

# THE CITIZENSHIP OF OTHERS

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## INTRODUCTION

The liberal notion of citizenship provides equality to all citizens, without regard to ascriptive or other differentiating characteristics. In this sense, citizenship promises to be dispositive of the treatment of all individuals who enjoy it; citizenship is uniform, unalloyed, and indivisible. These are the attributes of citizenship within a liberal national system, governing the relationships between citizens and the state, and among citizens within the state. But must these characteristics extend into the international realm, or may states choose to look beyond the mantle of citizenship when evaluating the citizens of others? And if states do choose to differentiate, and thereby discriminate, among the citizens of others, what obligations do those citizens' states bear?

This Article considers two instances in which the formal equality of citizenship is jeopardized by discrimination on the basis of national origin (the place of one's birth) and ancestry (the place of one's ancestors' birth). The first concerns the recent policy of India to subject U.S. citizens of Pakistani descent to differential treatment when applying for visas to visit India. The second concerns an ongoing political controversy in the United States around whether to grant Israel admission to the visa waiver program—which would waive the need for Israeli and U.S. citizens to apply for visas to the other country—while permitting Israel to continue to subject U.S. citizens of Palestinian or Arab descent to differential treatment. By deploying national origin and ancestry as proxies for national security threat, both cases violate American notions of equal citizenship, thereby implicating questions of U.S. responsibility to ensure the equal treatment of its citizens by foreign governments.

The reliance upon national origin and ancestry discrimination by India and Israel exposes the multiplicity of citizenship theory and practice across self-conceived liberal democracies, the notion that citizenship values are culturally bounded, and the idea that citizenship performs different forms of work in different societies. This should not be surprising, as citizenship is a central technology of the national project, and national projects vary widely by virtue of history, geography, culture, and ideology. Put another way, while the principle of equal citizenship remains elusive in every society, the

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pattern of the deviation from that principle may vary according to national project. In the United States, national origin and ancestry discrimination enjoy special, albeit uneven, protection, reflecting a political and social consensus that such discrimination is inconsistent with the civic and legal norms of equal treatment. But in other countries, similar forms of discrimination may prove less inimical to the citizenship project. Conversely, certain American practices may prove deeply offensive to other countries' citizenship ideals. In the first instance, then, the Indian visa regime vis-à-vis Pakistani ancestry and the proposed terms of inclusion of Israel within the U.S. visa waiver program reveal competing theoretical understandings and empirical functions of citizenship.

These multiple theories and practices of citizenship intersect in the seemingly mundane realm of visa policy—the regulated interchange of citizens. When the screening or selection criteria of Country A offend the citizenship values of Country B, Country B's duties of equal protection to its citizens are triggered. Indeed, the maintenance and fortification of Country B's national project demands the consistent defense of its citizenship values. States will always define their own citizenship categories, but in a world of constant international exchange, those definitions also resonate internationally, creating opportunities to shape the citizenships of other states. By expounding citizenship values in protection of one's own citizens, a state may also exert lasting influence on the citizenship commitments of other nations. This can be done in the specific context of national security considerations, but could be imagined in relation to other state concerns as well. Moreover, as the mobility of persons across state borders increases, we should expect competing conceptions of citizenship to become mutually constitutive. Not unlike the promotion of human rights, such deployment of a normative citizenship runs all the risks of hegemony and claimed universality, even if not framed in human rights terms. Leaving aside for the moment the normative question of whether citizenship should be an object of statecraft, the visa policy questions raised by the Indian and Israeli examples demonstrate its availability as a tool for shaping global citizenship norms.

This Article begins with a description of the Indian and Israeli examples, explaining the operation of the respective visa policies and how, in the name of contemporary national security considerations, the policies enact culturally specific, normative conceptions of citizenship embedded in the deep structure of each country's national project. The Article then considers how the seemingly mundane universe of visa policy operates as a site of conflict among competing normative visions of citizenship, and in particular, the ways in which the Indian and Israeli policies threaten a strong, albeit imperfect, American commitment to equal citizenship. The Article concludes by arguing that an understanding of the particularities of citizenship is necessary in order for countries such as the United States to propagate norms of equal citizenship and its promise of universality.

I. NATIONAL ORIGIN AND ANCESTRY DISCRIMINATION IN VISA POLICY:  
TWO EXAMPLES

The liberal conception of citizenship promises equal treatment of all citizens, without regard to other characteristics, including national origin or ancestry. In U.S. law, protections against national origin and ancestry discrimination are especially robust, extending formally to citizens and noncitizens alike. But citizenship in its conventional form operates nationally, and the rights of citizens of one country—whether rights to protection against state intrusion<sup>1</sup> or to healthcare or other forms of social welfare—do not extend extraterritorially. The same is true with respect to national notions of antidiscrimination, which, according to the liberal model, should converge with citizenship itself.<sup>2</sup> Thus, a citizen's right of freedom from state discrimination applies to her state alone.

In the realm of visa policy, states historically have enjoyed unfettered authority, as questions of admission have been understood as integral to sovereignty.<sup>3</sup> While recent developments in international human rights law, such as the principle of *nonrefoulement*,<sup>4</sup> may begin to apply pressure on these classical understandings, as an empirical matter, discrimination in the issuance of visas remains a state's prerogative. Countries, including the United States, frequently discriminate on the basis of nationality, age, ideology, and marital status.<sup>5</sup> In the American context, such decisions are

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1. *See* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 259 (1990) (holding that the Fourth Amendment does not apply to the search and seizure by United States agents “of property owned by a nonresident alien and located in a foreign country”).

2. *See* ANUPAMA ROY, *MAPPING CITIZENSHIP IN INDIA* 8 (2010) (“Citizenship is a status bestowed on those who are full members of the community. All who possess the status are equal with respect to the rights and duties with which the status is endowed. There is no universal principle that determines what those rights and duties shall be but societies in which citizenship is a developing institution create an image of an ideal citizenship against which achievement can be measured and towards which aspiration can be directed.” (quoting T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* 29 (1950))).

3. *See* *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1158–59 (D.C. Cir. 1999) (“In prescribing the conditions for allowing aliens to enter the country, Congress [has] acted in accordance with the ancient principle of international law that a nation state has the inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions. This firmly-established principle, dating from Roman times, received recognition during the Constitutional Convention and has continued to be an important postulate in the foreign relations of this country and other members of the international community. For more than a century, the Supreme Court has thus recognized the power to exclude aliens as ‘inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government’ and not ‘granted away or restrained on behalf of anyone.’” (footnotes omitted) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972); *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889)) (internal quotation marks omitted)).

4. *See* United Nations Convention Relating to the Status of Refugees art. 33, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) (“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”).

5. The case of Tariq Ramadan, a Swiss academic whose visa was revoked by the U.S. government in 2004, and whose reapplication was denied in 2006, provides a recent and

immune from judicial review under the doctrine of consular nonreviewability.<sup>6</sup>

The two examples discussed here do not involve discrimination on the basis of citizenship, but differential treatment of U.S. citizens on the basis of national origin and ancestry, which entails the violation of American norms of equal citizenship.

*A. India's Treatment of U.S. Citizens of Pakistani Descent*

To apply for a visa to India, U.S. citizens must fill out an application, submit payment, and await processing, first by a private company contracted by the Indian government, and then by the local Indian consulate. For most U.S. citizens, the process typically takes three to five business days, if not fewer, and the consulate routinely grants multiple-entry visas good for a period of years. However, a separate process governs U.S. citizens of Pakistani descent: for these individuals, including both naturalized U.S. citizens and citizens by birth, their applications require approval from the Ministry of Home Affairs in New Delhi.<sup>7</sup> The Indian consulates state that this process requires a minimum of six weeks, though in practice it often takes significantly longer; three to six months is not uncommon. If such applications are approved, they typically permit only a single entry, with a short expiry, and are stamped "US-PAK." In force since 2009, these special visa rules are well known among the Pakistani-American community, and likely operate to restrict the number of visas granted to Americans of Pakistani descent. Similar restrictions apply to British, Canadian, and Australian citizens of Pakistani descent.

India's visa application inquires explicitly about place of birth and ancestry, and Pakistani descent may be ascribed as far back as three

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germane example. See Benjamin Weiser, *Court Reverses Ruling Dealing with Visa of Muslim Scholar*, N.Y. TIMES, July 17, 2009, at A14 (describing the original allegations against Ramadan and describing a decision by the Second Circuit that the government was required to "confront Ramadan with the allegation against him and afford him the subsequent opportunity to demonstrate by clear and convincing evidence that he did not know, and reasonably should not have known, that the recipient of his contributions was a terrorist organization").

6. See *Saavedra Bruno*, 197 F.3d at 1159–60 ("In view of the political nature of visa determinations and of the lack of any statute expressly authorizing judicial review of consular officers' actions, courts have applied what has become known as the doctrine of consular nonreviewability. The doctrine holds that a consular official's decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise. For the greater part of this century, our court has therefore refused to review visa decisions of consular officials." (emphasis added) (footnotes omitted)). Courts have recognized limited exceptions to this rule. See generally James Lockhart, Annotation, *Construction and Application of Doctrine of Consular Nonreviewability*, 42 A.L.R. FED. 2D 1 (2009).

7. See *Processing Time*, INDIA VISA CENTER, <https://indiavisa.travisaoutsourcing.com/processing-times> (last visited Mar. 25, 2014); see also *Visa Services*, PASSPORT SEVA: CONSULAR, PASSPORT & VISA DIVISION, MINISTRY EXTERNAL AFF., GOV'T INDIA, <http://passportindia.gov.in/AppOnlineProject/online/visaServices> (last visited Mar. 25, 2014) (noting a separate visa process for "Pakistani Nationals and Foreigners of Pak Origin" in which a "Visa is granted to Pakistani nationals and foreigners of Pak origin only after clearance by concerned authorities").

generations; the application requires applicants to disclose not only their own place of birth, but also that of their parents and grandparents.<sup>8</sup> Although Pakistan and India only became independent countries in 1947, the logic of the visa application dictates that some applicants whose parents or grandparents were born in British India—that is, before 1947—may nonetheless be deemed of Pakistani descent. Thus, Pakistani identity precedes Pakistan itself. Territory, distinct from and antecedent to, the nation-state, becomes an object of suspicion.

The inquiry into national origin is not the only peculiarity of the Indian visa application. Since 2010, the application also asks the applicant's religion, providing choices of: "Bahai, Buddhism, Christian, Hindu, Islam, Others, Parsi, Sikh, Zoroastrian."<sup>9</sup> The religion question, like the questions regarding national origin and ancestry, are required fields on the form.<sup>10</sup>

India and Pakistan have long restricted visas to one another's citizens,<sup>11</sup> and the loosening or tightening of visa availability is a familiar indicator of bilateral relations between the two antagonists. Against this backdrop, it is tempting to read these special visa rules as merely another political instrument in the management of Indo-Pak relations. But the focus on national origin and ancestry, rather than nationality, troubles this account. Moreover, as I discuss below, the historical origins of the special visa rules make clear that they are designed to address real or perceived national security concerns about Americans and other westerners of Pakistani descent.

The special visa rules were introduced in December 2009, in direct response to the involvement of an American citizen, David Coleman Headley, in the Mumbai terrorist attacks in November 2008.<sup>12</sup> Born Daood

8. The visa application requires disclosure of the applicant's country of birth, current nationality, any previously held nationality or dual citizenship, and the place of birth, current nationality, and any previously held nationality of the applicant's parents. See *Visa Application Form*, BLS INT'L, <http://www.visa.blindia-usa.com/images/visasamp.gif> (last visited Mar. 25, 2014); see also *Indian Visa Online*, GOV'T INDIA, <http://indianvisaonline.gov.in/visa> (last visited Mar. 25, 2014).

9. See *Visa Application Form*, *supra* note 8.

10. *Id.*

11. In September 2012, India and Pakistan concluded an agreement to ease reciprocal visa restrictions. This marked the first high-level diplomatic negotiations since the Mumbai attacks in 2008. The agreement included steps such as multiple-entry visas for business travelers and visas for children and adults over sixty-five upon arrival. Travel restrictions, however, remain strict; business travelers, for example, must still apply for visas on a city-by-city basis. See, e.g., Salman Masood, *India and Pakistan Sign Visa Agreement, Easing Travel*, N.Y. TIMES, Sept. 9, 2012, at A12; Haris Anwar and Augustine Anthony, *India, Pakistan Relax Visa Requirements As Part of Peace Process*, BLOOMBERG NEWS (Sept. 9, 2012), <http://www.bloomberg.com/news/2012-09-09/india-pakistan-relax-visa-requirements-as-part-of-peace-process.html>; see also Anita Joshua, *India, Pakistan Ink Visa Agreement*, HINDU (Sept. 9, 2012), <http://www.thehindu.com/news/international/india-pakistan-ink-visa-agreement/article3874388.ece> (deeming the new agreement "the first major overhaul since 1974").

12. See Kavitha Rao, *India Tightens Visa Rules*, N.Y. TIMES (Jan. 5, 2010, 6:00 AM), [http://intransit.blogs.nytimes.com/2010/01/05/india-tightens-tourist-visa-rules/?\\_php=true&\\_type=blogs&\\_r=0](http://intransit.blogs.nytimes.com/2010/01/05/india-tightens-tourist-visa-rules/?_php=true&_type=blogs&_r=0) (providing a description of the initial rules); see also Vibhuti Agarwal, *India Eases Tourist Visa Rules*, WALL ST. J. (Dec. 4, 2012, 4:41 PM), <http://blogs.wsj.com/>

Gilani in Washington, D.C., to a Pakistani father and a white American mother, David Headley admitted his central role in the planning of the 2008 Mumbai terrorist attacks.<sup>13</sup> Previously a U.S. Drug Enforcement Agency informant, Gilani also testified that he worked as an operative both for a Pakistani terrorist group, Lashkar-i-Taiba, and for the Pakistani Inter-Services Intelligence Directorate (ISI).<sup>14</sup> In 2005, Gilani changed his first name, adopted his mother's surname, Headley, and subsequently made numerous trips to India on a multiple-entry visa in order to scout targets for the attacks.<sup>15</sup> Headley has since acknowledged that he changed his name in order to deflect suspicion among Indian authorities, because, along with his physical appearance and American-accented English, it would allow him to pass as a white American rather than as Pakistani.<sup>16</sup>

In response to the attacks, the Indian government announced its new visa policies. The policies included a mandatory sixty-day gap between entries on a tourist visa, in-country registration requirements if the sixty-day gap requirement is waived, and Home Ministry review prior to consular approval for frequent tourist visa applicants.<sup>17</sup> In addition, the new policies provided for Home Ministry review and attendant delays of visa applications for individuals of Pakistani ancestry, including U.S., Canadian, British, and Australian citizens. The website of the High Commission of India in Ottawa states the policies plainly, on a page titled "Visas to Persons of Pakistani Origin":

If you, or your parents or grandparents have/had Pak citizenship, a different procedure will be applicable as mentioned below. Applicants falling in this category may please note that visa granted to them shall be for a short term, usually for a period of 3 months. It will be based on the specific purpose of the visit and may be further restricted regarding the duration and the places that can be visited in India.<sup>18</sup>

The policy also included greater restrictions for those currently holding Pakistani nationality, including longer processing times, in-country registration requirements, and restrictions on movement within India.<sup>19</sup>

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indiarealtime/2012/12/04/india-eases-tourist-visa-rules/ (noting the relaxation of the initial sixty-day gap requirement).

13. See *A Guilty Plea to 2 Terrorism Charges*, N.Y.TIMES, Mar. 18, 2010, at A12; see also Ginger Thompson, *Mumbai Plotter Says Work for U.S. Drug Agency Provided Cover*, N.Y.TIMES, May 26, 2011, at A13.

14. See Thompson, *supra* note 13.

15. *Id.*

16. See *Mumbai-Attack Plotter Sentenced to 35 Years*, AL JAZEERA, (Jan. 25, 2013, 10:13 AM), <http://www.aljazeera.com/news/americas/2013/01/20131258846436127.html> ("Headley changed his birth name from Daood Gilani in 2006 so he could travel to, and from, India more easily to do reconnaissance without raising suspicions, videotaping and mapping targets for the gunmen."); see also Jane Perlez, *American Terror Suspect Traveled Unimpeded*, N.Y.TIMES, Mar. 26, 2010, at A1 ("Mr. Roty was able to use his Pakistani and American heritage to great advantage, playing up his American descent on his mother's side in India, and then behaving as a Pakistani in Pakistan, where his father was born.").

17. See Agarwal, *supra* note 12.

18. *Visa to Persons of Pakistani Origin*, HIGH COMMISSION INDIA OTTAWA, CAN., <http://www.hciottawa.ca/pages.php?id=132> (last visited Mar. 25, 2014).

19. *Id.*

Dual citizens of Pakistan and another country were deemed Pakistani nationals for the purposes of the visa policy.<sup>20</sup>

Although the visa policies enacted delays rather than an outright travel ban, the restrictions may effectively deter travel by individuals of Pakistani descent, and the U.S. State Department has expressed this concern to the Indian government. Its official statement is as follows:

The U.S. Department of State is aware that the Government of India imposes different policies and requirements with regard to visa issuance to applicants with Pakistani heritage, including U.S. citizens of Pakistani ancestry. The Department has raised its concerns with the Embassy of India in Washington, and the U.S. Embassy has also discussed the issue with officials of the Government of India in New Delhi.

Unfortunately, the State Department is limited in its influence on foreign government visa and immigration actions. Visas for travel to India are issued only by Indian authorities and are entirely under the purview of Indian laws, regulations, and procedures. It is the sovereign prerogative of any country—including India and the United States—to issue or deny entry visas and to set the terms under which those decisions will be made.<sup>21</sup>

The foregoing statement reveals the conundrum created by the Indian visa policy. On the one hand, the visa policy offends an American principle of equal citizenship that the State Department is eager to defend. On the other, the Indian policy exercises the sovereign prerogative to regulate entry, a prerogative that the United States not only recognizes with respect to India, but also strongly desires to preserve for itself.

The long history of enmity and suspicion between India and Pakistan, dating nearly to the countries' births, refreshed through multiple wars and border crises, and exploited by nationalist movements in both countries, has rendered each state vigilant to infiltration by the other.<sup>22</sup> The fear of infiltration has been heightened by the commonality of racial phenotype, language, and religious and cultural practices among citizens of both countries—the natural consequence of the Partition of British colonial India into the modern states of India and Pakistan.<sup>23</sup> But the Headley case

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20. *Id.*

21. Nisha Biswal, *Response to Twitter Question on Indian Visa's*, U.S. DEPARTMENT ST.: BUREAU S. & CENT. ASIAN AFF. (Jan. 27, 2012, 4:06 PM), <https://www.facebook.com/notes/us-department-of-state-bureau-of-south-and-central-asian-affairs/response-to-twitter-question-on-indian-visas/284915471568447>.

22. *See, e.g.*, YASMIN KHAN, *THE GREAT PARTITION 195* (2007) (“A natural corollary to the empirical confusions surrounding Pakistan’s territorial extent and Pakistan’s intrinsic meaning was that it took a long time for people to come to grips with the idea of India and Pakistan as separate sovereign lands . . . . The system of entry and exit permits, which began as a logical attempt to regulate the refugee flow, soon turned into a restrictive administrative regime which became self-sustaining. Now the aim was to keep out terrorists and enemies of the state . . . . Most of all, the governments needed to pin down precisely who was an Indian and who was a Pakistani. There was no room for ambiguities or uncertain gray areas.”).

23. *See id.* at 81 (noting that the Punjab region before Partition “had its own distinctive culture and its own strategic importance, and was both the birthplace of Sikhism and home to

introduced the specter of a different kind of enemy to the Indian state: one who could pass not as Indian—a challenge with which the Indian security apparatus has decades of experience—but as American.

The Headley rules reflect an anxiety shared by the West after the attacks of September 11, 2001: fear of the non-terrorist-looking terrorists, a category that is itself overdetermined by more than a decade of racial, religious, and national associations with terrorism. The Headley case is an example of the adaptive enemy, adjusting its tactics in response to antiterrorism measures that rely on traditional forms of profiling. By this account, the Headley rules are the (Indian) state's counter-adaptation, deploying national origin and ancestry where racial phenotype, religious identification, language, and nationality—as distinct from national origin—prove insufficient markers of terrorist threat.

Although created in response to the Headley affair, the Indian visa policy has been enacted against a backdrop of longstanding suspicion of Pakistan, which, the policy suggests, has helped to construct Pakistani as not just a nationality, but also an ethnicity. The assimilation of dual nationals into the category of Pakistani citizens is less troubling in this regard, since the maintenance of Pakistani citizenship reflects a choice of the dual national to retain affiliation with, and loyalty to, the Pakistani state. The ascription of Pakistani identity down to the second, or even third, generation of a Pakistani national, however, transforms the nationality into an ethnic attribution—this attribution descends automatically, even to an individual who is one-fourth of Pakistani origin (and even if that Pakistani origin precedes the existence of Pakistan itself).<sup>24</sup> By this account, “Pakistan” is rendered an immutable characteristic and a permanent threat, requiring constant Indian vigilance. Moreover, the ascription of Pakistani ethnicity on the basis of bloodline posits a fundamentally ethnic vision of not only Pakistani citizenship, but by implication, Indian citizenship as well.

The Indian construction of Pakistani ethnicity is inextricable from Muslim identity, given the virtual equation of Pakistan and Islam in the Indian imagination. Such an equation is to be expected, as Pakistan was formed as a Muslim homeland in the subcontinent, and the state has engaged in decades of religiously based self-construction and differentiation from the Hindu-majority India, even as India has experimented with Hindu nationalism.<sup>25</sup> The recurrent entanglement of Pakistan and India in

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a closely knitted Punjabi-speaking population of Hindus, Sikhs, and Muslims”). For a general introduction to the history and politics of Partition, see RAMACHANDRA GUHA, *INDIA AFTER GANDHI* 19–51 (2007).

24. See, e.g., *Visa to Persons of Pakistani Origin*, *supra* note 18. The text plainly reveals that Pakistani origin is a determination based on “citizenship” (rather than the racial or ethnic status) of the applicant’s parents and grandparents). Furthermore, the description of Pakistani as a category of ethnicity within South Asia is in many respects inapposite, as more traditionally defined, sub-national ethnic groups exist across the Pakistani-Indian border. For example, Punjabis—the most populous ethnic group in Pakistan—exist in both countries by virtue of Partition, and share a common language, pre-independence history, and cultural traditions, notwithstanding their religious differences.

25. The history of Indian and Pakistani constructions of national identity predicated on religious affiliation is long and varied—indeed, coextensive with the formal existence of



Kashmir likewise has fortified an understanding of Pakistani ethnicity as fundamentally Islamic. Thus, the “Islamic threat” of the Pakistani is not a post-9/11 construction, but instead has been an indigenous, longstanding feature of Indo-Pak relations, a fact that is supported by the broadly held view that the Mumbai attacks featured the involvement of the Pakistani state (and, in particular, elements of the ISI), rather than non-state actors alone.<sup>26</sup>

Notably, the tightening of visa restrictions with respect to Americans of Pakistani descent has been accompanied by a relaxation of restrictions with respect to the Indian diaspora. Through a series of policy initiatives designed to attract diasporic investment in India, the state has created special visa pathways for foreign nationals of Indian origin. Most recently, in 2003, India introduced the Overseas Citizen of India (OCI) status, which grants various benefits, including a “multiple entry, multiple purpose, life-long visa for visiting India,”<sup>27</sup> freedom from the ordinary requirement to register with immigration authorities, the ability to hold property, and preferential treatment for adoption from India.<sup>28</sup> And while its name

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those two countries. *See, e.g.*, KHAN *supra* note 22, at 175–76 (“[A]s refugees arrived in India and Pakistan they were encouraged to see themselves in a new light—to set aside their hardships momentarily and to appreciate that they now, after all, independent citizens of free countries . . . . [In Pakistan, t]he victims of Partition violence were called *shahids* and bathed in the language of martyrdom . . . . Partition quickly became repackaged as a war of liberation . . . . In northern India, the Hindu Right, particularly the RSS [Rashtriya Swayamsevak Sangh] and the Hindu Mahasabha, which had played such a provocative role in the months leading up to Partition, and had been hand in glove with violent rioters all along, now swung firmly behind the refugee cause.”). For a brief introduction to current controversies over Hindutva, or Hindu nationalism, and Narendra Modi, see Sambuddha Mitra Mustafi, *What Makes Narendra Modi a Middle-Class Hero?*, N.Y. TIMES, (May 16, 2013, 1:45 AM), <http://india.blogs.nytimes.com/2013/05/16/what-makes-narendra-modi-a-middle-class-hero/>. *See also* Victor Mallet & Barney Jopson, *US To End Boycott of India’s Narendra Modi Ahead of Election*, FIN. TIMES (Feb. 11, 2014, 5:14 AM), <http://www.ft.com/cms/s/0/526c00d2-92d3-11e3-8018-00144feab7de.html#axzz2tv3RfA4X>.

26. *See supra* note 13 and accompanying text.

27. *Overseas Citizenship of India Scheme*, MINISTRY OVERSEAS INDIAN AFF., <http://moia.gov.in/services.aspx?id1=35&id=m3&idp=35&mainid=23> (last visited Mar. 25, 2014).

28. A registered OCI is entitled to “parity with Non-Resident Indians in respect of all facilities available to them in economic, financial and educational fields except in matters relating to the acquisition of agricultural or plantation properties.” *Id.* (internal quotation marks omitted). In particular, the Ministry of Overseas Indian Affairs indicates that OCIs enjoy the following benefits:

- a. Parity with Non-Resident Indians in the matter of inter-country adoption of Indian children;
- b. Parity with resident Indian nationals in matters of tariffs in domestic air fares;
- c. Parity with domestic Indian visitors in respect of entry fee for visiting national parks and wildlife sanctuaries in India;
- d. Parity with non-resident Indians in respect of:
  - i. Entry fees for visiting the national monuments, historical sites and museums in India;
  - ii. Practicing the following professions in India . . . :
    - Doctors, dentists, nurses and pharmacists;
    - Advocates;
    - Architects; and
    - Chartered Accountants; and

purports to afford these benefits to “Citizen[s] of India,” the OCI status is in fact reserved for foreign nationals of Indian descent, thus blurring the traditional citizen-noncitizen dichotomy, providing a qualified form of dual citizenship, and introducing a multiplicity of state citizenship practices.

In fact, the definition of OCI mirrors almost exactly India’s definition of Pakistani descent, suggesting that foreign nationals of Pakistani descent are viewed by the Indian state as “Overseas Citizens of Pakistan.”<sup>29</sup> Under a 2005 law, the Citizenship (Amendment) Act,<sup>30</sup> OCI status may be granted to any individual who was eligible for Indian citizenship on the date that the Indian constitution became effective (January 26, 1950), belonged to territories that became India at Partition (August 15, 1947), or became citizens after enactment of the constitution.<sup>31</sup> OCI status is also available to individuals whose *parents* or *grandparents* meet one of these three requirements.<sup>32</sup> Those who have ever held Pakistani or Bangladeshi citizenship are ineligible.<sup>33</sup> Thus, “Indianness” is constructed to extend back up to three generations, the same as India’s construction of the Pakistani. The Indian and the Pakistani are thus constructed as each other’s inverse—as essential, immutable, and oppositional categories, recalling Etienne Balibar’s characterization of the “lesson of alterity,” according to which modern conceptions of citizenship rely upon “otherness as an indispensable element of its own identity, its virtuality, its ‘power.’”<sup>34</sup>

The legal inscription of Indian citizenship is inextricable from Partition. The first definitions of Indian citizenship, in the constitution of 1950, give substantial attention to the granting of citizenship to migrants from Pakistan.<sup>35</sup> Indeed, the citizenship chapter of the constitution establishes the template for determining India’s contemporary understanding of the Pakistani and the OCI construction of the Indian. The constitution reflects multiple approaches to citizenship: *jus soli*, *jus sanguinis*, and a partial

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e. Entitlement to appear for the All India Pre-Medical Test or such other tests to make them eligible for admission in pursuance of the provisions contained in the relevant Acts.

*Id.*

29. *See id.*

30. 2005, No. 32, Acts of Parliament, 2005 (India).

31. *Id.* § 4(a)(i)–(iii).

32. *Id.* § 4(a)(iv).

33. *Id.* § 4(b).

34. Sandro Mezzadra, *Citizen and Subject: A Postcolonial Constitution for the European Union?*, 1 SITUATIONS: PROJECT RADICAL IMAGINATION 31, 31 (2006), <http://ojs.gc.cuny.edu/index.php/situations/article/view/22/31> (translating ETIENNE BALIBAR, L’EUROPE, L’AMÉRIQUE, LA GUERRE: RÉFLEXIONS SUR LA MÉDIATION EUROPÉENNE 38–39 (2003) (“À la leçon d’ordre public issue de l’histoire européenne s’en ajoute ainsi une autre, qu’on pourrait appeler une *leçon d’altérité*, ou une reconnaissance (même hésitante, contrainte, conflictuelle) par l’Europe de l’altérité comme composante indispensable de sa propre identité, de sa propre virtualité, en clair de sa propre «puissance».”)).

35. *See* Anupama Roy, *Between Encompassment and Closure: The ‘Migrant’ and the Citizen in India*, 42 CONTRIBUTIONS INDIAN SOC. 219, 222 (2008) (“[Partition is] the primary context within which citizenship gets enframed in the Indian Republic.”).

detritorialization.<sup>36</sup> First, it confers citizenship on individuals who, at the commencement of the constitution, were domiciled in the territory of India, and (a) were born in the territory of India, (b) either of whose parents were born in the territory of India, or (c) have been “ordinarily resident” in the territory of India for a period of five years preceding the commencement of the constitution.<sup>37</sup> These provisions seek to capture those “found” in India soon after its independence<sup>38</sup> and render them from colonial subjects to citizens of the state. They do so through a combination of *jus soli*, *jus sanguinis*, and territorial presence. Second, the constitution confers citizenship on certain migrants to India from territories that became Pakistan. Article 6 of the citizenship chapter deems, as citizens of India, (as of the commencement of the constitution) individuals who migrated from the territory of Pakistan, and who either themselves, *their parents*, or *their grandparents* were born in pre-Partition India.<sup>39</sup> Article 7 authorizes the conferring of citizenship on migrants *from* India to Pakistan, who subsequently returned under permits for resettlement or permanent return.<sup>40</sup> Taken together, Articles 6 and 7 reflect the imperative to contend with the massive migration of Partition; migration from Pakistan was, literally, constitutive of the nation, and demanded rules to render the trauma and messiness of Partition intelligible to the state. Finally, Article 8 authorizes citizenship for “persons of Indian origin” residing outside of India, once again employing a trigenerational test: any individual who was born in the territory of pre-independence India, or whose parents or grandparents were so born, and who is resident in another country, is eligible for citizenship through registration.<sup>41</sup> Article 8 represents the most complete detritorialization of citizenship within the constitution, as it requires no residence in India, and at its furthest reach, requires only the birth of a grandparent within pre-independence India (including the territories that became Pakistan). At the same time, Article 8 also encompassed colonial subjects resident in other British colonies, and as such represents an ethnic model of citizenship.

As Valerian Rodrigues has argued, the constitutional structure of citizenship was expansive, eschewed strict territorial or ethnic ascription, and honored associational choice.<sup>42</sup> Associational choice is most clearly

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36. See Anupama Roy, *Overseas Indian Citizen: A New ‘Setubhandan’?*, 41 *ECON. & POL. WEEKLY* 1421, 1422 (2006).

37. INDIA CONST. art. 5.

38. ROY, *supra* note 2, at 36.

39. Article 6 also draws a distinction between those individuals who migrated to India before July 19, 1948, and those who migrated on or after that date. In order to be deemed a citizen, an individual in the former category must have been “ordinarily resident in the territory of India since the date of his migration . . . .” Those in the latter category must have been registered as a citizen of India before the “commencement” of the Constitution. Registration was possible only after a residency of at least six months in duration “immediately preceding” the date of application. See INDIA CONST. art. 6.

40. *Id.* art. 7.

41. *Id.* art. 8.

42. See Valerian Rodrigues, *Citizenship and the Indian Constitution*, in *CIVIL SOCIETY, PUBLIC SPHERE, AND CITIZENSHIP: DIALOGUES AND PERCEPTIONS* 214 (Rajeev Bhargava &

reflected in Articles 6 and 7, and yet these provisions are not entirely free of ascription. Rather, the trigenational eligibility rule still serves to define Indian ancestry, even if such ancestry does not automatically confer Indian citizenship; only the volitional act of migration to the territory of India, in combination with Indian ancestry, results in the conferring of citizenship. This same combination of ascription and volition repeats in Article 8, which requires that individuals of Indian ancestry—defined, once more, by a trigenational rule—affirmatively apply with the Indian government for registration as citizens.<sup>43</sup>

The original constitutional structure of Indian citizenship thus reflects three distinct foundational concerns: transforming colonial subjects of Great Britain into citizens of the Indian state; incorporating migrants from Pakistan in the period of Partition into India; and demarcating Indian citizenship from Pakistani citizenship (and, by extension, India from Pakistan). These goals are met through an imbricated system of *jus soli* and *jus sanguinis*, ascription and volition. By virtue of the histories of British colonialism, the independence movement that cleaved India, and the mass migration of Partition, the citizenship moves expressed in the constitution were essential to nascent India's national project. Unsurprisingly, the constitution's foundational definitions of citizenship prefigure the state's contemporary definitions of Indian and Pakistani citizenship.

As Anupama Roy has shown, the emergence of OCI status is consistent with a trend in India toward an ethnic model of citizenship.<sup>44</sup> Roy observes that the constitution conceived of citizenship in both ethnic and associational terms, conjuring a membership status that included both a territorially defined class and a migrant population that elected to join that class.<sup>45</sup> The ethnic dimension of Indian citizenship has, however, grown considerably in recent years. The Citizenship Act of 1955 provided for unrestricted *jus soli* citizenship for anyone born in India from the date of enactment of the constitution onward, but a 1986 amendment to the Act, created to restrict the granting of citizenship to children of migrants from Bangladesh, Sri Lanka, and Africa, limited *jus soli* to those with at least one Indian citizen parent.<sup>46</sup> A 2003 amendment, which also created the OCI status, further restricted *jus soli* to individuals whose parents were both Indian citizens, or to those with only one citizen parent, so long as the other parent was not an “illegal migrant” at the time of the individual's birth.<sup>47</sup>

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Helmut Reifeld eds., 2005) (noting that “the draft articles [of the constitution], both as they were initially proposed, and in their final version too, had some pronounced features which could be termed secular, understood as non-preference to any and inclusion of all relevant communities or groups,” and, further, “[w]hile accepting the fact that people were embedded in identities, [the constitution] grounded citizenship on principles that, while not reducible to them, were at the same time related to [those identities]”); see also ROY, *supra* note 2, at 39–40.

43. See INDIA CONST. art. 8.

44. See generally Roy, *supra* note 36.

45. Roy, *supra* note 36, at 1421–22.

46. See ROY, *supra* note 2, at 138; Roy, *supra* note 36, at 1422.

47. “Illegal migrant” is defined as “a foreigner who has entered into India (i) without a valid passport or other travel documents and such other document or authority as may be

Meanwhile, a 1992 amendment expanded upon the Act's original grant of patrilineal *jus sanguinis* citizenship by making citizenship available to individuals born outside of India to an Indian citizen father, even if the father himself only acquired citizenship through descent.<sup>48</sup> The trend is thus toward a restriction on citizenship by birth and an expansion of citizenship by descent. Citizenship by descent, in turn, forces a convergence of Indian ethnicity and Indian citizenship, as evident from the intent to exclude Bangladeshis, Sri Lankans, and Africans in the 1986 amendment—once more reviving Balibar's "lesson of otherness"—and as reinforced by the ascription of a deterritorialized citizenship to the OCI.<sup>49</sup>

The introduction of the OCI status in 2003 is a particular kind of deterritorialization of citizenship. Deterritorialization is typically associated with the claiming or granting of rights by or to undocumented workers or other irregular migrants, supplanting the privity between state and citizen on which traditional notions of citizenship rely with a notion of informal social contract borne of territorial presence and civic practice.<sup>50</sup> The OCI program works in the other direction, extending the status-granting, identity-making reach of the state outside of its territorial boundary in order to recapture a diaspora and harness it for national gain. Both moves should be expected in the current moment of globalization, as states compete for the benefits of migration and simultaneously seek to insulate themselves from its costs.

As Roy points out, the OCI category was initially limited to people of Indian origin in North America, Europe, Australia, New Zealand, Singapore, and Thailand, prompting Fatima Meer, a South African, to dub it a "[d]ollar and pound citizenship."<sup>51</sup> But the cultural nationalism of the OCI program is at least as strong as the economic. Even when the program was expanded in 2005, it excluded citizens of Pakistan and Bangladesh, thus recapitulating the foundational definition of Indian citizenship. But as Roy writes:

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prescribed by or under any law in that behalf; or (ii) with a valid passport or other travel documents and such other document or authority as may be prescribed by or under any law in that behalf but remains therein beyond the permitted period of time". The Citizenship (Amendment) Act, 2003, No. 6, Acts of Parliament, 2004 (India).

48. See Rodrigues, *supra* note 42, at 216 (noting the overarching trend toward more restrictive citizenship criteria and underscoring that "successive amendments to [the Citizenship] Act narrowly circumscribed birth as entitling one to citizenship, and birth came emphatically to be qualified by ethnic belonging. The open and inclusive approach to citizenship reflected in the constitution gave way to a pronounced sense of insularity").

49. See ROY, *supra* note 2, at 136–37 (noting the increase in scholarly theorization of the "changed socio-historical realities of an increasingly globalized, interdependent, and interconnected world, characterized by transnational migrations and multicultural populations rather than by bounded national communities," which give rise to an apparently "transcendental" citizenship); see also BALIBAR, *supra* note 34.

50. See, e.g., Saskia Sassen, *Repositioning of Citizenship: Emergent Subjects and Spaces for Politics*, 46 BERKELEY J. SOC. 4, 5–12 (2002).

51. C. Rammanohar Reddy, *Citizenship with Dollars and Pounds*, HINDU (Jan. 19, 2003), <http://www.hindu.com/mag/2003/01/19/stories/2003011900230300.htm>.

Not only did the OCI then sustain the original contexts of nation-state citizenship framed at the time of Partition, it also manifested the dominant political and ideological contexts of Hindutva [Hindu nationalism] within which the category was made effective, the official process of instituting the category having been completed by the Bharatiya Janata Party (BJP) dominated National Democratic Alliance (NDA) government . . . . [T]he overseas citizenship of India was hegemonically marked, constituting all persons of Indian origin, wherever in the world they were, as Hindus, since their *punya bhumi* [homeland] remained India.<sup>52</sup>

By this account, the Indian's other is not the Pakistani, but the Muslim, a familiar theme in the subcontinent dating back to Partition.<sup>53</sup>

The Muslim in India has been, and continues to be, a vexing figure. In the immediate aftermath of Partition, Muslims were deemed "suspect as open or closet Pakistanis," having been "too much involved in the Muslim League demand for Pakistan: their sympathies were not likely to change overnight, and their loyalty could not be counted upon."<sup>54</sup> Questions of loyalty and fears of complicity with Pakistan or infiltration by Pakistanis have animated modern Indian history, from Partition to Kashmir to the Headley affair. It is, therefore, among these historical circumstances that Indian notions of citizenship—the citizenship of Indians and the citizenship of others—must be evaluated. As the Indian's other, the Pakistani—nearly equated with the Muslim—is a permanent object of suspicion. Just as the physical boundaries of India and Pakistan have been reified, so too have Indian and Pakistani identities been reinscribed. Between the Headley rules on the one hand, and the developments in Indian citizenship practices on the other, we can see the convergence of national security and cultural nationalist concerns, each following a logic of ethnic citizenship. The Pakistani and the Indian are once more opposed through ascriptions of citizenship that predate the nationalities as a historical matter, and which suggest their essential and permanent nature.

Differentiation from the Pakistani is thus part of the deep structure of citizenship in India. The contemporary reliance on national origin and ancestry is inseparable from the nation-building project of post-independence India and reflects India's newly resurgent ethno-national model of citizenship. Rooted in the foundational trauma of Partition, and fueled by religious and cultural nationalism within India and Pakistan, the imperative to differentiation has assumed new relevance within India following September 11 and the Mumbai attacks. In this context, as at Partition, ancestry is constitutive of Indian understandings of citizenship rather than antithetical to them.<sup>55</sup>

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52. Roy, *supra* note 35, at 239.

53. Gyanendra Pandey, *Can a Muslim Be an Indian?*, 41 COMP. STUD. SOC. & HIST. 608, 615 (1999).

54. *Id.*

55. The figure of the migrant has also been transformed since independence. Whereas Partition created an imperative for the state to identify and incorporate the migrant, this moment of incorporation was finite; as the constitution provided, migrants from territory that became Pakistan were eligible for citizenship only until the date of commencement of the

*B. The Israel Visa Waiver Program Controversy*

In March 2013, companion bills were introduced in the House and Senate, both titled the United States-Israel Strategic Partnership Act of 2013.<sup>56</sup> With 351 cosponsors in the House<sup>57</sup> and fifty-three in the Senate,<sup>58</sup> the bills declare Israel a “major strategic partner”<sup>59</sup> of the United States. They include provisions for continued support of Israeli defense programs and expanded cooperation between the two countries on matters of defense, military and sensitive technology-related trade, energy, water, and agriculture. The bills also promote Israel’s inclusion in the Visa Waiver Program, engendering considerable opposition because of Israel’s disparate treatment of U.S. citizens of Palestinian, Arab, and Muslim descent.<sup>60</sup>

The Visa Waiver Program began as a pilot program in 1986.<sup>61</sup> Originally limited to eight countries,<sup>62</sup> it exempts the citizens of program-participant countries from the requirement to obtain from the State Department a nonimmigrant visa for business or tourist travel to the United States for up to ninety days.<sup>63</sup> The program has been amended numerous times since 1986, was made permanent in 2000,<sup>64</sup> and has now expanded to include

constitution. Thus, the constitution established a window of time in which migration was a basis for citizenship. Decades later, migration became oppositional to citizenship rather than a pathway to it. *See supra* note 39; *see also* Roy, *supra* note 35, at 234 (describing the Illegal Migrants (Determination by Tribunals) Act, 1983, No. 39, Acts of Parliament, 1983 (India), *invalidated* by Sarbananda Sonawal v. Union of India, (2005) 5 S.C.C. 665 (India), which “stressed that ‘special provisions for the detection of such foreigners in Assam and also in any other part of India in which such foreigners may be found to have remained illegally’ was necessary for ‘protecting the citizens of India’”); *id.* at 236 (characterizing the supreme court decision that struck down the Illegal Migrants Act as itself “manifest[ing] a trend towards the entrenchment of a notion of citizenship marked by cultural ascriptions which had almost imperceptibly crept into the Citizenship Act with the amendment in 1986”).

56. United States-Israel Strategic Partnership Act of 2013, S. Con. Res. 462, 113th Cong. (2013).

57. *H.R.938—United States-Israel Strategic Partnership Act of 2013*, CONGRESS.GOV, <http://beta.congress.gov/bill/113th/house-bill/938> (last visited Mar. 25, 2014).

58. *Id.*

59. *See* H.R. 938, 113th Cong. § 3 (2013); S. 462, 113th Cong. § 4 (2013). If enacted, Israel would be the only country to which this designation would apply.

60. *See, e.g.*, Letter from Azadeh N. Shahshahani, President, Nat’l Lawyers Guild, to Sen. Barbara Boxer (June 26, 2013), *available at* [http://www.nlginternational.org/report/NLG\\_letter-SB\\_462.pdf](http://www.nlginternational.org/report/NLG_letter-SB_462.pdf); Ali Gharib and George Hale, *Critics Fear Visa Waiver for Israel Glosses over Discrimination Against Americans*, DAILY BEAST (May 16, 2013), <http://www.thedailybeast.com/articles/2013/05/16/critics-fear-visa-waiver-for-israel-glosses-over-discrimination-against-americans.html>.

61. The Visa Waiver Pilot Program was contained in the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 313, 100 Stat. 3359, 3435.

62. The first country designated by the U.S. State Department was the United Kingdom, on July 1, 1988. During 1988 and 1989, the following countries were added to the pilot (in chronological order): Japan, France, Switzerland, the Federal Republic of Germany, Sweden, Italy, and the Netherlands. Visas: Passports and Visas Not Required for Certain Nonimmigrants, 54 Fed. Reg. 27,120 (June 27, 1989) (codified at 22 C.F.R. pt. 41 (2013)).

63. 22 C.F.R. § 41.2(1) (2012).

64. Visa Waiver Permanent Program Act, Pub. L. No. 106-396, 114 Stat. 1637 (2000) (codified as amended at 8 U.S.C. § 1187 (2012)).

thirty-seven countries.<sup>65</sup> The requirements for admission to the program were amended most recently via the Implementing Recommendations of the 9/11 Commission Act of 2007.<sup>66</sup> Approximately 40 percent of all overseas visitors enter the United States via the program.<sup>67</sup> Many countries actively seek admission to the program in order to promote tourism and commerce.<sup>68</sup> It is also understood as an expression of amity between the United States and member countries.<sup>69</sup>

Whereas visitors to the United States ordinarily must obtain a visa from an overseas U.S. consular post and are typically subject to in-person interviews and screening and must pay a processing fee, the Visa Waiver Program relieves visitors of the documentary, interview, and financial burdens attendant to nonimmigrant “B” visas.<sup>70</sup> Ordinary visa processing takes into account a broad range of factors, including whether the applicant meets a ground of inadmissibility under the Immigration and Nationality Act, the likelihood that the applicant will overstay the visa, and whether the applicant is in one of a number of “lookout” databases of people deemed a threat to the United States.<sup>71</sup> For participating countries, the Visa Waiver Program replaces these individualized assessments with a far less onerous application process, one that functions effectively as a presumption in favor of admission.<sup>72</sup> The criteria for admission to the program restrict it to “high volume/low risk” countries,<sup>73</sup> whose nationals likely would be granted visitor visas through the ordinary process, and which otherwise agree to forms of cooperation with the United States designed to approximate the same security interests as individualized assessments.

By statute, the program is limited to countries that have historically low rates of nonimmigrant visa refusals, adopt certain technologies such as machine-readable passports and visa documents that incorporate biometric

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65. The Visa Waiver Program currently designates: Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, Republic of Korea, San Marino, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. 8 C.F.R. § 217.2.

66. Pub. L. No. 110-53, § 711, 121 Stat. 266, 388 (codified at 8 U.S.C. § 1187). As the *Foreign Affairs Manual* summarizes, the program has been amended six times, including the 2007 amendments. In 1990, the eight-country cap was removed, and the program was reauthorized until 1994. In 1994, the program was reauthorized until 1996, and a probationary status for prospective participant countries was added. In 1996, the probationary status option was removed, and the program was reauthorized until 1997. In 1998, the program was reauthorized again until 2000, when the Visa Waiver Permanent Program Act made the program permanent. 9 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 41.2 N10 (2010), available at <http://www.state.gov/documents/organization/87159.pdf>.

67. ALISON SISKIN, CONG. RESEARCH SERV., RL32221, VISA WAIVER PROGRAM 9 (2014).

68. *Id.*

69. *Id.* at 12.

70. ALISON SISKIN, CONG. RESEARCH SERV., RL32221, VISA WAIVER PROGRAM 13 (2013).

71. SISKIN, *supra* note 67, at 1.

72. *Id.*

73. *Id.* at 9.



identifiers, enter into information-sharing agreements with the United States regarding loss or theft of passports or possible threats to U.S. security or welfare, and accept the streamlined repatriation of its citizens, former citizens, and nationals, against whom a final order of removal is issued.<sup>74</sup> In addition, a participating country must offer “reciprocal privileges” to the United States,<sup>75</sup> and the Department of Homeland Security, in consultation with the Department of State, must determine that the law enforcement and security interests of the United States would not be undermined by the country’s inclusion.<sup>76</sup>

Whereas on one level the Visa Waiver Program is merely a matter of administrative convenience, for visitors and the countries they visit alike, it is also understood as an expression of strategic partnership and amity between the United States and member countries. As President George W. Bush stated in 2008 when announcing the addition of the Czech Republic, Estonia, Slovakia, and South Korea to the program, “Today’s announcement signifies a new chapter in the relationship between the United States and your nations. It is a testament to the strong bonds of friendship that unite our people.”<sup>77</sup> Unsurprisingly, inclusion of countries in the program is an instrument of foreign policy, as reflected in the strategic significance of the three former Soviet-bloc countries and South Korea, and is understood as such by many countries.<sup>78</sup> In 2006, for example, then President Vaclav Havel wrote to President Bush urging inclusion of the Czech Republic in the program, arguing that doing so would “remove what Czechs feel is an unfortunate relic of the Cold War that no longer belongs in the modern Czech-U.S. alliance.”<sup>79</sup> As a recent

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74. 8 U.S.C. § 1187(c) (2012).

75. *Id.* § 1187(a)(2)(A).

76. *Id.* § 1187(c).

77. President George W. Bush, Statement by the President on the Visa Waiver Program (Oct. 17, 2008), *available at* <http://iipdigital.usembassy.gov/st/english/texttrans/2008/10/20081017125306eafas0.1320612.html#axzz2rztsq58a>.

78. Both Congress and the Executive have treated inclusion in the Visa Waiver Program as a foreign policy tool. As a Government Accountability Office (GAO) letter to Congress on the Visa Waiver Program documented in 2006, members of Congress have sought inclusion of particular countries, such as Poland and South Korea, in the program for policy reasons. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-835R, PROCESS FOR ADMITTING ADDITIONAL COUNTRIES INTO THE VISA WAIVER PROGRAM 3 (2006). In 2005, President Bush announced the “Road Map Initiative,” to assist additional countries in meeting the requirements to join the program. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-967, VISA WAIVER PROGRAM: ACTIONS ARE NEEDED TO IMPROVE MANAGEMENT OF THE EXPANSION PROCESS, AND TO ASSESS AND MITIGATE PROGRAM RISKS 16 (2008). As the GAO reported in 2008, “According to the Department of Homeland Security (DHS), some of these countries are U.S. partners in the war in Iraq and have high expectations that they will join the program due to their close economic, political, and military ties to the United States.” *Id.* at 3. In 2006, the Senate passed, but did not enact, a comprehensive immigration reform bill that included a section to expand the program to countries providing material support to the United States or the multilateral forces in Afghanistan or Iraq. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 413.

79. Daniel Griswold, *Expand Visa Waiver Program to Qualified Countries*, 26 FREE TRADE BULL. 3 (Jan. 26, 2007), *available at* <http://object.cato.org/sites/cato.org/files/pubs/pdf/FTB-026.pdf> (quoting letter on file with author).

Congressional Research Service report notes, “[T]he leaders and publics in many new EU members, such as Poland, are reportedly unhappy with their exclusion from the VWP given their support of controversial U.S. policies in Afghanistan, Iraq, and in the fight against terrorism.”<sup>80</sup> In many cases, inclusion in the program may also serve as an American endorsement of the democratic bona fides of participating countries. For example, a White House statement entitled “U.S.-Chile Partnership” notes the “deep historical partnership” between the two countries, as “close partners and vibrant democracies,” and includes the State Department’s nomination of Chile to the Visa Waiver Program in a list of cooperation agreements.<sup>81</sup> Thus, the symbolic value of the program, and not just the ease of travel it affords, makes it a coveted status for many countries. In light of the foreign policy role that the Visa Waiver Program has played historically, it is not surprising that the proposal to include Israel in the program would be included in a bill designed to promote Israel as a “major strategic partner.”<sup>82</sup>

The legitimizing effects of the Visa Waiver Program are embedded in its reciprocity requirement. The statutory requirement that member countries provide “reciprocal privileges” to U.S. citizens and nationals implies an equality of status among Americans and the citizens of other countries. As Havel wrote in his letter to President Bush regarding inclusion of the Czech Republic in the program, “It . . . allows you to demonstrate to an emancipated and self-confident ally the renowned U.S. spirit of equality and fair play.”<sup>83</sup> At a minimum, reciprocity in the context of the Visa Waiver Program means “visa-free travel” for U.S. citizens and those of the member country.<sup>84</sup> But the broad language of the statute—requiring “reciprocal privileges to citizens and nationals of the United States”—implies that visa-free travel must also be travel free of discrimination, because citizenship, by its liberal meaning, does not permit differentiation among its members, the language of the statute necessarily requires the extension of reciprocal privileges to *all* U.S. citizens.<sup>85</sup>

Although Israel would not meet the program’s current visa refusal rate requirement—the statute requires a rate of no more than 3 percent,<sup>86</sup> and the

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80. SISKIN, *supra* note 70 at 13; *see also* Craig Whitlock, *Poland’s Leader Hopes To Gain from Support of U.S. Policies*, WASH. POST, Feb. 7, 2006, at A15.

81. Press Release, White House, Fact Sheet: U.S.-Chile Partnership (June 4, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-us-chile-partnership>.

82. *See* United States-Israel Strategic Partnership Act of 2013, H.R. 938, 113th Cong. § 3 (2013) (“Congress declares that Israel is a major strategic partner of the United States.”).

83. Griswold, *supra* note 79, at 3.

84. *See, e.g.*, 9 U.S. DEP’T OF STATE, *supra* note 66.

85. 8 U.S.C. § 1187(a)(2)(A) (2012).

86. The statute requires either (a) a visa refusal rate of less than 2 percent during the two previous fiscal years combined and less than 2.5 percent in each of the previous two fiscal years, or (b) a visa refusal rate during the immediately previous fiscal year of less than 3 percent. *Id.* § 1187(c)(2)(A).

rate for Israel in fiscal year 2013 was 9.7 percent<sup>87</sup>—Israel’s treatment of American Muslims and Americans of Arab and Palestinian descent has proven the main obstacle to inclusion in the Visa Waiver Program because of the reciprocity requirement. For decades, advocates have documented concerns with Israel’s treatment of Muslim Americans, Arab Americans, and Palestinian Americans.<sup>88</sup> These have included “complaints of hundreds of American[s] of Arab descent who, upon entering Israel or the Occupied Territories, have reported being: detained for hours of humiliating questioning; forced against their will to secure a Palestinian passport; strip searched; forced to surrender cameras, computers, or phones (some of which have been destroyed or not returned); or denied entry and forced to buy a return ticket back to the U.S.”<sup>89</sup> In June 2013, sixteen members of Congress wrote a letter to the Israeli ambassador to the U.S. expressing concern that Israel was “disproportionately singling out, detaining and denying entry to Arab and Muslim Americans.”<sup>90</sup>

The U.S. State Department similarly has documented unequal treatment of U.S. citizens. In its country report for Israel, the West Bank, and Gaza, the State Department begins with a statement of its commitment to equal citizenship: “The U.S. government seeks equal treatment and freedom to travel for all U.S. citizens regardless of national origin or ethnicity.”<sup>91</sup> Yet whereas Israeli-American nationals are treated by Israel as Israeli at the port of entry, the report continues, “U.S. citizens who are or may be Palestinian-American (PA) dual nationals are treated as Palestinian nationals at the port of entry.”<sup>92</sup> Moreover, “[t]hose with extensive travel to Muslim countries or U.S. citizens whom Israeli authorities suspect of being of Arab, Middle

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87. *Adjusted Refusal Rate—B-Visas Only by Nationality, Fiscal Year 2013*, TRAVEL.STATE.GOV, <http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/RefusalRates/FY13.pdf> (last visited Mar. 25, 2014). In brief, the refusal rate is calculated by dividing total visa refusals (not counting an applicant who was initially denied but later approved the same year) by the total number of refusals and issuances. *Calculation of the Adjusted Visa Refusal Rate for Tourist and Business Travelers Under the Guidelines of the Visa Waiver Program*, TRAVEL.STATE.GOV, <http://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/refusalratelanguage.pdf> (last visited Mar. 25, 2014). Note that “overcomes,” where an officer “has the information he needs to overcome a refusal but has not processed the case to completion,” are not included in the numerator or denominator. *Id.*

88. See, e.g., James Zogby, *Congress Should Not Reward Israel with Visa Waivers*, HUFFINGTON POST (Apr. 20, 2013), [http://www.huffingtonpost.com/james-zogby/congress-should-not-rewar\\_b\\_3122128.html](http://www.huffingtonpost.com/james-zogby/congress-should-not-rewar_b_3122128.html); see also SISKIN, *supra* note 67, at 15.

89. Zogby, *supra* note 88. Other reports include requiring U.S. citizens of Palestinian descent to disclose email passwords in order to gain admission to the country. See Yousef Munayyer, *A Lopsided U.S. Visa-Waiver*, INT’L N.Y. TIMES, Oct. 28, 2013, at 9.

90. See *Friction Expected on Israel-US Visa Measure*, BOS. GLOBE (July 16, 2013), <http://www.bostonglobe.com/news/world/2013/07/16/congress-administration-disagree-israeli-visas/A19SiaeBJzAPc4qB7WDIRJ/story.html>.

91. *Israel, the West Bank and Gaza*, U.S. PASSPORTS & INT’L TRAVEL, <http://travel.state.gov/content/passports/english/country/israel.html> (last updated Feb. 6, 2014).

92. *Id.*

Eastern, or Muslim origin may face additional questioning by immigration and border authorities.”<sup>93</sup>

The prefatory statement of principle in the State Department report announces the issue as one of discrimination on the basis of national origin and ancestry.<sup>94</sup> In fact, national origin and ancestry discrimination are operating in at least two distinct ways. First, Israel ascribes Palestinian identity not only to those who hold both a U.S. passport and a PA identification, but to those U.S. citizens who *may be eligible* for a PA identification, even if they do not possess one.<sup>95</sup> As the report states, “Israeli authorities consider anyone who has parents or grandparents who were born or lived in the West Bank or Gaza to have a claim to a PA ID.”<sup>96</sup> The effect is for the Israeli government, and not the Palestinian Authority, to determine, on the basis of ancestry, who is Palestinian, and by implication, for the Israeli government rather than the United States to determine who is an American citizen. Second, according to the State Department, Israel gives enhanced scrutiny to U.S. citizens “whom Israeli authorities *suspect* of being of Arab, Middle Eastern, or Muslim origin.”<sup>97</sup> Thus, even if a U.S. citizen may not actually be eligible for a PA identification card, the mere fact of Arab, Middle Eastern, or Muslim heritage may trigger disparate treatment.

Even Senator Barbara Boxer, who introduced the United States-Israel Strategic Partnership Act in the Senate, acknowledges Israeli discrimination against Arab Americans’ visa and admission determinations.<sup>98</sup> She has defended the bill on the basis of its requirement that Israel exercise a “reasonable effort” to prevent discrimination against all American citizens.<sup>99</sup> Indeed, she argues that including Israel in the Visa Waiver Program would provide the United States leverage to end such discriminatory treatment. However, as the bill specifically qualifies the requirement of a “reasonable effort” with the phrase “without jeopardizing the security of the State of Israel,”<sup>100</sup> Israel may be able to justify and continue its current policies under those conditions.

Citizenship determination has long been understood as the sole prerogative of the sovereign.<sup>101</sup> In this instance, Israel’s ascription of

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93. *Id.*

94. *Id.*

95. “PA ID holders, as well as persons believed to have claim to a PA ID by virtue of ancestry, will be treated for immigration purposes as residents of the West Bank and Gaza, regardless of whether they also hold U.S. citizenship.” *Id.*

96. *Id.*

97. *Id.* (emphasis added).

98. See SISKIN, *supra* note 67, at 15.

99. *Id.* The bill states, in full, that the Secretary of State must certify that Israel “has made every reasonable effort, without jeopardizing the security of the State of Israel, to ensure that reciprocal travel privileges are extended to all United States citizens.” S. 462, 113th Cong. § 9(2) (2013).

100. S. 462 § 9(2).

101. Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT’L L. 694, 694 (2011) (“As a matter of traditional doctrine, international law has had little to say about the citizenship practices of states and the terms on which states determine the boundaries of their

Palestinian identity, combined with its policy of selective recognition of dual nationality, implies an Israeli claim of sovereignty over the Palestinian territories, which, while offensive to the aspirations of Palestinian nationhood, is not inconsistent with the contemporary political reality. Notably, it is Palestinian *identity*, as evidenced by eligibility (real or assumed) for a Palestinian Authority identification card, and not Palestinian *nationality*, that Israel ascribes.<sup>102</sup> While the existence of the PA identification card may be in anticipation of Palestinian nationhood—the cards are issued pursuant to the self-governance provisions of the Oslo Accords<sup>103</sup>—the fact of Palestinian non-nationhood, and Israel’s effective exercise of sovereignty over the Palestinian territories, is reinscribed by its ascription of Palestinian identity. The Palestinian Authority might ultimately issue the identification cards, but it does so subject to Israeli control.

Echoing the duality of India’s visa and citizenship policy, Israel’s constriction of the citizenship of Americans of Palestinian, Arab, and Muslim origin coexists with the liberal extension of citizenship to Jews under Israel’s Law of Return.<sup>104</sup> A foundational instrument of the Israeli national project, the Law of Return reflects an ethnic model of citizenship that dates back nearly to the creation of the state; it has served as a principal vehicle for fulfilling the state’s ambition to be a Jewish homeland.<sup>105</sup> As Gershon Shafir and Yoav Peled argue, ethno-nationalism has been one of three predominant strands in Israeli citizenship practice and theory, counterbalanced by democratic commitments and mediated by republicanism.<sup>106</sup> Whereas republicanism defines that nation—and thus the citizen—on the basis of territory, ethno-nationalism defines the nation on ethnic grounds. In the subcontinent, the cleaving of colonial India into two bordering nations has led to ethnic differentiation on both sides of the border. Likewise, the establishment of the state of Israel as a Jewish

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memberships.”); see also WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 124 (1995) (discussing minority rights claims in a contexts where sovereign states have unlimited power to determine citizenship).

102. See *Israel, the West Bank and Gaza*, *supra* note 91.

103. See Declaration of Principles on Interim Self-Government Arrangements, Isr.-P.L.O., Sep. 13, 1993, 32 I.L.M. 1525 (1993) (Oslo I Accord); Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-P.L.O., Sep. 28, 1995, 36 I.L.M. 551 (1997) (Oslo II Accord).

104. Law of Return, 5710-1950, 4 LSI 114 (1950) (Isr.). Originally enacted by the Knesset in 1950 and amended in 1954 and 1970, the Law of Return provides, “Every Jew has the right to come to this country as an *oleh*.” *Id.* § 1.

105. Since 1948, over 3.1 million people have immigrated to Israel. Andrew Esensten, *Rate of Jewish Immigration to Israel Leveling Off*, HA’ARETZ (Mar. 10, 2013, 6:15 AM), <http://www.haaretz.com/jewish-world/news/rate-of-jewish-immigration-to-israel-leveling-off.premium-1.508321>.

106. GERSON SHAFIR & YOAV PELED, *BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP* 33 (2002) (“[T]he inclusionary principle of democracy and the exclusionary principle of Jewish nationalism could coexist only because, and only insofar as, they were mediated by republicanism as part of the colonial project of building the nation-state and attaining national citizenship.”).

homeland demanded differentiation from bordering Palestinian and Arab territories, and therefore peoples.

It is a verity that the Jewish identity of Israel is a central—if contested—conceit of the nation. (In this regard, Israel's ethno-nationalism bears a stronger similarity to that of Pakistan, itself conceived of as a homeland for a religious minority, than to that of India.) As in the case of India, then, Israel's normative conception of citizenship is inextricable from the self-conception of the nation and the nation-building project. By this account, citizenship is culturally specific.

## II. VISA POLICY AS SITE OF CONTEST: A CLASH OF CITIZENSHIPS

Visa programs—the regulated interchange of citizens by states—represent a point of contact, and therefore potential conflict, between competing understandings of citizenship. Whereas citizenship is, fundamentally, a national status, visa programs subject citizens of one country to the values, including the citizenship values, of another. The ethno-nationalist dimensions of India's visa policy toward Americans of Pakistani descent and Israel's treatment of Americans of Palestinian, Arab, and Muslim descent pose a fundamental challenge to American conceptions of equal citizenship. Indeed, the seemingly mundane, bureaucratic determination of permission to visit made by one state may devalue the privileges of citizenship of another. In the cases of India and Israel with respect to U.S. citizens, the liberal conception of citizenship as unalloyed and indivisible is tested and even nullified. U.S. policy in response is therefore not merely a matter of protecting the interests of individual American citizens—a core obligation of a state to its citizens—but of protecting an American conception of citizenship itself.

While the history of American citizenship practices is rife with exclusionary practices—one need only recall *Dred Scott v. Sandford*,<sup>107</sup> the exclusion of women from basic citizenship rights,<sup>108</sup> and the period of Asian exclusion, culminating in the Immigration Act of 1924,<sup>109</sup> which barred admission of Asian immigrants because they were racially “ineligible to citizenship”<sup>110</sup>—ethnic assimilation predominates in

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107. 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

108. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57, 68 (1961) (holding that restricting mandatory jury service to men was constitutional), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 162 (1875) (holding that restricting the suffrage to males did not infringe on women's rights as citizens), *superseded by constitutional amendment*, U.S. CONST. amend. XIX.

109. Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153. According to the Office of the Historian in the U.S. State Department, “the most basic purpose of the 1924 Immigration Act was to preserve the ideal of American homogeneity.” *The Immigration Act of 1924 (The Johnson-Reed Act)*, U.S. DEPARTMENT ST., OFF. HISTORIAN, <http://history.state.gov/milestones/1921-1936/immigration-act> (last visited Mar. 25, 2014).

110. As a result of the Naturalization Acts of 1790 and 1870, Asians were racially ineligible for naturalization, and by operation of the “ineligible to citizenship” language of the 1924 Immigration Act, were barred from admission. For a discussion of the period of Asian exclusion, see Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination*

contemporary state discourse and practice. The Fourteenth Amendment's liberal granting of *jus soli* citizenship is itself an assimilationist instrument, promising that nationality-based distinctions will last no more than a generation, and committing the nation to territoriality as a predominant, though not exclusive, basis for citizenship.<sup>111</sup> As Peter Spiro has argued, territorial presence has long served not only to define the political community, but to constitute national identity.<sup>112</sup> National origin and ancestry discrimination are explicitly prohibited by the Civil Rights Act of 1964,<sup>113</sup> the Immigration Reform and Control Act of 1986,<sup>114</sup> and U.S. Supreme Court case law on equal protection<sup>115</sup> and interpreting Section 1981.<sup>116</sup> Of course, national origin and ancestry-based discrimination persists, notwithstanding these formal legal protections, and concerns have been especially acute in the antiterrorism and national security contexts, particularly in the years following the September 11 attacks.<sup>117</sup> But the assimilationist ideology is today foundational to the self-conception of the country as a "nation of immigrants."<sup>118</sup> That ideology, in turn, drives a normative vision of citizenship that is significantly more civic and classically liberal than the ethno-nationalist strands visible in contemporary Indian and Israeli citizenship practices.

In the contemporary moment, then, the United States occupies a different normative space regarding citizenship than India and Israel. The difference is profound, not only in its practical effects—that is, the differential treatment of U.S. citizens—but conceptually. In the liberal conception, the citizen is an abstract, universal figure who obtains equality by virtue of the

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*and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 12–15 (1998). For a broader history of exclusion in American citizenship practice, see ROGERS SMITH, CIVIC IDEALS (1997).

111. See generally PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION (2008). *Jus soli* citizenship is granted to anyone born on the country in question's soil. In addition to the Fourteenth Amendment's provision for *jus soli* citizenship, a statute provides for *jus sanguinis* citizenship, or citizenship by descent. See 8 U.S.C. § 1401 (2012).

112. SPIRO, *supra* note 111.

113. 42 U.S.C. § 2000a (2006). Although the Act uses only the term "national origin" and not "ancestry," earlier versions of the statute used both terms—in a review of the legislative history of Title VII of the Act, the Supreme Court concluded that the deletion of "ancestry" was not intended to effect a material change, as the two terms were considered synonymous. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 89 (1973); see also Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 574 n.14 (1995).

114. Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.).

115. See *Hernandez v. Texas*, 347 U.S. 475, 479 (1954) (stating national origin to be a suspect classification for equal protection purposes).

116. See *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (holding that Congress, with § 1981, "intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics").

117. See, e.g., Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002).

118. See generally SUSAN F. MARTIN, A NATION OF IMMIGRANTS (2010) (tracking the history of the United States' self-conception of openness to immigration and immigrants).

state's neutrality as to all citizens; the status as citizen is dispositive, and trumps all other affiliations, whether claimed or ascribed.<sup>119</sup> Such an understanding renders the notion of "equal citizenship" redundant, for citizenship is, by definition, a condition of equality. T.H. Marshall's notion of the image of an ideal citizenship goes further and posits citizenship as a developing institution,<sup>120</sup> or as John Hoffman terms it, a "momentum concept" that evolves over time and provides a metric of societal progress.<sup>121</sup> For Marshall, citizenship is a dynamic heuristic for egalitarianism. But whether static or dynamic, citizenship is, in the liberal understanding, an unimpeachable claim of equal membership, treatment, and right. To peer beyond the mantle of citizenship, and to value kinship, race, gender, ancestry, or other affiliations, is anathema.

Whereas the liberal model of citizenship demands a radical agnosticism of states as to its citizens' differing conceptions of the good, ethno-nationalist models conceive of the citizen as an embodiment of the state. Cultural homogeneity binds citizens to one another and to the state; the identity of the citizen and the state converge. As Shafir and Peled write:

In the ethno-nationalist, or *völkish*, approach, citizenship is not an expression of individual rights or of contribution to the common good, but of membership in a homogenous descent group . . . . The community, in this view, is not conceived of as existing outside the state, or over against it in some way, but rather as expressed in and embodied by the state. Thus, the tension between the individual and the state, or between the community and the state, that characterizes liberal and republican thinking, respectively, is absent from the ethno-nationalist discourse. Instead, this discourse integrates non-political, cultural elements into the concept of citizenship. It portrays nations as radically different from one another because their members possess distinct cultural markers, such as language, religion, and history. *Since nations are thus inscribed into the identity of their members, ethnic nationalism denies the possibility of cultural assimilation . . . .*<sup>122</sup>

A citizenship based upon the inscription of the nation in the identity of the ethno-citizen enables deterritorialization. The fact of shared descent is durable, if not permanent, across time and geography. The third generation person of Indian descent is claimed by the state as an Indian, and the Jew is presumptively Israeli. In both cases, actual citizenship requires a volitional act on the part of the individual, but that state has already consented. In contrast, the liberal model abhors kinship- or descent-based particularity

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119. See SHAFIR & PELED, *supra* note 106, at 4 ("Since the liberal state is supposed to be neutral with respect to its citizens' conceptions of the good, and treat all of them as equal, regardless of their ascriptive and other affiliations, liberal theory must constitute the citizen as an abstract, universal subject stripped of all particularity.").

120. T.H. Marshall, *Citizenship and Social Class*, in INEQUALITY AND SOCIETY 148, 149 (Jeff Manza & Michael Sauder eds., 2009).

121. JOHN HOFFMAN, *CITIZENSHIP BEYOND THE STATE* 138 (2004).

122. SHAFIR & PELED, *supra* note 106, at 6 (emphasis added) (citations omitted).



and conceives of citizenship as a universalizing move, a state technology that obliterates such status.<sup>123</sup>

This is not to suggest that either the United States on the one hand, or India and Israel on the other, represent pure forms of any one citizenship model. Rather, each reflects a significant degree of hybridity. This is reflected by the fact that the United States provides both *jus soli* and *jus sanguinis* citizenship. As Christian Joppke has argued, “All states are ‘ethnic’ in the sense that birth is the usual way of becoming a member of a state: ‘states are primarily communities of descent.’”<sup>124</sup> Thus, although the principle of *jus soli*, entrenched in the Fourteenth Amendment, enables cultural assimilation, it does not ensure it. Rather, the assimilationist capacity of *jus soli* depends upon immigration policy, patterns, and histories. In the period of Asian exclusion, then, when Asian immigration came to a standstill, and in the era of national origin quotas,<sup>125</sup> *jus soli* consolidated an ethnic notion of citizenship rather than undoing it.<sup>126</sup> And while immigration patterns have shifted dramatically since 1965, existing demographics, combined with *jus soli* and *jus sanguinis* practices, perpetuate dominant ethnic characteristics. Likewise, India and Israel’s citizenship practices are not purely ethno-nationalist, but instead interweave ethnic, civic, and republican attributes. As Joppke notes, “Tied to a territory and based on a personal substratum that reproduces itself intergenerationally, the modern state is a fundamentally dualistic institution, being territorial and ethnic at the same time.”<sup>127</sup>

This commonality notwithstanding, the ideological centrality of ethnic assimilation to the American national project stands in sharp contrast to the foundational and contemporary significance of ethno-nationalism in India’s

123. As Anupama Roy notes, the universalizing move of liberal citizenship often fails to fulfill its promise of equality by virtue of its uneven incorporation of differently situated individuals. “The universalist framework of citizenship . . . effaces the manner in which citizenship is differentially experienced along axes of class, caste, gender, language, etc.” ROY, *supra* note 2, at 17. I have written previously about the differential incorporation of citizenship in practice, with respect to Arabs, Muslims, and South Asians in the aftermath of the September 11 attacks. See Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, 72 SOC. TEXT 101, 106 (2002) (discussing a “citizenship exchange market in which the relative belonging of any one racial or ethnic community fluctuates in accordance with prevailing social and political pressures”).

124. Christian Joppke, *Citizenship Between De- and Re-ethnicization* 12 (Russell Sage Found., Working Paper No. 204, 2003) (quoting THOMAS ALEXANDER ALEINIKOFF & DOUGLAS B. KLUSMEYER, *CITIZENSHIP POLICIES FOR AN AGE OF MIGRATION* 14 (2002)).

125. Beginning in 1921, and continuing in modified form until 1965, the United States used a quota system for immigrant admissions based upon previously existing proportions of the foreign-born population. The formula thus privileged immigration from European countries because of their previously unrestricted immigration, and as a result contributed to the relative homogeneity of immigrants and their U.S. citizen children for a period of four decades. For a history of national origins quotas and the production of the racialized immigrant other, see generally MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2003).

126. This is true despite the Supreme Court’s decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), holding that the Fourteenth Amendment extended to U.S.-born children of Chinese descent notwithstanding the Asian Exclusion Acts.

127. Joppke, *supra* note 124, at 18.

and Israel's respective national self-conceptions. The modern overlay of national security considerations, and the concern for a kind of citizenship perfidy, may provide a new rationale for differentiation as among the citizenship of others, but as Part I demonstrates, the imperative to differentiation in India and Israel is longstanding.

This is not to downplay the salience of the current national security moment for contemporary citizenship practices. Rather, the post-September 11 incarnation of national security concern has placed significant pressure on liberal notions of citizenship, testing their limits and creating opportunities for either the reassertion of liberal principles or, alternatively, their mutation. The United States has hardly been immune from such pressure. In the aftermath of the September 11 attacks, the government targeted not only Arab, Muslim, and South Asian foreign nationals for a range of surveillance and enforcement practices, but U.S. citizens of Arab, Muslim, and South Asian descent as well.<sup>128</sup> In 2011, the Associated Press and other media discovered a New York Police Department surveillance program, operating since 2001, which “has mapped, monitored, and analyzed American Muslim daily life throughout New York City, and even its surrounding states.”<sup>129</sup>

Moreover, it appears that the United States at one point proposed the same kind of intra-citizenship differentiation on the basis of national security concerns—in the context of the Visa Waiver Program, no less—that India and Israel practice today. In 2007, the *New York Times* reported that then Secretary of Homeland Security Michael Chertoff was negotiating with the British government “on how to curb the access of British citizens of Pakistani origin to the United States.”<sup>130</sup> Although the article is vague about the “visa loophole” that the United States sought to close,<sup>131</sup> it can only refer to the Visa Waiver Program, of which the United Kingdom is a member.<sup>132</sup> According to the *New York Times*, one option under consideration was “to single out Britons of Pakistani origin, requiring them to make visa applications for the United States.”<sup>133</sup> Thus, if the report is accurate, the United States sought, in the name of national security, to peel back the citizenship of certain Britons, based solely upon their national origin. Such efforts, if in fact made, did not succeed, but the story suggests anew the precariousness of equal citizenship, the seductiveness of ethno-nationalist policies in the current national security moment, and the need for

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128. See generally Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Hate Violence As Crimes of Passion*, 92 CALIF. L. REV. 1259 (2004); Akram & Johnson, *supra* note 117; Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

129. THE CREATING LAW ENFORCEMENT ACCOUNTABILITY & RESPONSIBILITY (CLEAR) PROJECT ET AL., MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS 4 (2013).

130. Jane Perlez, *U.S. Seeks Closing of Visa Loophole: Britons of Pakistani Origin Gain Scrutiny on Terror*, N.Y. TIMES, May 2, 2007, at A1.

131. *Id.*

132. See Anil Kalhan, *The Visa “Loophole” and the Pakistani Penalty*, DORF ON L. (May 3, 2007, 3:31 AM), <http://www.dorfonlaw.org/2007/05/visa-loophole-and-pakistani-penalty.html>.

133. Perlez, *supra* note 130.

state vigilance in international visa policy and practice to protect not only the state's citizens, but the nation's conception of citizenship.

#### CONCLUSION

Returning to the controversies around India's and Israel's visa policies with respect to U.S. citizens, this is not a story of clean hands on the part of one state and unclean on the part of another. Rather, citizenship practices, like citizenship theories, are multiple, dynamic, overlapping, and often internally contradictory.<sup>134</sup> And yet, some theories have greater hold on a nation than others, owing to each nation's unique history, geography, and ideological practices and commitments. As Roy argues, "Citizenship is . . . inextricably tied with the processes of state formation."<sup>135</sup> Visa policies such as those discussed here bring these differences into relief and pit national citizenship ideologies in contest with one another.

Visa policy is bureaucratic, high volume, and oftentimes tedious. But understanding the controversies surrounding the Indian and Israeli policies as implicating not merely the travel interests of individual citizens and the security interests of the state, but the normative visions of citizenship itself, opens opportunities for more meaningful development of citizenship practices. Recognizing the cultural specificities of citizenship theory and practice may, in turn, enable the development of shared understandings. It is from a place of ethical particularity, then, that the universality promised by equal citizenship may be best achieved.

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134. See SHAFIR & PELED, *supra* note 106, at 6 ("In most societies two or more discourses of citizenship, superimposed on one another, vie for dominance. As Judith Shklar and Rogers Smith have shown, even in the United States, where the Lockean liberal tradition has long been held to dominate political life, its sway fluctuated throughout history and was continuously contested in theory.").

135. ROY, *supra* note 2, at 11.