).

virtue of being able to be out in the world and connected through magazines, films, and the internet has thus enabled a powerful transnationalism.⁶¹ Consider, again, Simon Watney on this point, who argues relatedly that the queer diasporic experience is informed by travel and tourism:

Few heterosexuals can imagine the sense of relief and safety which a gay man or lesbian finds in a gay bar or a dyke bar in a strange city in a foreign country. Even if one cannot speak the local language, we feel a sense of identification. Besides, we generally like meeting one another, learning about what is happening to people 'like us' from other parts of the world.⁶²

However, although Watney's identification of a certain queer connection among individuals in other countries is certainly true, it is also important to note, as other scholars have, that "[t]he experience of travel Watney is alluding to is most often than not founded on privilege and, for white Euro-American males, freedom of movement."⁶³ The pleasure-seeking theme expressed, in part, by Watney can often obscure how racialized difference marks those who are "traveled upon," and can miss the danger of economic and sexual exploitation that gay tourism sometimes causes.⁶⁴

Watney's suggestion of LGBT sameness, therefore, can also be answered by a critique that highlights the distributive implications that sexual tourism raises. In turn, these critiques of Watney give rise to a secondary theme of differentiation, which suggests that the experiences of LGBT individuals elsewhere in the globe may diverge greatly from those that Watney describes. Curiously, Watney is not completely blind to cultural difference; elsewhere, he observes that the AIDS epidemic has brought "into being new articulate groupings of men" in countries like India and the Philippines, "where homosexual acts were not related to notions of identity before the epidemic."⁶⁵ He continues:

This will lead to still further diasporic diversity. For example, it is clear that there is no single answer to such questions as how one thinks of oneself if one is Indian, British, and gay. One man will identify as a black man, another as a gay Asian, and a third may reject the validity of the category gay altogether. There can be no easy resolution to such issues, nor is resolution required.⁶⁶

61. See *id.* at 172; see also Fortier, 'Coming Home', *supra* note 17, at 411–12.

62. See the excellent discussion of this quote in Fortier, *Queer Diaspora*, *supra* note 17, at 186–87 (quoting Watney).

63. *Id.* at 187.

64. See *id.*; SARA AHMED, STRANGE ENCOUNTERS: EMBODIED OTHERS IN POST-COLONIALITY (2000); Jasbir Kaur Puar, *Queer Tourism: Introduction*, 8 GLQ: J. LESBIAN & GAY STUD. 1 (2002).

65. Fortier, *Queer Diaspora*, *supra* note 17, at 187 (quoting Watney).

66. *Id.*

Watney notes that “most of our greatest challenges today” are caused by the conflict between the gay imperative to think of its community as “unified and homogeneous,” versus the “constantly changing complexity of gay culture as it is lived.”⁶⁷ Watney nicely captures the diversity of subjectivities and identity formations that exist throughout the world. But what does Watney mean by “our challenges”? Who is included in “our,” and why are they challenges at all, rather than opportunities for forging more diversity? As Anne-Marie Fortier comments,

Watney’s travels towards other men “like him” suggests that they must stay in place if their difference is to be apprehended and recirculated within the new diasporic horizon to create “further diasporic diversity” “Queer diaspora” is put to work here as an image that is possible by concealing the relations of inequality and power that are an inherent part of it. Watney’s “our” reinstates the distance between “us” and “them” within his diasporic imagination, where differences remain fixed into place and simply add on to each other within the gradual diversification of diaspora.⁶⁸

Fortier concludes by arguing for a need for further interrogation of the politics that surround the formation of a transnational diasporic community.⁶⁹

As some of my prior work has argued, the typical concepts of gay and lesbian do not always capture the complexity of queer identity formation, particularly in cultures with a strong sense of separation between one’s sexual behavior and one’s outward political or sexual identity.⁷⁰ Thus, by emphasizing a particularized, singular idea of lesbian and gay identity, Western activists often miss some of the more complicated hybridities and identity formations within same-sex sexualities, particularly (but not exclusively) in the developing world.⁷¹ The public health debates surrounding global efforts at AIDS prevention have provided a fascinating and largely overlooked arena in which dominant Western paradigms of gay identity have been soundly rejected in favor of broader, more inclusive strategies of public health intervention that focus on behavior and conduct. In stark contrast to the United States’ focus on identity as a mode of community building, in India, for example, some men who have sex with men

67. *Id.* (internal quotations omitted).

68. *Id.* at 187–88.

69. *Id.*

70. Sonia Katyal, *Exporting Identity*, 14 *YALE J.L. & FEMINISM* 97, 153 (2002).

71. For example, in India, several prominent activists have concluded that the language of identities and Western constructions of sexuality can be markedly inappropriate in delivering culturally specific HIV/AIDS health services to some men in South Asia. Instead of the term “gay” or “homosexual,” public health activists have opted to use the term “men who have sex with men” (MSM). *Id.*; Sonia Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 *WM. & MARY L. REV.* 1429 (2006).

(MSM) may adopt instead a variety of indigenous terms and identities to describe particular sexual behaviors or none at all.⁷²

A brief glimpse at this context therefore exposes some limitations in translating gay identity paradigms to cultures that lack the same assumptions regarding the centrality of sexuality to personhood as in the West. Nevertheless, popular discussions of sexuality in Asia and elsewhere tend to suggest the West as the source of sexual modernity, where “queer Asia has tended to be recognized to the extent that it articulates with first world metropolises, for example, through queer life in diasporic communities, or through northern consumption of select cultural products from the global south.”⁷³ At times, LGBT advocates stress the “homophobia of third-world traditions,” implying that “modernization will make the non-Western world more liberated for queers.”⁷⁴ As scholar Ara Wilson argues, “Even when they are critical of Western dominance in the world, as is the case with many nationalists and sexual-rights advocates, this interpretation recapitulates Western hegemony, by locating the origin and agency of modern queer life squarely in the West.”⁷⁵ The logic of import/export often informs these discussions, suggesting that legible identities are derived from Western concepts of sexuality.

Again, however, the concept of a diaspora may be useful in navigating these conflicts. First, the idea of a queer diaspora captures the broad connections forged between LGBT-identified individuals across jurisdictions between North and South, East and West, helping to shed light on some of the limitations of a singular global model of gay or lesbian identity. Second, it also suggests the possibility that each locality offers its own decentralized interpretation of those connections as well, sometimes even in opposition to the dominant categories of gay and lesbian identity. I quote Watney’s above passage at length, for example,

72. The proliferation of competing identities demonstrates the difference between the concept of a fixed and stable perception of gay identity and the more fluid sexuality of many men and women throughout the world. As a prominent public health activist describes:

In India, for the majority of men who have sex with men, personal identity is not seen as the main [] issue. Behaviours are constructed within cultural frameworks of compulsory marriage and procreation, in terms of homosociability, lack of privacy, extended and joint family networks and so on. What we have then is a range of sexualities, a range of homosexualities and homosexual behaviours, a range of identities that very often are very differently constructed than in the West.

Kaytal, *supra* note 70, at 154–55.

73. Ara Wilson, *Queering Asia*, 14 INTERSECTIONS: GENDER, HIST. & CULTURE IN THE ASIAN CONTEXT at ¶ 3 (2006), available at <http://intersections.anu.edu.au/issue14/wilson.html>.

74. *Id.* ¶ 20.

75. *Id.* See also Inderpal Grewal & Caren Kaplan, *Global Identities: Theorizing Transnational Studies of Sexuality*, 7 GLQ 663, 669 (2001) (“[T]he United States and Europe are figured as modern and thus as the sites of progressive social movements, while other parts of the world are presumed to be traditional, especially in regard to sexuality.”).

because it captures, almost perfectly, the themes of universalization and minoritization that characterize the varied interpretations within a queer diaspora. Watney's observation also partly hints at the tensions that animate the secondary main theme of differentiation that characterizes SALGA's distant stance from the mainstream American gay and lesbian movement, as I discuss further below.

At times, what emerges from the constellation of transnational loyalties between those in the United States and India is also the birth of a diasporic community with experiences that recognize, at times, the need to challenge the typical progression from "in" to "out" that characterizes so many gay and lesbian narratives. Consider the reality faced by many SALGA members, who, due to immigration concerns, carefully separated their public South Asian faces from their private sexual and social identities.⁷⁶ According to one activist, Grace Poore, for many South Asian queer individuals, their legal status as immigrants circumscribed their political visibility.⁷⁷ Poore explains, "We understand why some of us never march on the outside of Gay Pride contingents in case of cameras. Why many of us fear going into bars in case of a raid. Why we only do radio interviews, never have our photographs taken."⁷⁸ Although Poore, like many others, was able to forge a means of being politically active despite the fear of visibility, many of these adaptations "remain liable to misinterpretation by individuals and activists who privilege only one form of 'being out,' and see other forms as betrayal, inauthenticity, or lack of developed political consciousness."⁷⁹

Precisely to avoid this danger, communities and subcultures, like SALGA, that embrace other narratives of sexual diversity can play a key role in constructing alternative transnational loyalties. The concept of a queer diaspora, as one example of this trend, enables the creation and study of alternative identities and communities that not only demonstrate different forms of subjectivity, culture, citizenship, and loyalty, but also, in some ways, bear "little resemblance to the universalized 'gay' identity imagined within a Eurocentric gay imaginary."⁸⁰ Within this narrative, for example, a queer diaspora tends to rewrite colonial constructions of third world sexualities, demonstrating that they are not "anterior, premodern and in need of Western political development," as

76. Nayan Shah, *Sexuality, Identity, and History*, in *Q&A: QUEER IN ASIAN AMERICA* *supra* note 39, at 147.

77. Luibhéid, *supra* note 9, at xxviii (quoting Grace Poore).

78. *Id.*

79. *Id.* ("If I couldn't sign petitions, I distributed them; if I couldn't lead meetings, I organized them; if I couldn't do civil disobedience, I wrote," Poore explained.)

80. GAYATRI GOPINATH, *IMPOSSIBLE DESIRES: QUEER DIASPORAS AND SOUTH ASIAN PUBLIC CULTURES* 12 (2005).

Gayatri Gopinath points out, but rather reconstitute conceptions of nationhood, identity, and citizenship.⁸¹

The architecture of the queer diaspora thus extends from the private sphere of the home to the global, public sphere of the transnational, reworking the idea of home and homeland in the process. Indeed, within the diaspora, particularly the queer diaspora, members are constantly rethinking—and reconstituting—their relationship to the concept of home.⁸² According to Martin Manalansan, the everyday is a crucial site that enables queers in the diaspora to both create new selves and forge new relationships among marginalized groups.⁸³ “If home, privacy and domesticity are vexed locations for queer subjects, particularly those in the diaspora, then it follows that queers’ struggles towards finding, building, remembering, and settling into a home, as well as the displacement brought about by migration,” create a new sphere of connection, belonging, and loyalty.⁸⁴

Indeed, the same configuration of themes—crossing over, going back and forth between the domestic and the diasporic—in the spheres of gender, sexuality, and nation was also at work in the national upheaval following Deepa Mehta’s 1996 film, *Fire*, which depicted two Indian sisters-in-law in a romantic relationship.⁸⁵ Yet while the film marked a milestone for being one of the first depictions of a romantic same-sex relationship in Indian cinema, it also marked a milestone in terms of how the diaspora—specifically the queer diaspora—embraced both the film and the underlying controversy that ensued. When the film was finally released throughout India, dozens of right-wing activists stormed theatres, causing riots and claiming publicly that lesbianism was not only an affront to Hinduism, but also “alien to Indian culture.”⁸⁶

Yet *Fire* also sparked the emergence of a politicized queer diaspora. Internationally, legally, and culturally, queer linkages between North and South, East and West, first and second generation immigrants, began to grow and blossom, culminating in a high-profile series of political demonstrations at the Indian consulate in 1998 in New York City.⁸⁷ Those protests, one might say, marked the beginning of a very public showing of unity between events that unfolded

81. *Id.*

82. See Eng, *supra* note 51; Fortier, ‘*Coming Home*’, *supra* note 17.

83. See Martin F. Manalansan IV, *Migrancy, Modernity, Mobility: Quotidian Struggles and Queer Diasporic Intimacy*, in *QUEER MIGRATIONS*, *supra* note 9, at 147.

84. Manalansan has called this sphere “diasporic intimacy.” See *id.* at 148.

85. See Gopinath, *supra* note 2, at 149; see also Madhavi Sunder, *Intellectual Property and Identity Politics: Playing With Fire*, 4 J. GENDER RACE & JUST. 69 (2000); Jigna Desai, *Homo on the Range*, 20 SOC. TEXT 65 (2002).

86. See Gopinath, *supra* note 2, at 150.

87. See Shah, *supra* note 2.

in South Asia and those that happened in the United States. At the time, SALGA, along with a coalition of other progressive groups located in New York, organized a protest in solidarity before the New York Indian consulate to argue that “secularism, freedom of expression, and freedom of choice are politically and inextricably linked, and that the film should be released” as a show of respect for freedom of speech and the life choices made by the film’s main characters.⁸⁸

For many involved in those demonstrations, it was a moment that marked the birth of a new political activism and solidarity with the events that unfolded within South Asia. As Gopinath observed, the events in India regarding *Fire* and in the United States regarding the India Day parade were deeply connected to one another, as the FIA essentially reconstituted in the diaspora the same kind of nationalism that was at work in the public debates in India about the film. And, just as we saw in the India Day parade, a show of nationalism by the FIA was met with an equally powerful show of cosmopolitanism by SALGA. Thus, when the *Fire* protests and the India and Pakistan Day parades came along, they offered something different—an unequivocal public opportunity for queer South Asians to demand attention and recognition, front and center, from a community that had long refused to acknowledge their existence publicly.

In the 1990s, the very idea of a South Asian gay or lesbian group demanding inclusion in a parade, let alone a political movement, probably seemed outlandish to the average South Asian. “I don’t mind the gays,” comprised an often-mentioned refrain. “But why must they be so public about it?” However, for many gay or lesbian South Asians, it quickly seemed that they had no choice; in the early 1990s, AIDS began to ravage communities, wreaking havoc on the public and private lives of queer men and women. Further, “coming out” as a queer South Asian enabled entrance into a truly global community—those who were diasporic South Asians mixed with folks who lived in India, London, Pakistan, and elsewhere, sharing tales of romance, political obstacles, and personal challenges over phones, emails, chat rooms, and listservs.⁸⁹ Watching *My Beautiful Laundrette*, reading *Funny Boy*, Pratibha Parmar’s *Khush*, or the countless other iconic (indeed, ironic) moments in which we watched LGBT identities take front and center in a non-Western platform—what was unfolding was the creation of a new world of transnational possibility amidst sexual diversity.

88. *Id.*

89. For examples of this trend, see the magazine *Trikone* (covering LGBT South Asians in the diaspora and throughout the globe) at <http://www.trikone.org/index.shtml>.

Those moments awoke something deep within, a connection to those based in India and throughout South Asia that is hard to articulate, and yet captures the emotional—and political—content of transnational queer citizenship. Many queer South Asians all over the world were deeply affected when told of the epidemic of lesbian suicides in rural India and of sordid tales of police corruption in the face of sodomy laws.⁹⁰ Similarly, stories circulated in the United States of lesbian and gay immigrants living in terror of deportation because their partnerships were not recognized by the law.⁹¹ Taken together, these moments underscored precisely why queer South Asians joined together, year after year, to demand inclusion in the India Day parade in New York City and to demand visibility in the gay pride parades at the same time.

In some ways, the notion of transnational cultural connections is best exemplified by the web. *Time* magazine reported in March of 2001 that “in the past five years the Internet has done to Asia’s gay and lesbian communities what Stonewall enabled in the West over the past twenty-five years.”⁹² Yet when scholars express concern over whether urban, middle-class, queer India will reflect or imitate Western constructions or will instead construct different identities, it is worth noting that cyberspace offers a tantalizing array of possibilities to both reconstruct and reimagine the self.⁹³ Scholars have written about the possibility for cyberspace to open up possibilities for the queer diaspora to redefine notions of home, belonging, and place, and to understand their own cultural identity formation.⁹⁴ One scholar writes that “Internet technologies become a haven for diasporic queer bodies to present themselves, to articulate their identity-related issues, and create homes-away-from-home by associating with images and sounds, and forming an identity based on their roots in ideas, images, and sounds rather than actual geographical faces.”⁹⁵

Thus, a reframing of home and of intimacy enables us to look at how diasporic queers confront both the public (legal) regulation of immigration, along

90. See PEOPLE’S UNION FOR CIVIL LIBERTIES-KARNATAKA, HUMAN RIGHTS VIOLATIONS AGAINST SEXUALITY MINORITIES IN INDIA: A PUCL-K FACT-FINDING REPORT ABOUT BANGALORE (2001); Nick Harvey, *The Fire Inside*, NEW INTERNATIONALIST, Oct. 1, 2008, <http://www.newint.org/features/special/2008/10/01/fire-inside>.

91. For more information, see detailed reports on the Immigration Equality website at <http://www.immigrationequality.org/template3.php?pageid=1>.

92. See John (Song Pae) Cho, Book Review, 14 INTERSECTIONS: GENDER HISTORY AND CULTURE IN THE ASIAN CONTEXT ¶ 1 (2006), http://intersections.anu.edu.au/issue14/cho_review.html (reviewing MOBILE CULTURES: NEW MEDIA IN QUEER ASIA (2003)).

93. Rahul Mitra & Radhika Gajjala, *Queer Blogging in Indian Digital Diasporas: A Dialogic Encounter*, 23 J. COMM. INQUIRY 400, 408 (quoting Khan).

94. See Atay, *supra* note 58, at 6.

95. *Id.* at 59.

with the private, domestic areas of the home.⁹⁶ “Diasporic queers in particular refuse the assimilative framework,” explains Manalansan; “they not so much carry with them the baggage of tradition but rather are in constant negotiation [S]elfhood and belonging are framed in the process of cultural translation and transformation.”⁹⁷ Here, as the Web demonstrates, visual and digital representations of home can substitute for the actual place.⁹⁸

Even outside of a diaspora, far from imitating or personifying images of LGBT Western life, Tom Boellerstorff, in his work with sexual minorities in Indonesia, describes a world where gay and lesbian subjectivities (far from replicating a “confessional” emphasis on “coming out”), marry members of the opposite sex and create normative nuclear families that allow these individuals to be “same but different” to others.⁹⁹ Boellerstorff masterfully exhorts scholars to think beyond the binaries of import-export, authentic-inauthentic, or indigenous-Western import, arguing that these binaries fail to capture the more nuanced reworkings individuals create with respect to the West. Instead, Boellerstorff argues that sexual minorities in Indonesia extract images of gay and lesbian existence in the West, but then develop their own subjectivities, a process that he calls “dubbing culture,” which has been described as a partial incorporation of the self into another discourse that produces something other than a failed translation, but instead produces a “new similitude, a new ‘original’ if you will, that provides space for authentically national, Indonesian gay and *lesbi* subjectivities.”¹⁰⁰ For Boellerstorff, the concept of dubbing enabled him to traverse beyond the impasse that tends to be created by the perception of LGBT movements as mimics or “puppets of [Western] globalization.”¹⁰¹

96. See Manalansan, *supra* note 83.

97. See *id.* at 155. Manalansan details the touching story of an undocumented queer Filipino immigrant named Alden, detailing his vexed relationship to immigration law, as well as to his construction of home, reporting:

His apartment consists of two parts or sides, the American side with the poster [by Herb Ritts of a naked man and sofa] and the Filipino side with the altar and family pictures. He said that by crossing the room, he traverses two boundaries of his two selves. “This part of the apartment is like the Philippines. So I only need to sashay to the other side, and I am back in America. This is how I feel, always going back and forth even if I have not actually gone home.”

Id. at 151.

98. *Id.*

99. See THOMAS BOELLERSTORFF, *THE GAY ARCHIPELAGO: SEXUALITY AND NATION IN INDONESIA* (2005); Philip Kitley, Book Review, 14 *INTERSECTIONS: GENDER HISTORY AND CULTURE IN THE ASIAN CONTEXT* ¶ 7 (2006), http://intersections.anu.edu.au/issue14/kitley_review.htm (reviewing *THE GAY ARCHIPELAGO: SEXUALITY AND NATION IN INDONESIA* (2005)).

100. See *id.* ¶ 3, 5.

101. The phrase “dubbing culture” comes from the idea of providing an alternative soundtrack to a film or television broadcast, usually used in connection with the idea of translating something from another language. See Tom Boellerstorff, *Dubbing Culture: Indonesia Gay and Lesbi Subjectivities and Ethnography in*

The idea of dubbing, for Boellerstorff, represents a sort of dialogical reconstitution of preexisting identities and discourses; it involves an alienation of an element and then a reworking of that element in a new context.¹⁰² As Boellerstorff writes, “[t]o ‘dub’ a discourse is neither to parrot it verbatim nor to compose an entirely new script. It is to hold together cultural logics without resolving them into a unitary whole.”¹⁰³ Consider his observations:

[L]esbi and gay Indonesians “dub” ostensibly “Western” sexual subjectivities. Like a dub, the fusion remains a juxtaposition; the seams show. “Speech” and “gesture” never perfectly match . . . there is no “real” version underneath, where everything fits. You can close your eyes and hear perfect speech or mute the sound and see perfect gesture, but no original unites the two in the dubbed production. This may not present the self with an unlivable contradiction, however, since in dubbing one is not invested in the originary but, rather, the awkward fusion. Disjuncture is at the heart of the dub; there is no prior state of pure synchrony and no simple conversion to another way of being.¹⁰⁴

Sexual minorities in Indonesia, especially the *gay* and *lesbi* variety, Boellerstorff writes, view themselves as part of a transnational imagined community, “as one ‘island’ in a global archipelago of gay and lesbian persons,”¹⁰⁵ one that offers a transnational reworking, rather than an imitation, of classic LGBT models from the West. This idea is not limited to Indonesia and often plays out within the diaspora as well. Another study reports, for example, drawing on Boellerstorff, that the LGBT Indian blogspace has enabled a balancing of the queer sexual self with one’s Indian identity, explaining that LGBT bloggers, like film dubbers, tend to demonstrate a kind of “dubbing” of Western notions of gay and lesbian identity: “They do not regard themselves as a ‘rerun’ of the West; they view themselves as different, but this difference is not seen to create a chasm of incommensurability” in understanding cultural sameness and difference.¹⁰⁶

In sum, not only does the concept of a “queer diaspora” enable us to challenge the fixedness of concepts like the nation, home, and homeland, but it also challenges the common identities we attach to notions like gay or lesbian, by introducing different identities—and economies—that both destabilize the

an *Already Globalized World*, 30 AM. ETHNOLOGIST 225, 225, 236 (2003) (quoting Oxford English Dictionary).

102. *Id.* at 237.

103. *Id.* at 226.

104. *Id.* at 236.

105. *Id.* at 232.

106. Mitra & Gajjala, *supra* note 93 (quoting Tom Boellerstorff, *I Knew It Was Me: Mass Media, ‘Globalization,’ and Lesbian and Gay Indonesians*, in *MOBILE CULTURES: NEW MEDIA IN QUEER ASIA* 21, 36 (C. Berry et al. eds., 2003)).

normative concept of being Indian and the dominance of the singular identity that attaches to the image of being LGBT-identified.¹⁰⁷ Gopinath points out that the concept of a queer diaspora has enabled the formation of transnational networks of commerce and culture in forging alternative visions of community, home, and nation, offering a powerful critique of nationalism at the same time.¹⁰⁸ In doing so, these challenges tend to remake our notion of nation and citizen by redrawing the other and the outsider within a new transnational framework.¹⁰⁹ The flourishing of the queer diaspora has thus enabled queer connections between immigrants and the homeland, just as it enables a decentralized, localized interpretation of queerness altogether. Not only do these narratives demonstrate that we must view nation, diaspora, and citizenship as crucially connected, but we also must see how each reinforces, reimagines, and reconstitutes the other.

II. THE CONSTITUTIONAL DIASPORA: THE EMERGENCE OF CONSTITUTIONAL REGIONALISM

In the Introduction and in Part I, I highlighted some ways in which persons within the diaspora are able to traverse various boundaries and to craft particular forms of hybrid identities between the point of destination and the homeland. In similar ways, legal doctrines and legal agendas can also migrate to other jurisdictions, producing a variety of generative effects that can be either progressive or regressive in nature, depending on the context. They can also engender a revolution of constitutional borrowing across jurisdictions, giving rise to multiple doctrinal hybridities, as demonstrated by the *Lawrence v. Texas*¹¹⁰ and *Naz Foundation v. Government of NCT*¹¹¹ opinions.

In sum, the same themes that we examined above— notions of home, nation, the dyad between the domestic and the transnational, the theme of migration in the era of transient borders—are not just suitable in examining the transnational movement of peoples, but may also be appropriate in examining

107. Gopinath, *supra* note 2, at 150–51.

108. *Id.* at 159.

109. GOPINATH, *supra* note 80, at 11 (“A queer diasporic framework productively exploits the analogous relation between nation and diaspora on the one hand, and between heterosexuality and queerness on the other: in other words, queerness is to heterosexuality as the diaspora is to the nation. If within the heteronormative logic the queer is seen as the debased and inadequate copy of the heterosexual, so too is diaspora within nationalist logic positioned as the queer Other of the nation, its inauthentic imitation.”).

110. 539 U.S. 558 (2003).

111. (2010) Cri. L.J. (Del.) 94 (2009), (2009) 160 DLT 277, available at http://www.nazindia.org/judgement_377.pdf.

the circulation of legal principles as well. In the cases of postcolonial nations in particular, legal principles and doctrines also create complex hybridities when crossing borders and can vary widely in their treatment of human rights and constitutional freedoms. Indeed, the very law at issue in *Naz Foundation*—section 377, India’s antisodomy law—was the product of British colonization, an exportation that was enacted in a variety of colonies, and then, in the case of India, Singapore, and others, has persisted long after the demise of colonization.¹¹² As a historical matter, among the eighty states that have sodomy laws, over half of them, like India and Uganda, inherited them as a byproduct of British colonialism.¹¹³ For this reason, queer activists have often linked their efforts to overturn section 377 to the legacy of Indian independence.¹¹⁴

Earlier, I suggested that the dominant theme of LGBT migration tends to offer a polarizing view of the United States and the West as a site of gay and lesbian liberation, often eliding the complexities faced by many immigrants and people of color, who navigate a complex intersectionality between race, citizenship, and sexual orientation.¹¹⁵ The same trend translates to the realm of law, where, at times, non-Western jurisdictions are painted as premodern and constitutionally less developed, in comparison to the West. The migrations of legal principles, particularly, as they often occur, from Western to non-Western jurisdictions, also tends to facilitate a similar kind of simplistic polarity that at times offers the West as analytically and constitutionally more sophisticated from other, non-Western jurisdictions, thus suggesting that Western legal principles are deserving of an unparalleled level of exportation.

For this reason, it is important to see how the notion of a constitutional diaspora can engender further legal developments that also help to deconstruct the bipolar divide between East and West, North and South, that often complicates the discussions surrounding gay and lesbian equality. In an important article, Teemu Ruskola exhorted the legal scholarly community to explore the ways in which the concepts of the Orient as well as the West have been produced through legal rhetoric.¹¹⁶ In his article, drawing on China, Ruskola

112. See, e.g., Douglas E. Sanders, *377 and the Unnatural Afterlife of British Colonialism in Asia*, 4 *ASIAN J. COMP. L.* 1 (2009).

113. See HUMAN RIGHTS WATCH, *THIS ALIEN LEGACY: THE ORIGINS OF “SODOMY” LAWS IN BRITISH COLONIALISM* (2008); see also Sanders, *supra* note 112.

114. On the sixty-first anniversary of India’s independence in 2008, for example, section 377’s opponents observed, although “India had got its independence from the British on this date in 1947,” for them, “queer Indians were still bound by a British Raj law,” calling section 377 an “abhorrent alien legacy . . . that should have left our shores when the British did.” HUMAN RIGHTS WATCH, *supra* note 113, at 2.

115. PUAR, *TERRORIST ASSEMBLAGES*, *supra* note 11.

116. See Teemu Ruskola, *Legal Orientalism*, 101 *MICH. L. REV.* 179, 193 (2002).

points out powerfully how neither Western nor Chinese law exists in isolation from the other, and how concepts of orientalism persist throughout legal frameworks, even in a postcolonial era.

One can easily apply Ruskola's insights to the way that the West has imagined LGBT rights in the developing world and the way that LGBT citizens in the developing world imagine the West. Those in the West, at times, tend to produce a vision of non-Western sexualities and identities as somehow far more limited or premodern in nature because they may, at times, display variations from the outward, politically expressive assertion of a fixed "gay" or "lesbian" identity.¹¹⁷ Yet these opinions, as I suggested in Part I, overlook the very way in which cultural variations can offer new constructions and identities that simply do not fit the in/out binary that characterizes Western gay and lesbian identity formations, and that may offer powerful legal insights regarding the limits of the classic antidiscrimination model.¹¹⁸ And the diaspora, too, plays a critical role, both in mediating these encounters, and in creating an alternative overlapping space that explores and transcends these intersections—whether it involves the migration of peoples or principles.

As I suggest below, the conventional bipolarity between North and South, East and West, often unwittingly adds to the perception, shared by many outside of the West, that gay and lesbian movements are the product of Western decadence. For example, President Yoweri Museveni of Uganda, who has campaigned against LGBT rights for over a decade, has called homosexuality "a decadent culture . . . being passed by Western nations," and has warned, "It is a danger not only to the [Christian] believers but to the whole of Africa."¹¹⁹ Those who argue that advocates of sexual equality for sexual minorities are attempting to impose Western values, another form of colonialism in the global South, also, one might argue, tend to implicitly engage in a kind of inverse 'orientalism' that describes homosexuality as a Western trait imported to Asia.¹²⁰ Not only do such observations drastically overstate the suggestion of gay decadence and liberation in the West, but they invisibilize the local, grassroots reality of LGBT existences across the world that are, most often, not a product of Westernization, but of the universality of same-sex desires across cultures, time,

117. Katyal, *supra* note 70.

118. *Id.*

119. HUMAN RIGHTS WATCH, *supra* note 113, at 6.

120. See Carol Johnson, *Analysing the Politics of Same-Sex Issues in a Comparative Perspective: The Strange Similarities Between John Howard and Mahathir Mohamad*, INTERSECTIONS: GENDER, HISTORY & CULTURE IN THE ASIAN CONTEXT, Nov. 2006, ¶ 14, <http://intersections.anu.edu.au/issue14/johnson.html> (quoting BADEN OFFORD, HOMOSEXUAL RIGHTS AS HUMAN RIGHTS: ACTIVISM IN INDONESIA, SINGAPORE, AND AUSTRALIA 45 (2003)).

and history. Moreover, as the example of Uganda illustrates,¹²¹ accounts that attribute homosexuality (or LGBT liberation) to the West overlook the growing influence of antigay activists who travel *from* the West to other nations in hopes of enacting further legislation. Not only are these groups extraordinarily powerful within the West, but their influence in advocating for a kind of constitutional *nonborrowing* of principles of LGBT equality is steadily growing outward, as I discuss further below.

At the same time, the legal orientalist trend towards such binaries identified by Ruskola also has repercussions for those of us *within* the West. Perhaps most importantly, polarizing accounts that focus on the primacy of the West in gay liberation struggles miss powerful opportunities to learn from other developments outside of the West in terms of imagining LGBT equality. Indeed, as I argue in the second Subpart of this Part, one might consider *Naz Foundation*, because of its heavy reliance on non-Western treatments of sexual orientation in law and culture, a jurisprudential emergence of a constitutional regionalism, signifying the development of a new direction in the regulation of sexuality in the global South. Thus, just as the rhetoric of nationalism may purify and excise a certain jurisdiction of tolerance of sexual minorities as it does in the India Day example described in Part I, nationalism can also operate in the opposite direction, creating opportunities for more inclusion, as the *Naz Foundation* opinion illustrates. In many ways, these possibilities—both between jurisdictions and within jurisdictions—represent the path of LGBT human rights issues in the future.¹²²

A. The Constitutional Diaspora of *Lawrence v. Texas*

Just as the diaspora of persons crosses both legal and geographical boundaries, *Lawrence*—as a decision, and as a constitutional text—engages in and produces its own type of constitutional borrowing as well. In citing foreign precedent from other Western nations in order to overturn the sodomy law in question, the *Lawrence* justices primarily desired to demonstrate that the multiple references in *Bowers v. Hardwick*¹²³ were outdated and failed to provide substantive guidance in overturning sodomy laws today. “The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction,” the Supreme Court explained,

121. As I discuss further, *infra* Part II.B.

122. Jeffrey A. Redding, *Human Rights and Homo-sexuals: The International Politics of Sexuality, Religion and Law*, 4 NW. J. INT'L HUM. RTS. 436 (2006).

123. 478 U.S. 186 (1986).

pointing to the Wolfenden Report, circulated in Britain, which recommended that sodomy laws be overturned and cited to several decisions of the European Court of Human Rights that had decided against sodomy laws.¹²⁴

Relying further on comparative constitutionalism, the Supreme Court observed that “[t]here has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent” than in those countries that rejected sodomy laws.¹²⁵ Instead, the Court noted that the right to engage in consensual sexual conduct is “an integral part of human freedom in many other countries.”¹²⁶ The majority then stated, “To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere.”

Lawrence’s somewhat cursory references to the wealth of foreign precedent that had already overturned sodomy laws (making the United States one of the last Western nations to do so) sparked perhaps the most dramatic constitutional dialogue of the previous decade, evoking a conflict between nationalism and cosmopolitanism that was loosely reminiscent of the issues raised in Part I. In a vociferous dissent, Justice Scalia warned that the Court’s recognition of other case law represented “dangerous dicta,” signaling the perilous potential that the Court might “impose foreign moods, fads, or fashions on Americans.”¹²⁷ In a different case, Justice Scalia declared, in classically nationalist rhetoric, that citing foreign precedent is “totally inappropriate as a means of establishing the fundamental beliefs of this Nation”¹²⁸ In dissenting on another occasion, he stated that “the practices of the ‘world community’” are irrelevant and expressed thankfulness that other nations and their conceptions of “justice are . . . not always those of our people.”¹²⁹

The constitutional borrowing that characterized the *Lawrence* decision has spawned vigorous debate, mounting passionate disagreement from the dissenting justices, as well as from members of Congress, blog writers, and members of the academy, in countless scholarly articles following the decision.¹³⁰ In 2005, two

124. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981)).

125. See Rex D. Glensy, *Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT’L L. 357, 440 (quoting *Lawrence*, 539 U.S. 558).

126. *Lawrence*, 539 U.S. at 573 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981)). See P.G. & J.H. v. United Kingdom, App. No. 00044787/98, ¶ 56 (Eur. Ct. H.R., Sept. 25, 2001); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (1993); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988).

127. *Lawrence*, 539 U.S. at 598–600.

128. *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J. dissenting).

129. *Atkins v. Virginia*, 536 U.S. 304, 347–48 (2002).

130. Many articles discuss the phenomenon of constitutional borrowing by the U.S. Supreme Court, in particular the 2003 symposium articles in the *International Journal of Constitutional Law*. See Barry Friedman & Cheryl Saunders, *Editors’ Introduction*, 1 INT’L J. CONST. L. 177 (2003); Wiktor Osiatynski,

members of Congress introduced resolutions declaring that “judicial determinations regarding the meaning of the Constitution in the United States should not be based on . . . [foreign precedent unless they] inform[ed] an understanding of the original meaning of the Constitution.”¹³¹ The same debate replayed itself in the blogosphere, compelling commentary from various blog writers, including Ann Althouse, Talk Left, Brian Leiter, Eugene Volokh, and Tim Wu, among others.¹³²

This Article does not intend to offer a reprise of those important debates, but I do want to draw attention to an additional layer of the phenomena of constitutional borrowing that might shed some light on its generative effects. Not only is the text of *Lawrence* an example of constitutional borrowing through its reliance on and citation of foreign sources within its text, but, as the discussion of the *Naz Foundation* decision in the third Subpart demonstrates, *Lawrence* also gave rise to its own generation of constitutional borrowing—

Paradoxes of Constitutional Borrowing, 1 INT'L. J. CONST. L. 244 (2003); Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L. J. CONST. L. 269 (2003); Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L. J. CONST. L. 296 (2003). See also CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & Albert J. Rosenthal eds., 1990); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 821–22 (1999); Jens C. Dammann, *The Role of Comparative Law in Statutory and Constitutional Interpretation*, 14 ST. THOMAS L. REV. 513, 522–23 (2002); David Fontana, *The Next Generation of Transnational/Domestic Constitutional Law Scholarship: A Reply to Professor Tushnet*, 38 LOY. L.A. L. REV. 445, 482 (2004); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 111 (2005); Samuel C. Kaplan, “Grab Bag of Principles” or Principled Grab Bag?: *The Constitutionalization of Common Law*, 49 S.C. L. REV. 463, 470 (1998); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 45 (2004); Michael Kirby, *Think Globally*, 4 GREEN BAG 2d 287, 291 (2001); Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640 (1999); Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353, 358 (2004); Diarmuid F. O'Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, Address Before the Institute of Advanced Legal Studies of the University of London (Oct. 11, 2004), in 80 NOTRE DAME L. REV. 1893 (2005); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006); Richard A. Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July–Aug. 2004 at 40; Matthew S. Raalf, Note, *A Sheep in Wolf's Clothing: Why the Debate Surrounding Comparative Constitutional Law Is Spectacularly Ordinary*, 73 FORDHAM L. REV. 1239, 1245 (2004); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69 (2004); Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, With Reference to Affirmative Action*, 36 CONN. L. REV. 649, 650 (2004); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Jeremy Waldron, *Foreign Law and Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005).

131. See Osmar J. Benvenuto, Note, *Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent*, 74 FORDHAM L. REV. 2695, 2698–99 (2006).

132. *Id.* at 2700 (listing citations).

creating a generative constitutional diaspora in the process, as the *Naz Foundation* opinion and others suggest.

The emergence of *Lawrence* compelled William Eskridge to hail that comparative constitutionalism is an “idea whose time has come.”¹³³ For Eskridge, the use of foreign legal precedent had both a persuasive and informative effect: First, foreign precedent provided a series of “normative focal points” that assisted American judges in evaluating the “consistency of sodomy laws with fundamental and shared constitutional principles,” and offering feedback about the potential harms of *Bowers*.¹³⁴ Second, the borrowing of foreign precedent also demonstrated a principle of “international comity,” signaling that the Court is attentive to the norms of other nations, and willing to show leadership on constitutional issues to the rest of the world.¹³⁵

Thus, by drawing from other jurisdictions, as well as by appropriating from the substance of particular doctrines within the United States, *Lawrence* represented a cosmopolitan amalgam of different influences. In this way, within *Lawrence*, we see the embodiment of a constitutional diaspora, a migration of foundational constitutional principles as well. Along such lines, Eskridge notes that the “cosmopolitan spirit of Justice Kennedy’s opinion . . . contrasts nicely with the whiff of xenophobia” in Scalia’s dissent.¹³⁶ For Eskridge, the opinion also demonstrated the notion of pluralism, the idea that such information not only persuades, but also informs justices of the consequences of continuing to exclude LGBT folks from equal citizenship. Eskridge writes:

The political experience of other countries is instructive for the United States, as Justice Kennedy implicitly recognized. Once gay people are accepted as decent citizens—as the Court did in *Romer v. Evans*—the private conduct that is characteristic of their intimate relations cannot be made a crime without some evidence of harm to third parties (at the very least). In this way, other countries are “laboratories” for political “experiments.” Once other countries have accorded gay people—or any other long-dispised or suppressed minority group—equal treatment without wrenching their pluralist systems, the price of denying gay people the same rights in the United States goes up and the arguments against equality grow shakier.¹³⁷

133. William N. Eskridge, Jr., *United States: Lawrence v. Texas and the Imperative of Comparative Constitutionalism*, 2 INT’L J. CONST. L. 555, 556 (2004).

134. *Id.* at 557.

135. *Id.*

136. *Id.* at 558.

137. *Id.* at 560.

The citation of foreign precedent in *Lawrence* necessarily expanded the domain of constitutional interpretation of longstanding principles like privacy and equality, but, in the process, it also enabled a reformation of those principles altogether. Along similar lines, in a powerful article, Nelson Tebbe and Robert Tsai defend the process of constitutional borrowing, which they argue has been a staple of constitutional decisionmaking for years.¹³⁸ Their argument is not limited merely to the *Lawrence*-ian debate about whether it is appropriate to borrow from other constitutional jurisdictions. Instead, they argue in favor not only of broadening the concept of borrowing, but also of expanding it to include the appropriation of underlying substantive principles as well, defending *Lawrence*'s practice of using the language of equality to inform and to define the Court's definition of liberty.¹³⁹

As Tebbe and Tsai suggest, a court can borrow principles across jurisdictions, or, in the case of liberty and equality in *Lawrence*, it can define principles like liberty by referencing the substantive language of equality. But while comparative constitutional interpretation yields a constitutional diaspora of principles, as I have suggested, those principles may also be limited by the weakness of their trajectory in the jurisdiction to which they are transplanted. In some of his analysis of constitutional borrowing, Sujit Choudhry, for example, points out that universalist claims of comparative constitutionalism, of the type that *Lawrence* demonstrates, inevitably reduce the task of judicial review to assessing specific rights-based claims, obscuring the inevitabilities of cultural difference.¹⁴⁰ Particularly when constitutional standards are derived from universalist international standards and human rights treaties, as is so often the case regarding the rights of sexual minorities, their transplantation may create institutional and interpretative problems between universalist standards and preexisting statutory or legislative principles.¹⁴¹ Indeed, as many scholars have noted, *Lawrence*'s carefully circumscribed language of privacy often limits consideration of some of the deeper issues that stem from equality.¹⁴² For example, as

138. See Nelson Tebbe & Robert Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010).

139. For example, in their discussion of *Lawrence*, the authors point out how the Court found that laws against sodomy violated the individual right to liberty, but based their findings principally on a notion of equality. The appropriation of equality, for Tebbe and Tsai, demonstrates a curious irony: "Despite formally refusing the equality rationale, the *Lawrence* Court nevertheless appropriated the rhetoric of equality" in its reformulation of liberty. *Id.* at 460. "Equality of treatment and the due process right to demand respect for conduct . . . are linked in important respects . . ." *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 575 (2003)).

140. Choudhry, *supra* note 130, at 834–35.

141. See Osiatynski, *supra* note 130, at 249.

142. Mary Anne Case, *Of "This" and "That" in Lawrence v. Texas*, 2003 SUP. CT. REV. 75; Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004). As David Eng and Teemu Ruskola have also suggested, the Court's focus on intimacy

both Katherine Franke and Mary Anne Case have insightfully pointed out, *Lawrence* lends itself to a type of liberty that is privatized, and therefore limits its protection to intimacy within the home, at the potential cost of a greater and more powerful recognition in public space. In other words, the *Lawrence* Court may have drawn from other jurisdictions and from the language of equality in its formation of liberty, but without a corresponding countermajoritarian commitment towards LGBT equality, either formal or otherwise, liberty remains forever circumscribed by these limitations, both within the United States, and perhaps in the jurisdictions where *Lawrence* is borrowed.

The crafting of a constitutional diaspora, just as I suggested in Part I with respect to a diaspora among peoples, allows for a space of connective possibility across jurisdictions, and it also gives rise to its own localized interpretations. *Lawrence*, in turn, concentrated on a realm of constitutional borrowing that relied on Western jurisprudence from Europe to reevaluate the constitutionality of sodomy laws, but its future trajectory may be limited by the fact that it is an opinion about privacy, rather than equality, laying the groundwork for other jurisdictions to transcend its limitations.

B. Uganda's Anti-Homosexuality Bill 2009

Post-*Lawrence* debates over constitutional borrowing seem to suggest, following Scalia's dissent, that opponents of gay rights must also oppose constitutional or legislative borrowing on some level. But the two can be too easily conflated, and it is important to separate an opposition to LGBT equality from the borrowing of legal principles. The need for this separation becomes especially pronounced in light of a powerful new trend of legal and statutory technical assistance across jurisdictions that stems from the growing role of American evangelicals within the global movement against LGBT equality. I would argue that this trend represents, indirectly, a new strain of legal technical assistance, one that stems, not from the borrowing of legal principles after *Lawrence*, but from the *nonborrowing*, or rejection of them, by major players in postcolonial states, specifically Uganda.¹⁴³ To analyze this position more fully, I

rather than the one-night-stand circumstances of the case tends to deemphasize the significance of the sexual act in favor of inscribing a particularized vision of "acceptable queer identity and lifestyle," suggesting "the Court and the Constitution 'will respect our sex lives, but on condition that our sex lives be respectable.'" See *id.* at 52 (quoting Teemu Ruskola, *Gay Rights Versus Queer Theory*, 23 SOC. TEXT 235, 239 (2005)).

143. In the case of *Lawrence* and the quest for LGBT equality in the United States, many countries might consider a foreign constitutional idea or institution and reject it outright based on the social conditions in the secondary context. See Osiatynski, *supra* note 130, at 250. Thus, "nonborrowing"—involving a refusal to adopt a foreign principle—can often illuminate resistance to the process of

draw from Kim Lane Scheppele's work on "aversive constitutionalism," arguing that part of what may have informed Uganda's vociferous antigay agenda stems from the desire, perhaps indirectly fed by *Lawrence's* outcome, to distinguish itself from the West generally, and from LGBT rights specifically.¹⁴⁴

In December 2009, the human rights world was startled to discover that Uganda had proposed executing its gay and lesbian citizens. The bill, titled the Anti-Homosexuality Bill 2009, is currently going through Uganda's parliament.¹⁴⁵ The bill threatens life imprisonment for acts ranging from "anything from sexual stimulation to simply 'touch[ing] another person with the intention of committing the act of homosexuality.'"¹⁴⁶ It criminalizes the "promotion of homosexuality" and punishes such acts with a steep fine, five to seven years imprisonment, or both.¹⁴⁷ Any person in authority who fails to report known violations of the law to the authorities also faces significant fines and up to three years in prison.¹⁴⁸ The bill offers the death penalty for "aggravated homosexuality," which is defined to include activity by HIV-positive people and by "serial offenders."¹⁴⁹ It also claims extraterritorial jurisdiction over Ugandans who violate its provisions while outside of the country.¹⁵⁰

The draconian aspects of the bill gave many people in the human rights community pause. But perhaps the bill's most shocking aspect was that it had

comparative constitutionalism regarding gay rights. See Leo Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT'L J. CONST. L. 196, 197 (2003).

144. See Scheppele, *supra* note 130.

145. Philip Webster, *Uganda Proposes Death Penalty for HIV Positive Gays*, TIMES (London), Nov. 28, 2009, available at <http://www.timesonline.co.uk/tol/news/world/africa/article6935558.ece>.

146. Previously, Uganda had a law on the books that offered life imprisonment for "carnal knowledge of any person against the order of nature"—a charge often used to persecute and to blackmail LGBT people. See International Gay & Lesbian Human Rights Commission, *Uganda: Arrests of Gay Men Have Begun*, Nov. 1, 1999, <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/125.html> (noting the impact of the bill). However, the new bill specifically penalizes "homosexuality."

147. Thus, the bill not only criminalizes conduct but also punishes, for the most part, any form of expression or advocacy around gay rights. In this way, both public expression and private acts are not only regulated, but prohibited. International Gay and Lesbian Human Rights Commission, *Uganda Action Alert: Dismiss the Anti-Homosexuality Bill*, Oct. 16, 2009, <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/globalactionalerts/989.html>.

148. As a reporter from *Time* magazine explained, in a secretive interview with a gay-identified doctor:

Thanks to a clause in the would-be law that punishes "failure to disclose the offense," anybody who heard the doctor's conversation [about homosexuality] could be locked up for failing to turn him in to the police. Even a reporter scribbling the doctor's words could be found to have "promoted homosexuality," an act punishable by five to seven years in prison.

Zoe Alsop, *Uganda's Anti-Gay Bill: Inspired by the U.S.*, TIME, Dec. 10, 2009, <http://www.time.com/time/world/article/0,8599,1946645,00.html>.

149. For more information on the bill, see International Gay and Lesbian Human Rights Commission, *Uganda Action Alert*, *supra* note 147.

150. *Id.*

an American genesis of sorts; it was partly inspired by a visit to Uganda, a few months before the bill was introduced, by a group of evangelicals who have become involved in the “ex-gay” movement in the United States.¹⁵¹ The theme of the gathering, according to Stephen Langa, the Ugandan organizer, was “the gay agenda—that whole hidden and dark agenda,” and its accompanying threats to the traditional African family. One American speaker, Scott Lively, wrote a book called *The Pink Swastika*, about the links between Nazism and a gay agenda for world domination.¹⁵² A conference attendee explained that the American speakers “underestimated the homophobia in Uganda” and “what it means to Africans when you speak about a certain group trying to destroy their children and their families.”¹⁵³ “When you speak like that,” he said, “Africans will fight to the death.”¹⁵⁴ A month after the conference ended, one of the Ugandan attendees introduced the infamous bill now before parliament.¹⁵⁵

Why is this story so important? Consider the observations made by one Episcopalian priest from Zambia, Reverend Kapya Kaoma, who noted: “The U.S. culture war have been exported to Africa.”¹⁵⁶ These debates, it seems, play into the homophobic nationalist discourse that suggests that the emergence of LGBT identity is a product of Western imperialism,¹⁵⁷ rendering LGBT movements in Uganda as somehow inauthentically African. Yet, as Kaoma’s statement suggests, the United States is far from being the exclusive location for migratory LGBT liberation, but instead represents just one site for the complex

151. Alsop, *supra* note 148. For more information, see the coverage of this topic by *The Rachel Maddow Show* (MSNBC television broadcast) Dec. 9, 2009, available at <http://www.msnbc.msn.com/id/26315908/vp/34354893>.

152. Other speakers from the United States included a self-described former gay man who leads “healing seminars” for converting gays to straights. Jeffrey Gettleman, *Americans’ Role Seen in Uganda Anti-Gay Push*, N.Y. TIMES, Jan. 4, 2010, at A1, available at <http://www.nytimes.com/2010/01/04/world/africa/04uganda.html>. Another American preacher, Rick Warren, author of the book *The Purpose-Driven Life*, was deeply involved in the politics and religion of Uganda, having hosted at Saddleback the very person who presented the proposed law, Martin Ssempe. In the United States, Warren famously made public statements in favor of Proposition 8, likening gay marriage to incest and polygamy. Faced with press scrutiny, Warren initially refused to denounce the Ugandan bill, claiming that “it is not my personal calling as a pastor in America to comment or interfere in the political process of other nations.” *The Rachel Maddow Show* (MSNBC television broadcast Dec. 10, 2009), available at <http://www.msnbc.msn.com/id/26315908/vp/34372297#34372297>. Finally, after facing national media attention, Warren changed his tune and recorded a strongly worded condemnation of the bill, calling it “unjust, extreme and un-Christian toward homosexuals.” See Howard Chua-Eoan, *Rick Warren Denounces Uganda’s Anti-Gay Bill*, TIME, Dec. 10, 2009, <http://www.time.com/time/world/article/0,8599,1946921,00.html>; Felicia Mann, *Ugandan Pastors Call for Apology From Rick Warren*, CHARISMA, Dec. 24, 2009, <http://www.charismamag.com/index.php/news/25760-ugandan-pastors-call-for-apology-from-rick-warren>.

153. Gettleman, *supra* note 152.

154. *Id.*

155. *Id.*

156. Alsop, *supra* note 148.

157. Wilson, *supra* note 73, ¶ 4.

political challenges to gay and lesbian equality. Thus, it is important to go beyond the common dualisms that we often see in discussions that surround sexuality—discussions of mainstream versus other, local versus global, First World versus Third World, tradition versus modernity.¹⁵⁸

One wonders, for example, if Scalia would extend his vociferous critique to the realm of borrowing of principles that the Ugandan example suggests. In fact, one might even argue that to some extent, a new generation—a diaspora—of both pro and antigay types of legal and technical assistance is beginning to take shape, as the Ugandan experience demonstrates. At this point, both the Ugandan example and the *Lawrence* opinion demonstrate that hybridities can emerge out of various legal transplantations, and these hybridities can compel either a broader or narrower view of antidiscrimination, depending on the circumstances of what is borrowed. The dynamic of borrowing itself does not always mean a complete transplantation. When ideas cross boundaries and settings, they compel the creation of hybridities that enable us to look back at the original text or idea and to reflect on how it can become transformed by its implantation. In turn, those localized interpretations can generate a successive constitutional diaspora in the process.

Kim Lane Scheppele, in her own work on comparative constitutionalism, has written of “aversive constitutionalism,” which she argues illuminates the more complicated process of defining a nation through the rejection of certain principles.¹⁵⁹ Scheppele explains:

While a rejected alternative may tell us *something*, the *aversive* alternatives, the ones that are so forcefully rejected that they cast their influence over the whole constitution-building effort, tell us more . . . This is because constitution builders often have a much stronger sense of what they *do not* want to adopt than what they do, a clearer vision of who and what they are *not* rather than who and what they *are*.¹⁶⁰

The idea of aversive constitutionalism, then, is to look backward, to criticize where other institutions made mistakes, and to incorporate the process of nation-making out of the rejection of particular possibilities.¹⁶¹

158. See Nishant Shahani, *After the Fire: India is Burning*, 15 GLQ 180 (2009). As Aihwa Ong points out (referring to the circulation of certain products), “[t]he dispersal of Coke, McDonald’s Restaurants, and American TV soap operas to villages in West Africa or to Cairo, Beijing, or Sydney is not bringing about a global cultural uniformity; rather, these products have had the effect of greatly increasing cultural diversity because of the ways in which they are interpreted and the way they acquire new meanings in local reception . . .” AIHWA ONG, FLEXIBLE CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY 10 (1999).

159. Scheppele, *supra* note 130, at 298.

160. *Id.*

161. *Id.* at 300.

In the case of Uganda's proposed legislation, as an example of this kind of trend, part of the subtext appeared to indirectly depict "authentic" Ugandan culture as averse to LGBT equality and the perception of LGBT existence as a Western influence; this particularistic position can also be linked to the belief that international human rights standards are forms of Western "moral imperialism."¹⁶² Yet, unusually, the perception of LGBT visibility throughout the West, coupled with a deep anticolonial sentiment, fueled a camaraderie between Western evangelists and Ugandan officials, both of which joined forces against gay rights, motivated by a cultural fusion of religious intolerance and anti-Western sentiments, respectively. In the case of Uganda, one might even argue that a kind of "nonborrowing" of *Lawrence* was also informed by a deeper "borrowing" of religious, cultural, and technical assistance from the American evangelical movement to depict "the gay agenda" in the West as a dangerous possibility in Uganda.¹⁶³

Typically, there have been two modes by which the presumption of non-Western LGBT sexuality as a product of Western influence can be challenged. One method, according to Ara Wilson, is recuperative, which points to the history of indigenous, nonheterosexual sexual practices throughout a particular history and culture.¹⁶⁴ By tracing local genealogies of same-sex desire, LGBT advocates are able to respond by showing the indigeneity of such histories and traditions. This process is particularly important in postcolonial environments, like Uganda, that face accusations of an LGBT identity as the product of Western influence. However, such practices can risk essentializing or erasing the complexity of same-sex desires throughout history in favor of documenting the existence of a gay or lesbian identity.¹⁶⁵ Consequently, while the project of recoding history carries a certain utility, one must be careful to avoid relabeling every piece of evidence of same-sex desire as gay or lesbian in nature, since there may be further cultural complexities that render these labels inadequate or limited.

162. See Osiatynski, *supra* note 130, at 261.

163. For example, consider the activities of Martin Ssempe, one of the Ugandan bill's sponsors and a clergyman, who has shown gay male hardcore porn in churches to fuel antigay sentiment. *Martin Ssempe, Anti-Gay Ugandan Pastor, Shows Church Gay Porn Videos*, HUFFINGTON POST, Feb. 18, 2010, http://www.huffingtonpost.com/2010/02/18/martin-ssempe-anti-gay-ug_n_467157.html. This is reminiscent of the film "The Gay Agenda," circulated by the Family Research Council in the United States for the same purpose in 1992. See DIDI HERMAN, *THE ANTI-GAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 67 (1997).

164. See Wilson, *supra* note 73, ¶ 6.

165. See *id.* ("In effect, this recuperative work accepts the association of modernity and the West, arguing instead that there was queer life in local traditions.").

Another mode involves turning to postcolonial critiques of the concepts of modernity and tradition, in part, by turning to the notion of a queer diaspora. Again, however, the trope of a diaspora is also deeply relevant, and overlooked, in this debate. Like their South Asian counterparts, Ugandans—whether inside or outside of the country—may be in the best position to respond to the nationalist critique of the emergence of an LGBT identity in Uganda. Indeed, many theorists have argued, in the context of the humanities, that localized interpretations can often destabilize the homogenizing tendencies of global gay uniformities.¹⁶⁶ As I suggested in Part I, the idea of a queer diaspora partly challenges “the import-export image of southern queer identities as mimicry of the West.”¹⁶⁷ By noting that sexuality holds different meanings in different contexts, and can relate to different trajectories of rights or possibilities, diasporic theories can challenge the centrality of the West.¹⁶⁸

It is important to note that the focus on a queer diaspora, while useful, faces potential limitations within both law and culture. While Ugandan sexual minorities may be in the best position to rebut, as a *cultural* matter, the perception of LGBT-identified individuals as the products of Western colonization, their influence may be limited before the Ugandan legislature and other spheres of regulation.¹⁶⁹ This means that a more focused legal or constitutional approach is needed, one that draws from non-Western contexts but also embraces the varied indigenous cultures that exist in Uganda. (The next Subpart discusses some possibilities for constitutional regionalism in the context of India). On a deeper level, as well, a focus on the diasporic community risks overemphasizing the experiences of those in the diaspora from the majority of individuals who remained in the home country. “[W]hile such analyses create alternative queer narratives within the global north,” Wilson writes, “diasporic queer critiques of Western hegemony still pivot on the first world.”¹⁷⁰ Therefore, the challenge is to find a way to recenter non-Western sexualities, not as the “pure” products of Western imperialism, indigenous history, or diasporic influence, but as identities and practices that are specific to a contemporary context and moment.

166. See Inderpal Grewal & Caren Kaplan, *Global Identities*, 7 GLQ 663, 671 (2001) (citing Katie King, *Local and Global: AIDS Activism and Feminist Theory*, 28 CAMERA OBSCURA 78 (1992)).

167. Wilson, *supra* note 73, ¶ 7.

168. See *id.*

169. That is why other scholars recommend the need for connecting the diaspora to progressive social change and resistance to colonization. See Shah, *supra* note 2 (“Rather than react to this critique [of Westernized LGBT influence] by enumerating indigenous forms of queer sexualities, it may be more accurate, and more strategic, to connect the history of colonialism with the history of diasporic anti-colonial resistance and to point out that many movements for progressive social change have been diasporic.”).

170. *Id.* ¶ 8.

C. The New Constitutional Regionalism: The *Naz Foundation* Decision

The previous Subparts outlined two types of a diaspora of legal principles: the first, a constitutional diaspora that *Lawrence* exemplified as an example of comparative constitutional interpretation; and the second, a legislatively oriented attempt in Uganda to reject *Lawrence* and other LGBT rights developments, in part, by drawing upon views on morality and homosexuality from the religious right in the United States. These actions are opposite sides of the same coin, and each form of dynamic borrowing engenders its own reactions in the culture to which it is transferred. Yet there is a third way to navigate global sexualities, perhaps by turning towards a more *regional* approach to the constitutional protection of sexuality.¹⁷¹ The trend among LGBT activists is to presume that activists elsewhere can learn much from law and theory in the West; I think it is far more instructive for us to explore what the West can learn from the trend towards constitutional borrowing *within* non-Western nations and the creation of an alternative constitutional diaspora in the process.¹⁷²

Along these lines, in some very important work, Holning Lau has pointed to a variety of progressive developments throughout Asia, arguing that it is important to challenge the “imagination of Asia as a region void of any protection of sexual orientation and gender identity rights.”¹⁷³ He points to an article published in the *William and Mary Law Review*, in which two authors argued that Justice Kennedy, in drafting *Lawrence*, decided not to cite cases from Asia on the grounds that “gay rights are nonexistent” there.¹⁷⁴

Yet as Lau points out, contrary to this perception, by the time that *Lawrence* was handed down in 2003, a variety of Asian nations had already decriminalized sodomy laws—in Japan (1882), Thailand (1956), Hong Kong (1991), and Fiji (1997) respectively.¹⁷⁵ He points to, in addition, a recent South Korean Supreme Court ruling that held that transsexuals have a right to recognition of their gender identity as one powerful example of how non-Western jurisdictions can

171. See Gayatri Gopinath, Assistant Professor of Women’s Studies, Univ. of Cal., Davis, Talk at the Center for Lesbian and Gay Studies Colloquium Series: Queer Regionalism (May 17, 2006); Wilson, *supra* note 73.

172. See Shahani, *supra* note 158, at 182.

173. See Holning Lau, *Grounding Discussions on Sexuality and Asian Law*, 44 U.C. DAVIS L. REV. at 3 (2010) [hereinafter Lau, *Grounding Discussions*] (forthcoming, draft on file with author); Holning Lau, *Sexual Orientation & Gender Identity: American Law in Light of East Asian Developments*, 31 HARV. J.L. & GENDER 67 (2008) [hereinafter Lau, *Sexual Orientation*].

174. Lau, *Grounding Discussions*, *supra* note 173, at 3 (citing Stephen G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 804–05 (2005)).

175. See Lau, *Grounding Discussions*, *supra* note 173, at 5–6 (listing citations, and noting that Fiji amended its constitution in 1997 to proscribe sexual orientation discrimination).

be much more forward-looking and far less monolithic in their perceived opposition to sexual minorities than those in the West might perceive.¹⁷⁶ Lau notes several recent decisions in Hong Kong that demand equal treatment for same-sex couples under public indecency laws,¹⁷⁷ a case imposing antidiscrimination protections against a broadcasting authority that objected to a television documentary on same-sex couples,¹⁷⁸ and a transgender marriage case that is moving through the judicial system.¹⁷⁹

Compared to the United States, which has yet to extend federal protections to individuals on the basis of sexual orientation, in 2008, Taiwan amended its employment discrimination law to include protections based on sexual orientation.¹⁸⁰ In addition, while the United States has almost no federal protections based on gender identity, in 2009, the Pakistan Supreme Court held that transgender individuals, known as *hijras*, had the right to be recognized as a third sex and to be free from police harassment.¹⁸¹ All of these examples discount the perception that LGBT rights are nonexistent in Asia.

Many of these developments culminated in the Delhi court opinion, *Naz Foundation*, handed down last year. As I suggest below, *Naz Foundation* is an important opinion, not just for its rejection of sodomy laws, but also for its studied integration of non-Western comparative constitutionalism, which one might argue offers an example of regionalism that serves as a counterpart to the perception of LGBT rights as a Western import.

The first legal challenge to India's law banning "crimes against nature," section 377, was filed in 1994, pursuant to an observation by one official, Kiran Bedi, who observed that he could not distribute condoms in prison to prevent the spread of HIV because he would be abetting a violation of section 377.¹⁸²

176. *Id.* at 3; Lau, *Sexual Orientation*, *supra* note 173, at 91.

177. Lau, *Grounding Discussions*, *supra* note 173, at 7 (citing *Sec'y for Justice v. Yau Yuk Lung and Another*, 10 HKCFAR 335, July 17, 2007).

178. *Id.* at 7 (citing *Cho Man Kit v. Broadcasting Authority*, [2008] HKEC 783 (CFI), May 8, 2008 (Hong Kong Court of First Instance)).

179. *Id.* (citation omitted).

180. *Id.* at 7.

181. *Id.* at 8 (citation omitted).

182. There is a vast array of literature on sodomy laws in India and the history of same-sex sexualities, much of which is cited in Katyal, *supra* note 70 and Katyal, *supra* note 71. A few recent pieces are ALTERNATIVE LAW FORUM, THE RIGHT THAT DARES TO SPEAK ITS NAME: DECRIMINALIZING SEXUAL ORIENTATION AND GENDER IDENTITY IN INDIA 5 (Arvind Narrain & Marcus Eldridge eds., 2009), available at <http://www.alternativelawforum.org>; BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA (Arvind Narrain & Gautam Bhan eds., 2005); Ruth Vanita, "Living the Way We Want": Same Sex Sexualities in Contemporary India, in THE PHOBIC AND THE EROTIC: THE POLITICS OF SEXUALITIES IN CONTEMPORARY INDIA 342 (Brinda Bose & Subhabrata Bhattacharyya eds., 2007); Alankar Sharma, *Decriminalising Queer Sexualities in India*, 7 SOC. POL'Y & SOC'Y 419 (2008); Sumit Baudh, *Human Rights and the Criminalisation of Consensual Same-Sex Sexual Acts in the Commonwealth, South, and Southeast Asia*,

The petition was at first dismissed, but several high profile lawyers from the Lawyers Collective, and others undertook another challenge to the law in 2001.¹⁸³ When the Delhi High Court handed down its judgment on July 2, 2009, one activist noted, “It was as if a weight had been lifted from our shoulders and one was finally set free.”¹⁸⁴

1. Culture, Identity, and History in the Global South

The Delhi High Court’s *Naz Foundation* decision, although it relied in part on *Lawrence* and other cases from the West, also transcended these decisions by relying on a wider host of non-Western jurisdictions, particularly South Africa, in reaching its conclusions. Indeed, the *Naz Foundation* opinion can be read as a uniquely powerful example of cosmopolitan constitutional borrowing, balanced with a deep attention to Indian originalism. Not only did the *Naz Foundation* court rely on U.S. jurisprudence, but it drew on decisions from Canada, Fiji, Hong Kong, Nepal, and South Africa.¹⁸⁵ It paid particular attention to Nepal, which enacted constitutional protections based on sexual orientation and gender identity, and which in 2009 actually set up a government panel to study same-sex marriage laws in order to reform its own laws.¹⁸⁶

Although the court relied on *Lawrence* for critical propositions regarding the role of privacy and autonomy, it relied on many other jurisdictions, as well as

(S. & Se. Asia Res. Ctr. on Sexuality, Working Paper, 2008); Jigna Desai, *Homo on the Range: Mobile and Global Sexualities*, 20 SOC. TEXT 73 (2002). There is also a set of articles in a symposium by the National University of Juridical Sciences in India, at <http://www.nujslawreview.org/law-review-vol2no3.html>, including Pritam Baruah, *Logic and Coherence in Naz Foundation: The Arguments of Non-Discrimination, Privacy, and Dignity*, 2 N.U.J.S. L. REV. 505 (2009); Shamnad Basheer et al., *Section 377 and the ‘Order of Nature’: Nurturing ‘Indeterminacy’ in the Law?*, 2 N.U.J.S. L. REV. 433 (2009); Ratna Kapur, *Out of the Colonial Closet, But Still Thinking ‘Inside the Box’: Regulating ‘Perversion’ and the Role of Tolerance in De-Radicalising the Rights Claims of Sexual Subalterns*, 2 N.U.J.S. L. REV. 381 (2009); Jasmine Joseph, *Divided Laws in a Unified Nation: Territorial Application of High Court Decisions*, 2 N.U.J.S. L. REV. 471 (2009); Bargav Joshi & Neha Mary Koshy, *Judicial Interpretation of Article 21 in the Naz Foundation Case: Privacy—A Moral Right or a Creature of an Amoral Constitution?*, 2 N.U.J.S. L. REV. 541 (2009); Tarunabh Khaitan, *Reading Swaraj Into Article 15: A New Deal for All Minorities*, 2 N.U.J.S. L. REV. 419 (2009); Siddharth Narrain, *Crystallizing Queer Politics—The Naz Foundation Case and Its Implications for India’s Transgender Communities*, 2 N.U.J.S. L. REV. 455 (2009); Vikram Raghavan, *Navigating the Noteworthy and Nebulous in Naz Foundation* 2 N.U.J.S. L. REV. 397 (2009); Rukmini Sen, *Breaking Silences, Celebrating New Spaces: Mapping Elite Responses to the ‘Inclusive’ Judgment*, 2 N.U.J.S. L. REV. 481 (2009); Rohit Sharma, *The Public and Constitutional Morality Conundrum: A Case-Note on the Naz Foundation Judgment*, 2 N.U.J.S. L. REV. 445 (2009).

183. For more history on the decision, see the press release from the Lawyers Collective, at <http://www.lawyerscollective.org/node/1004>.

184. ALTERNATIVE LAW FORUM, *supra* note 182, at 7.

185. *Id.* at 27.

186. See Lau, *Grounding Discussions*, *supra* note 173, at 8 n.36 (citing Pant et al. v. Nepal, Writ No. 917, Dec 21, 2007).

on broader United Nations human rights declarations on sexual orientation. In doing so, *Naz Foundation* also transcended *Lawrence* in powerful and lasting ways. Unlike *Lawrence*, which was grounded in notions of privacy and substantive due process, the *Naz Foundation* decision was motivated by four explicit platforms: the rights to privacy, dignity, equality, and nondiscrimination.¹⁸⁷ In each of these platforms, in important ways, the Delhi court went beyond *Lawrence*, in its willingness to specify precisely the benefits that might flow from decriminalization, and in its willingness to articulate why sodomy laws are contrary to international human rights principles, and unconstitutional under India's own privacy jurisprudence. In sum, the *Naz Foundation* opinion reformed *Lawrence* by demonstrating its limitations.

Perhaps the first leap from *Lawrence* involved a simple matter of tone and length. Rather than the detached, somewhat impersonal, brief, value-neutral position that the U.S. Supreme Court took in *Lawrence*, the Delhi High Court in *Naz Foundation* displayed not just a cosmopolitanist embrace of inclusion, but also an apparent indignance that sodomy laws still stood in India, particularly in light of all its detailed discussion of the jurisdictions that had overturned them.¹⁸⁸ As Vikram Raghavan observes,

unlike other contemporary decisions, the foreign citations in *Naz Foundation* are not just ornaments or serial lights that made the decision sparkle. Rather, *Naz Foundation* is among a handful of recent Indian decisions that actually rely on foreign precedent to shape an imaginative outcome relevant to the local context. *Naz Foundation's* foreign references include materials from the usual suspects, the United States and the United Kingdom, as well as decisions from unlikely places, such as Hong Kong, Fiji, and Nepal. Those latter decisions are particularly important because they remind the cynic that gay rights aren't some luxurious Western construct.¹⁸⁹

One might argue that the strongest example of non-Western LGBT sexuality stemmed, in part, from the filings that surrounded the *Naz Foundation* case, which meticulously emphasized the role of history, citing to evidence of homosexuality throughout various non-Western cultures, not just European history. In the filings surrounding the case, the *Naz Foundation* lawyers drew attention to a number of prominent Indians who are said to have engaged in same-sex affective conduct, as well as "[a]nthropological research [that] has found homosexual subcultures in Native American cultures, ancient Greece, Chinese

187. ALTERNATIVE LAW FORUM, *supra* note 182, at 12.

188. See Raghavan, *supra* note 182, at 401–02.

189. *Id.* at 402.

traditions, sub-Saharan Africa, and the Samurai traditions in Japan.”¹⁹⁰ According to one expert, Arvind Narrain:

It is the [reference to same-sex sexuality throughout Indian history] which provides the strongest rebuttal to the notion of queer rights being a western disease—a careful drawing of a narrative that traces the queer as part of “out” history and embodying a set of practices which exist at times unacknowledged, at others hidden, at yet others struggling to become “visible.” In more simple terms, queer rights is an issue for Indians because there are queer traditions, queer practices, and queer people in India and rights language is one mode of making this history visible.¹⁹¹

The *Naz Foundation*’s lawyers’ diligence paid off, as the court quoted from India’s own solicitor general, who had observed at a United Nations human rights council meeting that Indian society was historically accepting of sexual difference prior to the enactment of section 377 and that the circumstances surrounding its enactment are well worth reexamining today.¹⁹²

Another major difference from the legacy of sodomy opinions in the West involves the comparably significant absence of identity-based rhetoric in the arguments surrounding the Indian case relative to *Lawrence*. The term “men who have sex with men,” rather than “gay men,” figured much more prominently, along with the court’s willingness to articulate a set of cultural and public health concerns that avoided focusing on sexual identity and categorization.¹⁹³ The opinion spends paragraph after paragraph detailing the goals and objectives of public health education on HIV in an astonishingly comprehensive manner, finding that section 377 is a powerful impediment to HIV education and the right to health.¹⁹⁴ In some ways, the issue of class, indirectly, operated as a powerful device towards this inclusion: Scholar Alok Gupta has discussed how in order to make HIV education more effective, public health and LGBT organizations learned that they had to reach beyond gay-identified individuals and instead employed transgendered persons known as *hijras* and *kothis* (feminized males, many of whom are non-English-speaking and who come from middle-

190. Katyal, *supra* note 71, at 1458 (citing Naz Foundation brief).

191. *Id.* at 1458 (quoting Arvind Narrain, *Queer People and the Law*, <http://www.india-seminar.com/2003/524/524%20arvind%20narrain.htm> (last visited Apr. 15, 2010)).

192. See *Naz Found. v. Gov’t of NCT*, (2010) Cri. L.J. (Del.) 94 (2009), (2009) 160 DLT 277 ¶ 84, available at http://www.nazindia.org/judgement_377.pdf (quoting the solicitor general: “Now in India we didn’t have this concept of something being ‘against the order of nature.’ It was essentially a Western concept which has remained over the years. Now homosexuality as such is not defined in the Indian Penal Code, and it will be a matter of great argument whether it’s ‘against the order of nature’”).

193. Katyal, *supra* note 71, at 1457.

194. *Naz Found.*, 160 DLT ¶¶ 60–66.

lower-class backgrounds).¹⁹⁵ Eventually, both *hijras* and *kothis*, according to Gupta, demanded recognition of a separate identity from the rest of the LGBT movement,¹⁹⁶ perhaps indirectly adding to their visibility throughout the opinion.¹⁹⁷

Along with the focus on MSM and public health, the opinion also spent a great deal of its time and attention on the particular challenges faced by transgendered persons in India, also known as *hijras*.¹⁹⁸ Siddharth Narrain has argued that the opinion puts transgender equality on a platform that is comparable with sexual orientation equality.¹⁹⁹ For example, *Naz Foundation* cites the Yogyakarta principles that detailed the need for protection on the basis of gender identity, in addition to sexual orientation, and discussed cases from Pakistan and Nepal that dealt substantially with the rights of transgender persons. After detailing an event in which HIV educators in the MSM community were imprisoned on the grounds that their material was obscene and violative of section 377, the court then turned to discuss the case of a *hijra* who was first subjected to a gang rape, and then taken to a police station, where “[s]he was stripped naked, handcuffed to the window, grossly abused and tortured merely because of [her] sexual identity.”²⁰⁰ The court details several similar cases affecting a gay man, a lesbian woman, and another transgender person in the same manner, conveying the unacceptable treatment at the hands of the Indian authorities due to section 377. In fact, the court took pains to focus on the special considerations faced by the *hijra* community, who were also historically criminalized on account of their identity by the British, who required authorities to keep a registry of all eunuchs suspected of violating section 377. The court quoted from the revered Indian leader, Jawaharhal Nehru, who called the British statute that required this registry a “monstrous . . . negation of civil

195. See Alok Gupta, *Englishpur ki Kothi: Class Dynamics in the Queer Movement in India*, in *BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA* 127 (Arvind Narrain & Gautam Bhan eds., 2005).

196. See *id.* at 128 (noting that the *kothi* groups “continue to see ‘gay’ as an exclusive and unwelcoming space of upper-class and English-speaking homosexual men”).

197. The emphasis on a wider embrace of gender identities is also reflected elsewhere in South Asia, like Nepal, which embraces a much broader category of identities beyond the classic labels of LGBT identity. See Lau, *Sexual Orientation*, *supra* note 173, at 72 (listing these categories).

198. Note, however, that the conflation of transgender and *hijra* has been subject to some debate. See Ashwini Sukthankar, *Complicating Gender: Rights of Transsexuals in India*, in *BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA*, *supra* note 195, at 164–65.

199. In addition, Siddharth Narrain has argued that *Naz Foundation*’s theme of protecting sexual minorities in public suggests that *Naz Foundation* can be extended to suggest a mantle of protection for transgender individuals from harassment in public spaces. See Siddharth Narrain, *Crystallising Queer Politics: The Naz Foundation Case and Its Implications for India’s Transgender Communities*, 2 N.U.J.S. L. REV. 455, 466, 469 (2009) (citing Sunil Babu Pant making this observation).

200. *Naz Found. v. Gov’t of NCT*, (2010) Cri. L.J. (Del.) 94 (2009), (2009) 160 DLT 277, ¶ 22–23, available at http://www.nazindia.org/judgement_377.pdf.

liberty,” and demanded that “no tribe” should face group criminalization on account of their identity.²⁰¹ Yet despite the repealing of the British act criminalizing *hijras* specifically, the *Naz Foundation* court concluded that the criminalization of the *hijra* community unacceptably continues as a result of section 377.²⁰²

2. Privacy, Dignity, and Equality Beyond *Lawrence*

Turning towards sexual orientation discrimination, the court evidenced a clear transnational impulse in recoding sexual orientation not just as a powerful characteristic of personhood, but also as an attribute meriting human rights protection. Borrowing language explicitly from the South African Constitutional Court, the Delhi High Court noted that LGBT persons are denied “moral full citizenship,” and then launched into an extensive discussion of almost every major case that has overturned sodomy laws—from *Dudgeon v. United Kingdom*²⁰³ to *Norris v. Ireland*²⁰⁴ to *Toonen v. Australia*.²⁰⁵ Returning extensively to South Africa, the court quoted the United Nations High Commissioner for Human Rights, who compared sodomy laws to apartheid and noted their inconsistency “with international law and with traditional values of dignity, inclusion and respect for all.”²⁰⁶

Beyond tone, however, the *Naz Foundation* opinion took each of *Lawrence*’s key observations and reformed them in such a way that the reader could not help but recognize *Lawrence*’s limitations as a result. Consider, first, the Delhi High Court’s treatment of privacy. The *Lawrence* opinion was heavily circumscribed—literally—by the spatial boundaries of the home and the privacy associated with sexual intimacy. The fact that the case involved two men

201. See *id.* at ¶ 50, available at http://www.nazindia.org/judgement_377.pdf (“I am aware of the monstrous provisions of the Criminal Tribes Act which constitute a negation of civil liberty . . . an attempt should be made to have the Act removed from the statute book. No tribe can be classed as criminal as such and the whole principle as such is out of consonance with civilized principles of criminal justice and treatment of offenders . . .”).

202. *Id.*

203. 45 Eur. Ct. H.R. (ser. A) (1981).

204. 142 Eur. Ct. H.R. (ser. A) (1988).

205. Communication No. 488/1992, U.N. Doc CCPT/C/50/D/488/1992 (1994), available at <http://www.unhcr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5>. Press Release, Human Rights Committee, Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/50/D/488/1992 (Apr. 4, 1994).

206. *Naz Found.*, 160 DLT at ¶ 59. The court cited the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity, and pointed out that thirty countries have made positive changes in protecting against discrimination on the grounds of sexual orientation and gender identity. *Id.* at ¶ 43.

engaged in sexual activity within the home may have demanded such a focus, but because the U.S. Supreme Court focused mostly on spatial privacy, the opinion made few observations about any legal protections of homosexuality that extended outside of the home.

In contrast, in outlining a version of privacy that is not tethered to spatial boundaries, the *Naz Foundation* opinion offers a broader notion of privacy that connects much more actively to sexual autonomy. In explaining why section 377 violated the rights to both dignity and privacy, for example, the Delhi High Court noted that the dissent in *Bowers* “made it clear that the much-quoted ‘right to be left alone’ should be seen, not simply as a negative right to occupy a private space free from government intrusion, but as a right to get on with your life, your personality and make fundamental decisions about your intimate relations without penalization.”²⁰⁷

In clear divergence from *Lawrence*’s tethering of its right to circumstances within the home, the *Naz Foundation* court crafted a version of privacy that explicitly “deals with *persons* and not *places*.” In fact, the court carefully explained how multiple Indian (and American) cases had broadened the concept of privacy to include the right to privacy in family, marriage, procreation, motherhood, and education, among other areas.²⁰⁸ By contrast, *Lawrence* focused mostly on the importance of protecting sexual behavior within the private confines of the home and said little about any of these other areas to which the notion of autonomy and privacy has been linked.²⁰⁹ As many scholars have argued, the tactical reliance on spatial privacy in South Asia has limited utility, particularly given the fact that many people targeted by section 377 (sex workers, MSM, and transgendered persons) are usually targeted in public, not private space.²¹⁰

Second, the court focused on how section 377 criminalized “individual choices which are central to personal *dignity*.”²¹¹ The court then defined the concept of dignity with reference to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and, most notably, a host of U.S. Supreme Court

207. *Id.* at ¶ 40 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Blackmun, J. dissenting)).

208. *See id.* at ¶¶ 33–34 (drawing, in part, on *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

209. Some scholars note that *Naz Foundation* is nebulous on the question of whether its findings are only limited to criminal consensual acts between adults in private, and question how much its holding extends to conduct in public spaces. *See Raghavan, supra* note 182, at 405.

210. *See Gautam Bhan, Challenging the Limits of Law: Queer Politics and Legal Reform, in BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA, supra* note 195, at 46.

211. ALTERNATIVE LAW FORUM, *supra* note 182, at 14.

opinions, starting with *Olmstead v. United States*,²¹² continuing on to *Griswold v. Connecticut*,²¹³ then *Eisenstadt v. Baird*,²¹⁴ *Roe v. Wade*,²¹⁵ and *Planned Parenthood v. Casey*.²¹⁶ While the opinion drew heavily on India's own rich sources of jurisprudence on privacy and dignity, it also drew upon cases from South Africa and related scholarship by Ryan Goodman on how sodomy laws shape a person's identity and self-esteem.²¹⁷

Third, in contrast to *Lawrence*, which limited its observations to the context of mostly spatial privacy, and only tangentially alluded to the issue of equality, the *Naz Foundation* opinion put equality front and center—and established a strong claim for equal protection on the basis of sexual orientation in the process.²¹⁸ In doing so, *Naz Foundation* transcended *Lawrence* by treating discrimination on the basis of sexual orientation as analogous to sex discrimination, and chose to apply strict scrutiny to section 377, in contrast to *Lawrence*.²¹⁹

Along these lines, consider how the *Naz Foundation* opinion contrasts sharply with *Lawrence* in its treatment of same-sex relationships. In *Lawrence*, the U.S. Supreme Court tepidly noted that the Texas sodomy statutes impermissibly sought to control a personal relationship that is well within a person's liberty to choose, "whether or not entitled to formal recognition in the law."²²⁰ The Court explicitly refused to recognize gay and lesbian relationships as equal to heterosexual relationships (which it has recognized through countless marriage cases), and in doing so, makes a subtle but obvious point about their potentially lesser value in the eyes of the judges.²²¹ Although the architecture of the *Lawrence* opinion was a likely product of compromise, its message was

212. 277 U.S. 438 (1928).

213. 381 U.S. 479 (1965).

214. 405 U.S. 438 (1972).

215. 410 U.S. 113 (1973).

216. 505 U.S. 833 (1992).

217. See *id.* at ¶¶ 48–49 (citing Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643 (2001)).

218. Although it recognized that the equal protection argument was tenable, the Supreme Court in *Lawrence* chose to rescind *Bowers* on the grounds that the rationale that animated the sodomy provisions was substantively invalid. The Court explained "were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants." *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

219. The court explained its reasoning for the choice: "Discrimination on the basis of sexual orientation is itself grounded in stereotypical judgments and generalization about the conduct of either sex." *Naz Found.* 160 DLT at ¶ 99. It went even further by concluding, in the alternative, that "[a] provision of the law branding one section of people as criminal based wholly on the State's moral disapproval of that class goes counter to the equality guaranteed . . . under any standard of review." *Id.* at ¶ 113.

220. *Lawrence*, 539 U.S. at 567 (emphasis added).

221. "[The opinion] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578.

clear: The Court avoided asserting that gay and lesbian relationships were entitled to recognition, either by this opinion or by other prior opinions on marriage. In bold contrast, however, the Delhi High Court quoted from the landmark opinion by the Constitutional Court of South Africa:

A person cannot leave behind his sense of gender or sexual orientation at home. While recognizing the unique worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely, and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places, and their times. The expression of sexuality requires a partner, real or imagined. It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves.²²²

To be clear, the *Naz Foundation* opinion did not address marriage. But in explicitly describing the worth of same-sex relationships, the court captured more precisely its value of intimacy outside the confines of the home. Some have taken this observation to suggest that *Naz Foundation* offers more protection to same-sex intimacies than *Lawrence* does, by extending this protection to public spaces, with potentially dramatic effects on the rights of sexual minorities in India.

3. Antidiscrimination, Constitutional Morality, and Indian Originalism

Towards the end of the opinion, the court emphasizes its role as a guarantor of fundamental rights. In doing so, the *Naz Foundation* court lent itself to the belief that its role was not just to protect citizens from the state, but also to protect citizens from one another.²²³ While others have criticized the court for its

222. *Naz Found.*, 160 DLT at ¶ 47.

223. The court drew on a variety of international sources to hold that the prohibition against sex discrimination extended horizontally to private conduct as well; that is, the Indian Constitution prohibits not only discrimination by the government, but also “discrimination of one citizen by another in matters of access to public spaces.” *Naz Found.*, 160 DLT at ¶ 104. By construing the right to nondiscrimination as a “horizontal” right, rather than a purely “vertical” one affecting the rights of the citizen against the state, the court essentially eviscerated the limitations that the state action doctrine might have had on ensuring full equality for individuals at the hands of other citizens. Imagine for a moment the implications behind this interpretation. It suggests that gay and lesbian individuals not only have the right to dignity, privacy, and equality at the hands of the state, but also at the hands of their fellow citizens. See Tarunabh Khaitan, *Good for All Minorities*, in *THE RIGHT THAT DARES TO SPEAK ITS NAME* *supra* note 182, at 119–20. The court cited a famous quote by Justice Jackson in *West Virginia v. Barnette*, 319 U.S. 624 (1943): “the very purpose of the bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One’s right to life, liberty and property . . . and other fundamental rights may not be submitted to vote: they depend on the outcome of no elections.” *Naz Found.*, 160 DLT at ¶ 120.

extension here into areas that do not constitute classic state action, it is notable nonetheless for its recognition of the need for constitutional protections for sexual minorities.²²⁴

We can see how in each of the aspects I have mentioned—an offering of an affirmative notion of privacy, a willingness to consider sexual orientation discrimination as sex discrimination, and a refusal to diminish the meaning of same-sex relationships to the value of personhood—*Naz Foundation* transcends *Lawrence* in powerful ways. But in other aspects, the *Naz Foundation* opinion breaks from *Lawrence* entirely. Recall, for example, that *Lawrence* refused a role for “morality” as a basis for legal provisions by citing a line in Stevens’s *Bowers* dissent: “[T]he fact that the governing majority in a state has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”²²⁵

In stark contrast, the *Naz Foundation* opinion *reforms* rather than *abandons* morality in powerful ways. In an interesting twist, the *Naz Foundation* court noted, “Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjective notions of right and wrong. If there is any type of ‘morality’ that can pass the test of compelling state interest, it must be ‘constitutional morality’ and not public morality.”²²⁶ In making this statement, the court notes that it is the stigmatizing and criminalizing of LGBT individuals that is against constitutional morality, not the act of sodomy.²²⁷ The court observed that the Indian Constitution “recognizes, protects, and celebrates diversity,” and that the stigmatization or criminalization of gay people “would be against the constitutional morality.”²²⁸

Such statements illustrate that one of the decision’s more noteworthy aspects for future scholars is its reformation of these notions of morality and originalism. As Vikram Raghavan notes, “*Naz Foundation*’s beauty is that it skillfully mixes originalism, rarely invoked by Indian courts, with pragmatism in constitutional interpretation.”²²⁹ Rather than relying on a fixed notion of originalism to deny rights to sexual minorities, a typical turn of Scalia’s dissents in such cases, the *Naz Foundation* court did the opposite: It reframed the concepts of originalism and morality to demonstrate how both ideas demanded the overturning of such laws. Gautam Bhan explains that the notion of

224. Raghavan, *supra* note 182, at 414.

225. *Lawrence*, 539 U.S. at 577 (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (Stevens, J. dissenting)).

226. *Naz Found.*, 160 DLT at ¶ 79.

227. Raghavan, *supra* note 182, at 410.

228. *Naz Found.*, 160 DLT at ¶ 80.

229. See Raghavan, *supra* note 182, at 398.

constitutional morality originated in the writings and teachings of Ambedkar, the drafter of the Indian Constitution.²³⁰ As Bhan observed, the Delhi court “turned for help, to an older moment, a moment of origin. Citing the constitutional debates of 1946, it reminded us of another India. An India that was being imagined just as it was coming to freedom.”²³¹ Indeed, after relying on a host of foreign sources, and then transcending them entirely in its opinion, the *Naz Foundation* court then turned to the original architect of the Indian Constitution to demonstrate precisely how the Indian notion of constitutional morality—as distinct from popular morality—can be profitably reformed towards equality.

In sum, drawing upon countless tenets of international human rights, cases from the United States and elsewhere that overturned sodomy laws, and the writings of the revered founding father of India, Pandit J. Nehru, the court articulated a vision of originalism that diverges from the American understanding of the term. The opinion’s penultimate paragraphs quoted an inimitably lofty passage from Nehru, who opined the following on the notion of equality that stemmed from the “city of words”: “Words are magic things often enough, but even the magic of words sometimes cannot convey the magic of the human spirit and of a Nation’s passion . . . [The Resolution of Equality] seeks very feebly to tell the world of what we have thought or dreamt of so long, and what we now hope to achieve in the near future.”²³² Elsewhere, the court wrote:

If there is one constitutional tenet that can be said to be the underlying theme of the Indian Constitution, it is that of “inclusiveness” The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as “deviants” or “different” are not on that score excluded or ostracised Where society can display inclusiveness and understanding, such persons can be assured of a life of dignity and nondiscrimination.²³³

Considering that queer Indians have long had to fight against the charge that homosexuality is not indigenous to India but a foreign importation, this quote is a powerful observation that suggests that what is essentially “Indian” about India is its tradition of nondiscrimination, dignity, and inclusiveness towards tolerance of sexual minorities.

230. Gautam Bhan, *On Freedom’s Avenue*, in *THE RIGHT THAT DARES TO SPEAK ITS NAME*, *supra* note 182, at 93, 94.

231. *Id.* at 93.

232. *Naz Found.*, 160 DLT at ¶ 130–31.

233. *Id.* at ¶ 130.

In short, the Delhi court offered human rights advocates and the nascent LGBT movement in India a triumphant and unimaginable win, both for the forcefulness of its findings as well as for its relentless eloquence in favor of the civil rights and equality of sexual minorities. This prompted Indian legal scholar Lawrence Liang to observe that *Naz Foundation* is India's *Roe v. Wade*²³⁴—as Vikram Raghavan echoes, “a rare opportunity for activists to reshape public opinion and influence a wider social debate about gay rights,” a point that is particularly poignant when compared to the fact that wider support from the legislature is needed as well.²³⁵ Kajal Bhardwaj, a lawyer who was present when the verdict was read, recalled that by the time that the chief justice had finished reading the holding, “people were openly weeping and there were handshakes and hugs all around.”²³⁶ She continues:

Watching the spectators collapse on each other, overcome by emotion, the guards charged with maintaining decorum in the court room quickly ushered the group out . . . Other lawyers in the Delhi high court gaped at the big troop descending the stairs, one wondering out aloud with unintentional accuracy, “*Kahan se release hoke aayen hain ye sab?* (Where have all these people been released from?)”²³⁷

III. TOWARDS TRANSNATIONAL CULTURAL CITIZENSHIP

As I have suggested throughout this Article, both types of diaspora—of persons and of principles—are movements that rewrite the roles of the judiciary and citizenship.²³⁸ Towards this end, a queer diasporic formulation, as I have suggested, offers alternative accounts of cultural identities and legal developments, and thus challenges the narrative of development and progress that tends to judge all “other” sexual practices against a model of European-American sexual identity.²³⁹ “By narrating a different history of South Asian diasporic formation,” Gayatri Gopinath writes, “a queer diasporic archive allows us to memorialize the violences of the past while also imagining ‘other ways of being in the world.’”²⁴⁰ In this Article, I have described two such alternative narratives—one offered by SALGA’s demonstration of transnational activism and loyalty,

234. 410 U.S. 113 (1973).

235. Raghavan, *supra* note 182, at 417 (citing Liang).

236. See Kajal Bhardwaj, *Reforming Macauley*, in *THE RIGHT THAT DARES TO SPEAK ITS NAME*, *supra* note 182, at 97, 98.

237. *Id.*

238. See generally Barry, *supra* note 16 (reaching similar observations).

239. GOPINATH, *supra* note 80, at 11.

240. *Id.* at 21 (quoting Dipesh Chakravarty).

and the other offered by *Naz Foundation's* commitment to inclusiveness and equality, effected through its own form of regionalist constitutional borrowing.

Both narratives also illustrate the ways in which the two types of diaspora transcend borders and remake the idea of nationhood in the process. Benedict Anderson's famous book *Imagined Communities* powerfully postulated that a nation is conceived, not as a reality, but as a collective work of imagination that has emerged from the circulation of capital and the rise of print communication.²⁴¹ Regarding global sexualities, law assists the process of imagining the nation by mapping a highly generalized series of identities onto the diversity of the human experience, even as those identities reveal themselves to be highly dependent on context, time, and place. And although cases like *Lawrence* and *Naz Foundation* represent a particular moment in the development of gay and lesbian civil rights, they can also offer other jurisdictions particular insights about the utility and universality of particular categories and principles. The architecture of each opinion often charts the path to future challenges regarding the ultimate trajectory of LGBT civil rights and offers a vantage point to those of us contemplating the limitations and possibilities of citizenship.

For some activists, it is said that *Naz Foundation* represented the emergence of the idea of "sexual citizenship"²⁴² in South Asia. One might argue that in the court's painting of the notion of LGBT equality in India in such broad, lofty strokes, and especially through the employment of Nehru's timeless statements about the need for inclusion, the *Naz Foundation* court was essentially extending the hand of citizenship—utterly unmistakably so—to queer minorities. One of the most prominent leaders of the gay rights movement in India, Arvind Narrain, writes of the "radical potential" of the idea of citizenship "to represent the rights of groups that have historically been marginalized."²⁴³ "By participating in the playground of citizenship," Ratna Kapur has written, "the migrant subject is not insulated from the normative content of this concept and from how her sexual and cultural conduct and religious identity can all serve to exclude her from being regarded as the 'real thing.'"²⁴⁴ And when LGBT individuals make claims based on notions of civil rights and equal protection, they

241. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1991). See Benigno Sanchez-Eppler & Cindy Patton, *Introduction: With a Passport Out of Eden*, in *QUEER DIASPORAS*, *supra* note 18, at 1, 10 (discussing how the notion of an "imagined community" has sustained the creation of sexualities that are not only discursively mobile, but are also not specific to a particular time or place of origin).

242. See Geetanjali Misra, *Decriminalising Homosexuality in India*, 17 *REPRODUCTIVE HEALTH MATTERS* 20, 27 (2009) (quoting Shohini Ghosh).

243. See Arvind Narrain, *Rethinking Citizenship: A Queer Journey*, 14 *INDIAN J. GENDER STUD.* 61, 61 (2007).

244. See Ratna Kapur, *The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion*, 8 *THEORETICAL INQUIRIES L.* 537, 568 (2007).

are making claims not purely about legal entitlements, but also about the need for a certain psychic connection to citizenship and inclusion.²⁴⁵

Linda Bosniak, in a similar vein, has written of four aspects of citizenship: (1) as a formal legal status; (2) as a claim to certain rights towards equal membership in society; (3) as a political activity, encompassing political engagement; and (4) as a form of identity or solidarity.²⁴⁶ The last claim of citizenship as concerning a sense of identity involves a strong sense of collective solidarity, and it encompasses precisely the transnational ties this Article has documented. In other words, the notion of cultural citizenship, in contrast to the formality of legal citizenship, embraces a broad array of activities that enable minority groups to claim both space for themselves and the right to certain entitlements in the destination country and in the homeland.²⁴⁷ Consider this observation:

Unlike assimilation, which emphasizes absorption into the dominant white, Anglo-European society, or cultural pluralism, which conceives of retention of minority cultural traits and traditions within U.S. society, but nonetheless privileges white European culture and history and assumes retention of existing class and racial [and gender] hierarchies under the pretense of political equality, *cultural citizenship* allows for the potential of opposition, of restructuring and reordering society.²⁴⁸

Curiously, the notion of citizenship has generally been posited as somewhat oppositional to particular cultures, especially in an age of disputes over minority rights to language or religious practices. As Leti Volpp has suggested, “[t]he citizen is assumed to be modern and motivated by reason; the cultural other is assumed to be traditional and motivated by culture.”²⁴⁹ Others have argued that full citizenship and cultural visibility seem inversely correlated, such that “the least powerful in a society are the most culturally endowed.”²⁵⁰ In such discussions, the notion of citizenship takes on a “cultureless” character as an amalgam of civic virtues such as courage, law-abidingness, loyalty, economic virtues, and

245. See Sharon Holland, *The Question of Normal*, 10 GLQ 123, 129 (2003).

246. See Leti Volpp, *The Culture of Citizenship*, 8 THEORETICAL INQUIRIES L. 571, 578 n.23 (2007) (discussing the work of Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 456–88 (2000)).

247. WILLIAM FLORES & RINA BENMAYOR, *LATINO CULTURAL CITIZENSHIP: CLAIMING IDENTITY, SPACE, AND RIGHTS* 15 (1997).

248. Horacio N. Roque Ramirez, *Claiming Queer Cultural Citizenship: Gay Latino (Im)Migrant Acts in San Francisco*, in *QUEER MIGRATIONS*, *supra* note 9, at 162 (quoting FLORES & BENMAYOR, *supra* note 247, at 15).

249. Volpp, *supra* note 246, at 574.

250. See *id.* at 599 (citing RENATO ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* 198 (1989)).

willingness to engage in political discourse.²⁵¹ Culture, in contrast, is subsumed with cultural difference, an obstacle to assimilation generally (and citizenship in particular).²⁵² Along these lines, in order to become citizens, immigrants are usually expected to divorce themselves from cultural attachments, and to some extent, from the private realm: “The citizen is engaged in the public; the private is the space for cultural practices.”²⁵³

Internationally speaking, however, I would posit that *Naz Foundation* signifies a new way to traverse the boundary Volpp identifies between culture and citizenship, by potentially dislocating the idea of *legal* or *formal* citizenship from the idea of *cultural* citizenship. The separation of law from culture may be necessary to deemphasize the unequalizing effect that legal entitlements can create.²⁵⁴ The concept of cultural citizenship has been described by author Renato Rosaldo to signify

the right to be different (in terms of race, ethnicity, or native language with respect to the norms of the dominant national community, without compromising one’s right to belong in the sense of participating in the nation-state’s democratic processes. . . . From the point of view of subordinate communities, cultural citizenship offers the possibility of legitimizing demands made in the struggle to enfranchise themselves. These demands can range from legal, political and economic issues to matters of human dignity, well-being, and respect.²⁵⁵

Again, there is an emphasis on the line between legal citizenship, as defined by the existence of formal regulatory and political mechanisms, and cultural citizenship, which captures the more informal, collective relationships between peoples who may be disenfranchised by those very mechanisms.

We see elements of cultural citizenship in each of the Parts in this Article—and it can take varied forms, ranging from an emotional or affective tie within an LGBT collectivity in the diaspora to a more sustained regional or political critique of the regulatory systems that govern sexuality. Part I, for example, explores a *subjective* dimension of cultural citizenship through the activities of SALGA and the Irish GLBT society, who, in a complex statement of transnational dissent, chose to emphasize their transnational ties to the homeland in the face of formal exclusions in their destination country.

251. See *id.* at 577 (citing Will Kymlicka & Wayne Norman, *Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts*, in *CITIZENSHIP IN DIVERSE SOCIETIES 7* (Will Kymlicka & Wayne Norman eds., 2000)).

252. *Id.* at 571.

253. *Id.* at 584.

254. See Ramirez, *supra* note 248.

255. Renato Rosaldo, *Cultural Citizenship in San Jose, California*, 17 *POLAL* 57, 63 (1994).

In Part II, we also see elements of *regional* cultural citizenship in the ties that are forged between countries like Nepal, who are considering legislating same-sex marriage, and India, who are undertaking a reversal of sodomy laws as a final step of Indian independence from the British. Even outside of India, elsewhere in the globe, *Naz Foundation* might also signify the emergence of a new form of regional cultural citizenship that is based, in part, on the transnational loyalties that a diaspora facilitates. “As queer South Asians in the diaspora,” Gopinath has asserted, “‘citizenship,’ queer or otherwise, is not something that we can ever take for granted.”²⁵⁶ Instead, as Gopinath suggests, the queer diaspora creates a multiplicity of collective spaces in the face of state regulation—spaces that are always mobile, always contingent, and always dynamically formed in relation to the nation.²⁵⁷ A case like *Naz Foundation*, inasmuch as it relies on constitutional principles from both within and outside of the West, can signify the migration of those principles and be embraced by the diaspora elsewhere, as SALGA’s experience in Part I suggests. The migration of legal principles that informs both *Naz Foundation* and *Lawrence* also further facilitates the forging of new global possibilities through dynamic borrowing of legal principles.

It is important to note, however, that the relationship between legal and cultural citizenship can be a dialogic one. In other words, the *presence* of cultural citizenship can be transformed into a formal claim towards legal citizenship (as in *Naz Foundation*); just as the *absence* of legal citizenship can be transformed into a collective experience of cultural citizenship (as in Uganda). Just as SALGA turned, in its statement of cultural dissent, to *Naz Foundation*, forging international ties between the collective LGBT South Asian community in the diaspora and elsewhere, *Naz Foundation* ushered in an important integration of cultural and legal regionalism with Indian originalism, transforming disenfranchised sexual minorities into recognized legal subjects deserving of formal protection and equality. Even in Uganda, despite the antigay legislation we discussed, which excises LGBT citizens of their position as equal citizens, there are also elements of an important collective visibility among LGBT citizens, who, in addressing their own indigenous heritage and existence in this debate, challenge the regulatory state to recognize, more fully, their existence through antidiscrimination protections. All of these developments, to a varying extent, affect the cultural and legal formation of citizenship, informing and reforming ties between the queer diaspora and the homeland, and the relationship of the diaspora to the destination country.

256. Gopinath, *supra* note 51, at 120–21.

257. *Id.* at 121.

Capturing some of these transnational cultural connections, Asian American studies scholar Aihwa Ong has written of the notion of “flexible” citizenship as one effect of the migratory flows of capital, enabling the creation of new subjects borne from the mobility of class and opportunity that elide classic legal formations.²⁵⁸ For too long, Ong argues, citizenship scholars have focused on its formal, legal/political aspects, obscuring how the universalistic criteria of democratic citizenship has distributive effects on different citizens, and also how their location and subjective experience might affect how that citizenship is constructed.²⁵⁹ The reason why cultural citizenship is important, for Ong, is that it offers us a vantage point from which to examine how cultural practices and beliefs are produced out of negotiating, first, with the state that provides formal citizenship; second, with the larger public that interacts with the immigrant citizen; and third, with the self who is constantly in the process of identity formation. As Ong writes, “[c]ultural citizenship is a dual process of self-making and being-made within webs of power linked to the nation-state and civil society.”²⁶⁰

I would argue that Ong’s statements illuminate the important interplay between legal and cultural citizenship, demonstrating how the formation of an LGBT diaspora reforms a cultural connection to the homeland, just as it can inform the formal, regulatory approach that a state might take in addressing issues of LGBT equality within its borders. The important point here is to not only recognize this interplay between formal regimes of regulation and informal cultural connection, but to also situate it within the transnational flows of capital. In making this observation, it is also important to observe the role that legal connections (and their absence) can play in creating the subjective experience of citizenship. Other legal scholars have also noted similar aspects of the emergence of transnational cultural citizenship. The late immigration scholar Kim Barry explained how emigrants display a sense of external citizenship, which comprises their formal legal status as citizens of the destination country and a more cultural dimension that captures their “lived experience of participation in national life.”²⁶¹ Anupam Chander, too, has written of how nations reshape their collective image to include diasporic persons through more explicit state

258. ONG, *supra* note 158, at 4 (“Besides suggesting new relations between nation-states and capital, transnationality also alludes to the transversal, the transactional, the translational, and the transgressive aspects of contemporary behavior and imagination that are incited, enabled, and regulated by the changing logics of states and capitalism.”).

259. See, e.g., Aihwa Ong, *Cultural Citizenship as Subject-Making*, 37 CURRENT ANTHROPOLOGY 737 (1996), available at <http://escholarship.org/uc/item/5sn1795g>.

260. *Id.* at 738.

261. See Barry, *supra* note 16.

recognition.²⁶² He describes how states have formed agencies to serve members of its diaspora by enabling them to access legal protections and specialized entitlements.²⁶³ And Linda Bosniak has described how citizenship transcends the nation to create a culture of postnationality by emphasizing the decline of state sovereignty and the rise of the transnational subject.²⁶⁴

The result of this notion of cultural citizenship involves some deemphasis on the legal, statist aspects of citizenship in favor of the cultural aspects of connections within the diaspora and elsewhere. But it does not elide formal state regulation entirely. Consider, again, the SALGA narrative that demonstrates this phenomenon. When the FIA excluded SALGA from the 2009 India Day parade in New York City, SALGA reframed its loyalties to emphasize linkages to the *Naz Foundation* opinion rather than to the mainstream Indian diasporic community in the United States. In this way, SALGA's formal legal citizenship took a secondary position to its ties of transnational cultural citizenship—a way to enable SALGA to draw attention to the group's perceived equality in the homeland of India. In such examples, it does not necessarily matter that *Naz Foundation*'s import extends to a different jurisdiction; what matters is that the opinion signifies a new way for the diasporic community in the United States to establish further cultural and jurisprudential loyalties with the homeland.

Note, however, that although *Naz Foundation* opens a new world of possibility, it is still circumscribed by many of the limitations of formal claims to LGBT equality. As Ratna Kapur has pointed out, the dominant theme of tolerance, so apparent in the *Naz Foundation* opinion, does not always pave the way towards LGBT equality, nor does it offer a transformative kind of emancipation.²⁶⁵ When claims to LGBT equality seem based on a universal logic, Kapur writes, “tolerance becomes the tool for handling that difference that formal

262. See Anupam Chander, *Homeward Bound*, 81 N.Y.U. L. REV. 60 (2006) (describing these entitlements).

263. *Id.*

264. See Linda Bosniak, *Multiple Nationality and the Postnational Transformation of Citizenship*, 42 VA. J. INT'L L. 979 (2002).

There is also a vast literature on the concept of citizenship. See, e.g., T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE AND AMERICAN CITIZENSHIP* (2002); SEYLA BENHABIB, *CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN A GLOBAL ERA* (2002); *CITIZENSHIP AND SOCIAL THEORY* (Bryan S. Turner ed., 1993); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (1950); PETER H. SCHUCK, *CITIZENS, STRANGERS AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 238–39, 245 (1998); Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161 (2008); Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1416 (1997); Volpp, *supra* note 11; Audrey Macklin, *Who Is the Citizen's Other? Considering the Heft of Citizenship*, 8 THEORETICAL INQUIRIES L. 333 (2007) and related articles in the symposium.

265. See Kapur, *supra* note 182, at 284.

equality is unable to accommodate or address.²⁶⁶ Instead, tolerance functions to reproduce the liberal notion of equality, but in focusing mostly on depoliticizing the issue, does little to dismantle the stigma of a queer sexual orientation.²⁶⁷ Thus, Kapur suggests that, rather than actually advancing the cause of sexual liberation, *Naz Foundation* and other court cases and concomitant rights claims may be limited in their victory.²⁶⁸ “Tolerance,” she writes, “does not offer any vision of transformation, but becomes a substitute for justice, where the difference of the ‘Other’ is accommodated rather than her injury addressed.”²⁶⁹ As she argues, even the newfound visibility of the LGBT movement in India risks depoliticization through its reliance on conventional consumerism and the neoliberal marketplace.²⁷⁰ Further, “while there is an appearance of magnanimity on the part of the majority or the state,” she concludes, “in fact the extension of tolerance constitutes a way in which to sustain dominant sexual, familial, and cultural norms.”²⁷¹

Indeed, Kapur is certainly asking the most important question: What are the limits of tolerance within a legal framework? Both forms of diaspora—of peoples and of legal principles—give rise to transnational loyalties that indirectly tinker with the fixed notions that we attach to citizenship and that help us to reimagine a liberation that can be just as dispersed across jurisdictions as the diaspora itself. As the SALGA example suggests, transnational loyalties emerge from queer connections forged across borders, recoding the concept of citizenship to “Mother India.” These transnational loyalties have transformative potential. Just as SALGA’s protests reformed the presumed heterosexuality of the Indian diaspora, they also reformed the presumed stereotypes associated with the gay and lesbian movement in the United States. And *Naz Foundation*, as it becomes reframed as a commentary on—and a transcendence of—*Lawrence*’s limitations, helps us imagine a more regional and inclusive approach to comparative constitutional interpretation. Commenting on the appearance of Nehru’s passage, on equality and the “city of words,” mentioned in the prior Part, Indian scholars Lawrence Liang and Siddharth Narrain continue:

But we also know that it would be naïve to believe that the city of words finds its perfect reflection in reality, and more often than not the real world is always an imperfect one in which promises remain unfulfilled, and in the memorable words of Langston Hughes, dreams are

266. *Id.* at 393.

267. *Id.* at 394.

268. *Id.* at 388.

269. *Id.* at 394.

270. *Id.* at 394–95.

271. *Id.* at 395.

deferred. . . . But isn't it also the case that the constant striving for the perfect community and the attempts at bridging the distance between the city of words and the imperfect city is precisely what we name as politics. It is in the distance that is traversed between the two cities, that struggles reside. And finally it is only through politics and struggles that rights are created [A] constitution does not create rights, it merely confirms their existence.²⁷²

In other words, the notion of the transnational queer citizen captures the idea that the letter of the law, just like national borders themselves, can be both transcended and transgressed by the forces of culture—to fill the void between Nehru's "city of words," which suggested the letter of the law, and Liang and Narrain's "imperfect city," which directed us to the cultural realities that we inhabit. It is precisely in the diasporic reworking of those entitlements that the concept of home and nation-state gain a newfound salience in their reconstitution.

Nevertheless, despite these possibilities for transcending national borders and citizenship rules, one must be careful not to minimize the import of the nation and of the laws that govern queer diasporas, and the concomitant relationship between legal and cultural citizenship. In other words, we may be able to "think ourselves beyond the nation,"²⁷³ but the lived reality of many in the post-9/11 world underscores just how powerful state regulation can be in managing aspects of our daily lives. Leti Volpp, in her own work, presciently reminds us that "[w]e function not just as agents of our own imaginings, but as the object of others' exclusions."²⁷⁴ It is through the transcendence of borders that we reimagine nationhood, and it is through the reimagination of nationhood that we reimagine citizenship altogether. Our pathway to the future will be informed by the success—or failure—of this transnational possibility.

CONCLUSION

On August 15, 1947, precisely at midnight, the Constituent Assembly, which consisted of representatives selected by the Indian people, took a solemn oath of office to serve the people of India. "The appointed day has come, the day appointed by destiny—and India stands forth again after long slumber and struggle, awake, vital, free and independent," spoke Pandit Jawaharlal Nehru on

272. Lawrence Liang & Siddarth Narrain, *Striving for Magic in the City of Words*, in *THE RIGHT THAT DARES TO SPEAK ITS NAME*, *supra* note 182, at 109, 110.

273. Volpp, *supra* note 11, at 1597 (quoting Arjun Appadurai, *Patriotism and Its Futures*, 5 *PUB. CULTURE* 411, 411 (1993)).

274. *Id.* at 1598.

that morning.²⁷⁵ For those who remember that day, it was marked by the newfound awareness that this crowded, populous nation—poor, fledgling, and plagued by its own civil strife—could rise up against the edifices of colonization, and successfully give birth to what stands today as the largest democracy in the world. Even to this day, India's victory over Britain—indeed, over the very legacy that ruled India for centuries—remains an unparalleled, even dazzling, moment in global history, one that marked the triumph of the poor and the colonized over a monastic imperialism.

Let us fast forward briefly to another moment sixty-two years later. A group of queer South Asians has gathered at the Stonewall Inn in New York City, at 7:30 p.m. precisely, to mark another historical moment in the birth of gay rights. As they gather, clinking glasses, celebrations have been underway in every major city in India to mark the Delhi High Court's decision to overturn sodomy laws in India. The moment is crucial, not just for its legal importance, but also for its cultural significance in the non-Western world. The strident extension of equality and civil rights to sexual minorities in India is a powerfully emblematic moment—just as the photographs of hundreds of queer activists standing outside of the Delhi High Court suggest.

275. Jawaharlal Nehru, Prime Minister, India, Speech on the Granting of Indian Independence (Aug. 14, 1947), *available at* <http://www.scribd.com/doc/18496549/Jawaharlal-Nehru-Speech-1947>.