

ETHNONATIONALISM AND LIBERAL DEMOCRACY

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ABSTRACT

Some scholars argue that liberal democracy precludes the state from adopting a particularistic ethnonational identity. In their view, Israel is unique among contemporary nation-states because it allows its particularistic Jewish identity to trump principles of universalism and equality upon which liberal democracy supposedly rests. This Article argues that ethnonationalism remains a common and accepted feature of liberal democracy that is consistent with current state practice and international law. Democratic states implement “laws of return” that privilege the immigration and citizenship of particular ethnic groups. Liberal democracies also promote the welfare of their co-ethnics living abroad and maintain political ties to diasporic ethnonational communities. Such practices are becoming more common as globalization disrupts the coincidence of ethnic demography and political boundaries. International law and practice confirm that a sovereign democratic government may represent a particular ethnonational community. Far from being unique, the experience of Israel exemplifies the character of liberal democracy by highlighting its dependence on particularistic nation-states.

1. INTRODUCTION

Before arriving at the Annapolis Conference in 2007, the prime minister of Israel, Ehud Olmert, set an important precondition for any Middle East peace agreement. The Palestinian leadership must recognize Israel “as a Jewish state,” he said. “This is a launching point for all negotiations. We won’t have an argument with anyone in the world over the fact that Israel is a state of the

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Jewish people.”¹ Palestinian leaders rushed to reject Olmert’s demand. “[T]he Palestinians will never acknowledge Israel’s Jewish identity,” insisted the chief Palestinian peace negotiator, Saeb Erekat.² “When they say that they want us to recognize a Jewish state, that is impossible. There is no country in the world where religious and national identities are intertwined.”³

As a factual matter, Erekat’s charge is false. Many countries maintain national religious bodies and identities, from the Church of England and the Romanian Orthodox Church to the Islamic Republic of Pakistan and the other 56 members of the Organization of the Islamic Conference.⁴ Erekat’s own Palestinian Authority provides in Article 4 of its Basic Law that “Islam is the official religion in Palestine” and “[t]he principles of Islamic Shari’a shall be the main source of legislation.”⁵

Nevertheless, the accusation is a familiar and powerful one: Israel’s particularistic identity—its desire to serve as a homeland for the Jewish people—contradicts principles of universalism and equality upon which liberal democracy supposedly rests. “Israel, in short, is an anachronism,” alleges Tony Judt of New York University.⁶ “[I]t remains distinctive among democratic states in its resort to ethnoreligious criteria with which to denominate and rank its citizens” and has thereby “imported a characteristically late-nineteenth-century separatist project into a world that has

¹ David Horovitz, *The ‘Jewish Israel’ Genie*, JERUSALEM POST, Nov. 16, 2007, at 24; see also Daniel Pipes, Op Ed., *Accept Israel as the Jewish State?*, JERUSALEM POST, Nov. 29, 2007, at 16 (“[Ehud] Olmert has boldly demanded that his Palestinian bargaining partners accept Israel’s permanent existence as a Jewish state.”).

² Horovitz, *supra* note 1, at 25.

³ *Id.* See also *Palestinians Harden Refusal to Accept a ‘Jewish State,’* JERUSALEM POST, Nov. 15, 2007, at 1 (“Opposition from Palestinian leaders to Prime Minister Ehud Olmert’s demand that the Palestinians recognize Israel as the ‘state of the Jews’ intensified on Wednesday, threatening to derail the planned post Annapolis attempt to renew substantive peace negotiations.”); *Abbas Repeats Rejection of ‘Jewish State’ Demand*, JERUSALEM POST, Dec. 2, 2007, at 3. (“‘In Israel, there are Jews and others living there. This we are willing to recognize, nothing else,’ [Palestinian Authority President Mahmoud] Abbas told reporters.”).

⁴ See Jeff Jacoby, Op Ed., *Is Israel a Jewish State?*, BOSTON GLOBE, Nov. 14, 2007, at A19 (“In fact, there are many countries in which national identity and religion are linked.”).

⁵ PALESTINIAN AUTHORITY BASIC LAW art. 4, available at <http://jurist.law.pitt.edu/world/palestbasic.htm>.

⁶ Tony Judt, *Israel: The Alternative*, N.Y. REV. OF BOOKS, Oct. 23, 2003 at 8.

moved on, a world of individual rights, open frontiers and international law.”⁷

This Article, in contrast, argues that ethnonationalism remains a common and accepted feature of liberal democracy, consistent with current state practice and international law. Part 2 reviews the common criticism of Israel and argues that the Jewish State actually highlights the important role of particularistic nationalism in maintaining a system of liberal democratic norms. Part 3 examines how contemporary liberal democratic states privilege their own ethnonational identities through domestic law and international practice. Such states enact “laws of return” that provide preferential citizenship policies to co-ethnic immigrants and maintain legal, institutional, and political bonds with their co-ethnics living abroad. Part 4 places the liberal democratic practice of privileging certain ethnocultural identities within the international legal framework of “self-determination of peoples” and considers what the prevalence of ethnonational particularism among democratic states reveals about the status of Israel and the foundations of liberal democracy.

2. ISRAEL AND LIBERAL DEMOCRACY

Some scholars argue that liberal democracy precludes the state from adopting a particularistic ethnonational identity. In this view, Israel’s identity as the state of the Jewish people contradicts its professed commitment to liberal democratic norms.⁸ Far from demonstrating such a contradiction, however, the Israeli example highlights the compatibility of the two principles. The establishment of Israel in the mid-twentieth century addressed the failure of liberal universalism to uphold human rights and democratic government. The predicament of the Jews revealed the political reality that the aspirations of liberal democracy can be achieved only through particularistic nation-states.⁹

⁷ *Id.*; see also Tony Judt, Op Ed., ‘Jewish State’ Has Become an Anachronism, L.A. TIMES, Oct. 10, 2003, at B15 (concluding that Israel risks falling into the wrong camp of “belligerently intolerant, faith driven ethno states.”).

⁸ See *infra* Part 2.1 (introducing Israeli society as a case of contradicting principles of ethnicity and democracy).

⁹ See *infra* Part 2.2 (providing an overview of the creation of the Israel nation state).

2.1. *The Structural Dilemma*

The charge recurs throughout politics and political science that Israel's identity as the state of a particular people sets it apart from the world's other democracies. Israel "is the only country in the world today that has adopted, as a matter of official policy, the pursuit of a certain racial makeup of its citizenry: i.e., maintaining a Jewish majority," insists the president of Palestine Media Watch, Ahmed Bouzid.¹⁰ To many, Israel's identification with the Jewish people undermines the state's democratic legitimacy. Raymond Gastil, a previous director of the Comparative Survey of Freedom, assigned Israel a lower score in the category of political rights because of the country's "definition of the state as belonging to a particular religious or ethnic group."¹¹ Indeed, there seems to be an academic consensus that Israel's Jewish identity presents a structural dilemma:

Israel was to be a Jewish nation-state; as a *nation*-state, its fundamental legitimation was conceived in terms of particularistic Jewish national symbols; but as a modern civil *nation-state*, its fundamental legitimation was conceived in terms of the universalistic precepts of democratic freedom and equality before the law of all of its citizens.¹²

"Israel is a special case," argues Sammy Smooha, a sociologist at Haifa University.¹³ Smooha calls Israel an "ethnic democracy," a designation the Jewish state merits because it "defines itself as a state of and for Jews," reveres Jewish symbols and national heroes, favors Jewish immigration through the Law of Return, and concerns itself with the welfare of world Jewry in its foreign policies.¹⁴ "Israel cannot be classified as an open, liberal democracy," explains Smooha; but rather, Israel's "ethnic democracy is a system in which two contradictory principles operate: 'the democratic prin-

¹⁰ AHMED BOUZID, *The Right of Return: Israel and Palestine*, in FRAMING THE STRUGGLE: ESSAYS ON THE MIDDLE EAST AND THE US MEDIA 1, 1 2 (2003).

¹¹ Raymond D. Gastil, *The Past, Present and Future of Democracy*, J. INT'L AFF., Winter 1985, at 161, 163.

¹² Erik Cohen, *The Changing Legitimations of the State of Israel*, in 5 STUD. IN CONTEMP. JEWRY 148, 148 49 (Peter Y. Medding ed., 1989).

¹³ Sammy Smooha, *Ethnic Democracy: Israel as an Archetype*, ISRAEL STUD., Fall 1997, at 198, 205 06.

¹⁴ *Id.*

ciple,' making for equal rights and equal treatment of all citizens, and 'the ethnic principle,' making for fashioning a homogenous nation-state and privileging the ethnic majority."¹⁵

But do principles of liberal democracy really preclude the right of the Jewish people to self-determination? The argument that Israel's Jewish identity contradicts democratic values is especially odd coming from advocates of an independent Palestinian state. An Arab member of Israel's Knesset, Azmi Bishara, has proposed legislation that would transform Israel from a Jewish state to what he calls "a state of all its citizens" but at the same time he praises the Palestinians' "national liberation struggle" and looks forward to that struggle's fulfillment in an independent state for the Palestinian people.¹⁶ To some, then, it seems that democratic principles entitle the Palestinian people to self-determination and political independence but deny to the Jews those same rights. Judt, at least, exhibits some consistency: he argues that modern democracy will not countenance any sort of national state.¹⁷ Instead of "two states for two peoples," Judt suggests that Jews and Palestinians surrender their national aspirations and opt for a binational state.¹⁸ Israel's founders, he argues, imported an archaic ideology into the mid-twentieth century when they established a Jewish nation-state in 1948.¹⁹

Judt has the chronology backwards. Israel emerged as a *response*, not a precursor, to liberal universalism. As the philosopher Leo Strauss explained it, political Zionism "started from the failure of the liberal solution" to the Jewish problem.²⁰ Specifically, the failure of liberal universalism to address the worst human-rights crisis in history revealed that a liberal scheme of human rights requires a system of particularistic nation-states. In this way, Jewish

¹⁵ *Id.* at 200, 202.

¹⁶ Peter Berkowitz, *Israel's House Divided*, WKLY. STANDARD, Apr. 12, 2004, at 32-33.

¹⁷ See Judt, *Israel: The Alternative*, *supra* note 6 ("The very idea of a 'Jewish state' a state in which Jews and the Jewish religion have exclusive privileges from which non Jewish citizens are forever excluded is rooted in another time and place.").

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ LEO STRAUSS, *Preface to Spinoza's Critique of Religion*, in *JEWISH PHILOSOPHY AND THE CRISIS OF MODERNITY: ESSAYS AND LECTURES IN MODERN JEWISH THOUGHT* 137, 141 (Kenneth Hart Green ed., 1997) (1965).

nationalism built upon—it did not antedate—norms of liberal universalism. The example of Israel is unique not because it departs from customary norms of liberal democracy, but because the peculiar historical circumstance of the Jews—as a people scattered throughout the world's nation-states—revealed most starkly the dependence of liberal democracy on particularistic nationalism. For most other peoples, concentrated in geographic nation-states under sovereign governments, liberal-democratic impulses overlapped with particularistic nationalism such that the dependence of the former on the latter could pass unnoticed. As globalization and demographic shifts have disrupted that overlap, however, liberal-democratic states have more explicitly evinced their concern with their own ethnocultural identities.

Political Zionism followed what had always been, and continues to be, the practice of liberal-democratic states; it simply put that practice into sharper relief. Israel's ethnocultural identity does not render the Jewish state anachronistic or unique in international politics. Indeed, as other liberal democracies face concerns similar to Israel's at its founding—distinct peoples living in diaspora—Israel looks less and less, not more and more, exceptional.

2.2. *The Failure of Universalism and the Birth of Israel*

Particularistic nationalism and liberal democracy—so far from being contradictory at their outset—emerged together at the same historical moment and persisted in symbiosis. The declaration of inalienable and universal Rights of Man at the end of the eighteenth century coincided with the principled assertion of particularistic nationalist aspirations. As philosopher Pierre Manent explains, “European nations had existed for a long time, but their particularity now burst forth with a new intensity and energy. No longer were they merely nations in some passive sense, now they wished *to exist as nations*.”²¹ This spirit of nationalist self-assertion accompanied the spread of liberal-democratic norms such that “democracy and the nation henceforth had a common existence; or rather democracy as we understand it came into being within the framework of the nation. The nineteenth century is thus simultaneously the century of democratic expansion and the cen-

²¹ Pierre Manent, *Democracy Without Nations?*, 8 J. DEMOCRACY 94 (1997).

tury of the emergence of nationalities," including, notably, the unifications of Italy and Germany.²²

The reason for this coincidence of liberal democracy and nationalism is not immediately apparent. To contemporary observers, the cosmopolitan notion of universal human rights seems to rest uneasily alongside particularistic claims of national self-assertion. Yet, as Hannah Arendt explains in *The Origins of Totalitarianism*, the Rights of Man contained an "implication of which the framers of the declaration were only half aware."²³ Human rights were meant to protect individuals against abuses by the state. They were taken to be prepolitical and inalienable, and therefore no special law was needed to protect them because all laws were supposed to rest on them. Man, and not the state, was the source of rights. Hannah Arendt further writes:

Man appeared as the only sovereign in matters of law as the people was proclaimed the only sovereign in matters of government. . . . The people's sovereignty . . . was not proclaimed by the grace of God but in the name of Man, so that it seemed only natural that the 'inalienable' rights of man would find their guarantee and become an inalienable part of the right of the people to sovereign self-government.²⁴

In Arendt's telling, the idea of inalienable human rights entailed a paradox from the very beginning: "it reckoned with an 'abstract' human being who seemed to exist nowhere, for even savages lived in some kind of a social order."²⁵ If some "backward" society lacked human rights, it was because it had not yet achieved popular sovereignty but was oppressed by foreign or native despots. "The whole question of human rights, therefore, was quickly and inextricably blended with the question of national emancipation; only the emancipated sovereignty of the people, of one's own people, seemed to be able to insure them."²⁶

It was precisely at the middle of the twentieth century that the identity between the rights of man and the rights of peoples in the

²² *Id.*

²³ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 291 (Harvest 1985) (1951).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

European nation-state system became most evident—when, during World War II and the Nazi Holocaust, “a growing number of people and peoples suddenly appeared whose elementary rights were as little safeguarded by the ordinary functioning of nation-states in the middle of Europe as they would have been in the heart of Africa.”²⁷ The twentieth century saw in the most dramatic fashion the predicament of people left outside the nation-state system and forced to insist on only those universal human rights that are supposed to be independent of nationality. It turned out that when human beings were no longer citizens of any sovereign state and had to rely on their minimum rights, no authority was left to protect them and no institution was willing to guarantee them. “The world found nothing sacred in the abstract nakedness of being human,” writes Arendt.²⁸

Those who were not Englishmen or Frenchmen or Germans but merely human beings found themselves outside the protection of the law, since no country or government would claim them. Stateless persons found themselves not simply denied their legal rights, but placed “out of legality altogether”:

The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion—formulas which were designed to solve problems *within* given communities—but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them; not that they are oppressed but that nobody wants even to oppress them.²⁹

This condition of complete rightlessness was achieved, stripping the Jews of all legal status, before the gas chambers could be set into motion.

The loss of legality does not mean that one is punished according to unjust laws—even criminals have a legal status—but that one’s treatment by others does not depend on what one does or does not do. It is not the loss of specific rights, but of the *right to have rights*, that has been denied. “The fundamental deprivation of

²⁷ *Id.*

²⁸ *Id.* at 299.

²⁹ *Id.* at 295–96.

human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective."³⁰ The experience of twentieth-century totalitarianism revealed this antecedent right on which the supposedly inalienable Rights of Man rested:

[T]he existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community [became apparent] only when millions of people emerged who had lost and could not regain these rights because of the new global political situation.³¹

These rights were not, and could not be, expressed in eighteenth-century terms because Enlightenment thinking assumed that rights spring directly from human nature. But that conception of inalienable rights, based on the notion of an abstract unencumbered human being, collapsed at precisely the moment its adherents faced people who actually were merely human, stripped of political attachments. The twentieth century revealed that human rights rested on a framework of national rights. "Not only did loss of national rights in all instances entail the loss of human rights," writes Arendt, but "the restoration of human rights, as the recent example of the State of Israel proves, has been achieved so far only through the restoration or the establishment of national rights."³²

Israel may have arrived "too late" for many Jews who perished in Europe prior to 1948. But far from anachronistically importing an outmoded political model, Israel emerged as an accommodation to the political realities and requirements of its own time. The universalism now touted by post-Zionists as the next stage of Israel's political development actually *predates* Zionism itself.³³ In the nineteenth century and earlier, European Jewry sought political emancipation and assimilation into the political, economic, and

³⁰ *Id.* at 296.

³¹ *Id.* at 296-97.

³² *Id.* at 299.

³³ See, e.g., SHIMON PERES, *THE NEW MIDDLE EAST* 98 (1993) ("[P]articuliarist nationalism is fading and the idea of a 'citizen of the world' is taking hold."). On post-Zionism generally, see YORAM HAZONY, *THE JEWISH STATE: THE STRUGGLE FOR ISRAEL'S SOUL* (2000) (discussing the cultural and intellectual debate over Israel's existence as a Jewish state).

cultural lives of the countries in which they lived as the way to end their outsider status in European society.³⁴ Many Jewish leaders and intellectuals sought to move past Jewish particularism. The German-Jewish philosopher Hermann Cohen, a vocal opponent of Zionism, argued that the Jews had superseded the need for a nation-state. For Cohen, the destruction of the ancient Jewish state in Israel was a welcome development because it permitted the Jews to transcend nationalism and spread a universal message. "Cohen saw an ultimate identity of purpose between German nationalism and Jewish messianism. The German national spirit was 'the spirit of classical humanism and true universalism,' while the Jews, no longer a nation limited by place, were the international religious emissaries of the same values."³⁵ For this reason, Cohen believed Jews around the world owed Germany "a debt of filial piety."³⁶

It was the failure of assimilation as a solution to the Jewish problem, the persistence of anti-Semitism in spite of political emancipation, the collapse of liberal-universalist German nationalism, and, ultimately, the shocking divergence of the destinies of the Jews and Germany that fatally undermined the universalist outlook.³⁷ Zionism emerged from the failure of, not in resistance to, pure liberal universalism. Thus, Leo Strauss could speak of the dilemma faced by "the Western Jewish individual who or whose parents severed his connection with the Jewish community in the expectation that he would thus become a normal member of a purely liberal or of a universal human society, and who is naturally perplexed when he finds no such society."³⁸ In accordance with the European identification of individual rights with national self-determination, the Jews discovered that political emancipation could be achieved only through *national* emancipation and sovereignty as well.

³⁴ See LOUIS L. SNYDER, *Zionist Nationalism*, in *ENCYCLOPEDIA OF NATIONALISM* 431, 432 (1990) (noting the belief among a class of Jewish intellectuals that assimilation could solve the "outsider" problem the Jewish people faced).

³⁵ DAVID BIALE, GERSHOM SCHOLEM: *KABBALAH AND COUNTER HISTORY* 74-75 (2d ed. 1982).

³⁶ *Id.* at 75.

³⁷ On the failure of Jewish assimilation, see ARTHUR HERTZBERG, *THE FRENCH ENLIGHTENMENT AND THE JEWS: THE ORIGINS OF MODERN ANTI SEMITISM* (1968) (describing the reaction of partisans of the Enlightenment and the French Revolution to Jewish emancipation).

³⁸ STRAUSS, *supra* note 20, at 144.

Here, however, it is important to note that Zionism aimed to find a place for the Jews *within* the European nation-state system: to make of the Jews a nation like any other. The dramatic role that Israel has played in rescuing Jews from Europe, the Arab world, and elsewhere as well as the ongoing Arab-Israeli conflict make Israel's *national* character especially conspicuous. So the formulation (adopted into Section 7a of Israel's Basic Laws in 1992) of the State of Israel as "a Jewish and democratic state" is often taken to be self-contradictory. But the national aspect of Israeli democracy makes Israel no different from other democratic states. As the Israel Supreme Court has ruled, "there is no substance to the alleged contradiction, so to speak, between the different clauses of Section 7a: the existence of the State of Israel as a Jewish state does not negate its democratic nature, any more than the Frenchness of France contradicts its democratic nature."³⁹ Indeed, the modern state of Israel emerged precisely because the Western scheme of universal rights depends on a system of nation-states that define their polities in ethnocultural terms. Zionism emerged from the failure of liberal universalism to secure equal rights to European Jews and a decision therefore to play by European rules by founding a state on the European model.⁴⁰ As such, Israel's ethnonational identity does not distinguish it from other democratic states. At least in this respect, Israel is not a special case. In accordance with the Zionist aspiration, Israel is a normal country. Its national character remains consistent with current state practice and international law.

3. KIN STATES

A central feature of the Jewish State is its Law of Return, which guarantees citizenship to any Jewish immigrant. Such laws reflect a general practice of liberal democratic states, which privilege their own ethnonational communities in laws of citizenship.⁴¹ Just as Israel concerns itself with the welfare of the Jewish people, European states seek to promote their own ethnonational identities and the interests of their co-ethnics who live abroad. The state's inter-

³⁹ CA 88/1 42(4) PD 177, 189 [1988] (Isr.), *quoted in* Smoocha, *supra* note 13, at 207.

⁴⁰ See HOWARD M. SACHAR, *ISRAEL AND EUROPE: AN APPRAISAL IN HISTORY* xi (2000) ("Israel is the product of Europe more than of any other civilization.").

⁴¹ See *infra* Part 3.1 (discussing laws of return).

est in protecting its kinfolk abroad and in fostering ethnocultural affinities is part of an emergent rather than a retrograde trend.⁴² Due to globalization and migration, an increasing number of countries see their kinfolk living outside their borders. As a result, democratic states have sought new legal structures to maintain ties with their national communities living in diaspora.⁴³

3.1. *Laws of Return*

Israel's declaration of independence of 1948 announces the country's intention to "ensure complete equality of social and political rights to all its in-habitants irrespective of religion, race or sex" and to "guarantee freedom of religion, conscience, language, education and culture."⁴⁴ It calls upon "Arab inhabitants of the State of Israel to preserve peace and participate in the upbuilding of the State on the basis of full and equal citizenship and suitable representation in all its provisional and permanent institutions."⁴⁵ But at the same time, the document speaks of "the natural right of the Jewish people to be masters of their own fate, like all other nations, in their own sovereign State" as well as the "right of the Jewish people to rebuild its National Home" in order to "solv[e] the problem of its homelessness by re-establishing in Eretz-Israel the Jewish State, which would open the gates of the homeland wide to every Jew and confer upon the Jewish people the status of a fully privileged member of the comity of nations."⁴⁶

A central element of this national mission consists in the Israeli Law of Return, which guarantees the right of every Jew to immigrate to Israel and claim automatic citizenship. When the Knesset passed the law unanimously in 1950, David Ben-Gurion called it a "bill of rights . . . guaranteed to all Jews in the diaspora by the State of Israel" and an expression of "the supreme mission of the state."⁴⁷ Ben-Gurion himself brought the bill before the Knesset:

⁴² See *infra* Part 3.2 (discussing Europe's constitutional heritage).

⁴³ See *infra* Part 3.3 (discussing diaspora peoples).

⁴⁴ DECLARATION OF ISRAEL'S INDEPENDENCE, May 14, 1948, reprinted in HELEN MILLER DAVIS, CONSTITUTIONS, ELECTORAL LAWS, TREATIES OF STATES IN THE NEAR AND MIDDLE EAST 206 (1953).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ David Ben Gurion, Prime Minister of Israel, Speech before the Knesset (July 3, 1950), quoted in HAZONY, *supra* note 33, at 56.

"This is not a Jewish state merely because Jews are the majority of its population. It is a state for Jews everywhere."⁴⁸ Ben-Gurion stated, "The Law of Return . . . embodies the central purpose of our state."⁴⁹

Now, however, many see the Law of Return as an obstacle to democracy in Israel. "[A]lthough the Law of Return was originally designed to restore historical justice to the scattered and beleaguered Jewish people, it has, in practice, also been discriminatory to the Arab citizens of Israel and, hence, has jeopardized full democracy," writes Israeli historian Tom Segev.⁵⁰ Similarly, Israeli political scientist Ilan Peleg argues that "[i]n defending the Law of Return before the Knesset, Ben-Gurion laid down the foundation for an ethnocentric, aliberal [sic] Israel."⁵¹ How the Law of Return causes political inequality in Israel is unclear, however, because the immigration policy does not affect political rights *within* the state. Still, it is the very idea of granting any rights—even immigration rights—to Jews *as Jews* that offends liberal sensibilities. "The Law of Return is discriminatory," Zehava Gal-On, a Knesset member from the left-wing Meretz Party, told the *New York Times*.⁵² "It discriminates between Jews and non-Jews. I can accept that after the Holocaust, it was kind of a necessity. But maybe after 51 years, we are not in the same situation, and we don't need to run our country based on such undemocratic laws."⁵³ Israeli journalist Danny Rubinstein has gone so far as to describe the Law of Return as "overt discrimination" of the sort that "was the basis for the apartheid regime in South Africa."⁵⁴

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Tom Segev, *Twists in the Law of Return*, L.A. TIMES, Jan. 21, 2005, at B11; see also BARUCH KIMMERLING, *THE INVENTION AND DECLINE OF ISRAELINESS: STATE, SOCIETY, AND THE MILITARY 182* (2001) ("The state is defined as belonging, not only to its citizens, but to the entire Jewish people—a major deviation from any acceptable definition of liberal democracy.").

⁵¹ Ilan Peleg, *Israel's Constitutional Order and Kulturkampf: The Role of Ben-Gurion*, ISRAEL STUD., Spring 1998, at 230, 242 (arguing that Israeli democracy is undermined by an "ethnocentric order").

⁵² Deborah Sontag, *Debate in Israel: Jewish State or Now a Multicultural State?*, N.Y. TIMES, Dec. 6, 1999, at A1 (discussing the debate over the Law of Return).

⁵³ *Id.*

⁵⁴ Danny Rubinstein, *Part of the Family or Tenants?*, HA'ARETZ, July 29, 1991, quoted in HAZONY, *supra* note 33, at 57.

But in actuality the Law of Return does not discriminate between citizens within Israel, nor does it render the citizenship of non-Jews inferior to that of Jews. Rather, the law looks outside the country, and addresses only Jews living abroad. So the question is whether Israel may privilege Jews in its laws regarding immigration and the acquisition of citizenship—not in citizenship itself. Ahmed Bouzid, president of Palestine Media Watch, claims the policy “is of course in direct violation of the International Convention on Elimination of All Forms of Racial Discrimination, which explicitly prohibits ‘any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin.’”⁵⁵ But that convention’s prohibitions are not so broad. The full definition of racial discrimination provided in Article I:1 is:

[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin *which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*⁵⁶

The prohibition applies only to domestic political affairs. The convention explicitly acknowledges the legal right of states to enact preferential laws regarding immigration and citizenship: “Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality,” reads Section 1:3.⁵⁷ Indeed, states enjoy broad authority to define their laws regarding immigration and the acquisition of citizenship.

Laws of repatriation, as explored further below, are common among democratic states. Especially if Israel is recognized as the national home of the Jewish people and the expression of that people’s right to self-determination, it follows that Israel has the right to privilege Jewish immigration. The League of Nations mandate for Palestine endorsed “the establishment in Palestine of a national home for the Jewish people” and acknowledged “recogni-

⁵⁵ BOUZID, *supra* note 10, at 2.

⁵⁶ G.A. Res. 2106 (XX), 20 U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 art. 1 (1966) (emphasis added).

⁵⁷ *Id.*

tion has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country.”⁵⁸

Similarly, the United Nations Special Committee on Palestine, which recommended the partition of Palestine and the creation of a “Jewish State,” did so because the “Arab and Jewish peoples, after more than a quarter of a century of tutelage under the Mandate, both seek a means of effective expression for their national aspirations.”⁵⁹ The committee rejected the idea of a bi-national state because “these two peoples live physically and spiritually apart, nurture separate aspirations and ideals, and have widely divergent cultural traditions.”⁶⁰ Rather, each people was to see its own tradition expressed in a sovereign state.⁶¹ The main obstacle to a bi-national state was the expectation of continued Jewish immigration—that is, a lopsided demographic balance. Jewish immigration “is the one factor, above all others, that rules out the necessary cooperation between the Arab and Jewish communities in a single State,” the committee wrote. “The creation of a Jewish State under a partition scheme is the only hope of removing this issue from the arena of conflict.”⁶²

With this conclusion, the United Nations clearly expected each state’s immigration and citizenship laws to aim at preserving a demographic majority of its own people. Even during the transitional period under U.N. administration, the General Assembly resolved, “no Jew shall be permitted to establish residence in the area of the proposed Arab State, and no Arab shall be permitted to establish residence in the area of the proposed Jewish State.”⁶³ Arabs

⁵⁸ *Mandate for Palestine*, League of Nations Doc. C.529M.314 1922 VI (1922).

⁵⁹ U.N. Special Comm. on Palestine, Report to the General Assembly, U.N. Doc. A/364 (Sept. 3, 1947), 48, 95.

⁶⁰ *Id.* at 99. For more on the conflicting aspirations of Jewish and Arab nationalism, see Steven Menashi, *Conflicts Religious and Secular*, POL’Y REV., Aug. Sept. 2004, at 90 (discussing the historical conflict between Zionism and Arab nationalism in the context of Arthur Hertzberg’s *The Fate of Zionism: A Secular Future for Israel & Palestine*).

⁶¹ U.N. Special Comm. on Palestine, *supra* note 59, at 100 (“Only by means of partition can these conflicting national aspirations find substantial expression and qualify both peoples to take their places as independent nations in the international community and in the United Nations.”).

⁶² *Id.*

⁶³ G.A. Res. 181(2), U.N. GAOR, 2d Sess., U.N. Doc. A/519B, ¶B17 (Nov. 29, 1947).

(but not Jews) living outside the Arab state would nevertheless be eligible for citizenship there, as would Jews (but not Arabs) with respect to the Jewish state. And each state was to "control residence within its borders" to maintain the demographic balance.⁶⁴ Despite this privileged immigration, the U.N. still expected that each state be democratic and extend equal rights to its minority groups. The U.N. did not believe that to realize the national aspirations of each people would contradict the requirements of liberal democracy.

Other nations, in fact, continue to follow "kin repatriation" policies that differ little from Israel's Law of Return. The phenomenon became so significant following the collapse of the Soviet Union that in 1995, the Council of Europe established a committee specifically to consider the repatriation of ethnic migrants.⁶⁵ Many of the policies (such as those of Germany, Poland, and Israel) date from the postwar period. Indeed, many states have:

set up specific reception and integration policies, which are different from immigration policies and which give preferential treatment to those who want to "come back" to their country of "origin." . . . Most of the States consider, for different reasons and to varying extents, that they have a moral duty to receive their coethnics who wish to move, to "return" to their historic homeland.⁶⁶

The Federal Republic of Germany follows a law of return for "members of the German people" from the former Soviet Union and, until recently, the countries of Eastern and Central Europe. Many of the immigrants who came to Germany under the law "are descendants of German-speaking settlers who migrated hundreds of years ago and long before the creation of the German nation-state . . . to areas which have never been part of Germany."⁶⁷ In

⁶⁴ *Id.* ¶B23.

⁶⁵ See generally ANNE DE TINGUY, REPATRIATION OF PERSONS FOLLOWING THE POLITICAL CHANGES IN CENTRAL AND EASTERN EUROPE (1997) (assessing the various repatriation programs adopted in Europe).

⁶⁶ Anne de Tinguy, *Ethnic Migrations in the 1990s from and to the Successor States of the Former Soviet Union: "Repatriation" or Privileged Immigration?*, in DIASPORA AND ETHNIC MIGRANTS: GERMANY, ISRAEL, AND POST SOVIET SUCCESSOR STATES IN COMPARATIVE PERSPECTIVE 112, 112-13 (2003).

⁶⁷ Ruud Koopmans, *Germany and Its Immigrants: An Ambivalent Relationship*, 25 J. ETHNIC & MIGRATION STUD. 627, 631 (1999).

other words, German law confers citizenship on ethnic Germans without any connection to the German state. According to Article 116 of the German Constitution, "a German within the meaning of this Constitution" could be either a citizen of the German state or a person of German ethnicity who is neither a citizen nor lives in Germany. Article 6 of the Federal Law on Expellees explains, "[m]embers of the German people are those who have committed themselves in their homelands to Germanness . . . , in as far as this commitment is confirmed by certain facts such as descent, language, upbringing or culture."⁶⁸ While other applicants for German citizenship face steep requirements, members of the German people have an almost unrestricted right to citizenship. From 1945 to 1997, Germany absorbed about 15 million ethnic Germans, not including the 17 million ethnic Germans absorbed following unification. At the same time, Germany has not offered naturalization to some 8 million non-German residents, such as guest workers and asylum seekers.⁶⁹

Until a new nationality law was enacted in 1999, immigration to Germany was grounded on *jus sanguinis*. Thus, despite the fact that Germany received "1,7 million Aussiedler from the former Soviet Union (mainly from Kazakhstan and Russia) since the end of the eighties (3,8 millions between 1959 and 1997, including Poland, Romania and other Eastern European countries)," it did not define itself as a country of immigration.⁷⁰ Germany's 1999 nationality law did not repudiate *jus sanguinis*; rather, it added *jus soli* as an additional path to citizenship and shortened the residency requirement from 15 years to 8 years for non-Germans who are granted entitlement to naturalization under certain conditions.⁷¹ The law was a modest response to the reality that more than seven million non-German ethnics live in Germany on a permanent basis. Of those, one-third have lived there for more than 30 years, and

⁶⁸ *Id.* at 630.

⁶⁹ See Smooha, *supra* note 13, at 200 ("Germany . . . borders on ethnic democracy").

⁷⁰ Tinguy, *supra* note 66, at 118.

⁷¹ See German Embassy London, Reform of Germany's Citizenship and Nationality Law, available at http://www.london.diplo.de/Vertretung/london/en/07/other_legal_matters/Citizenship/Reform_Germanys_citizenship_D_D,property=Daten.pdf (outlining the new citizenship requirements for children born to foreigners in Germany and for long term residents).

half have lived there for at least 20 years.⁷² Yet they lack the right to citizenship that ethnic Germans who have never lived in Germany enjoy.

Other states also follow preferential immigration and citizenship policies. The Greek Citizenship Code grants automatic citizenship to “persons of Greek origin” who volunteer for military service. The “foreign person who is not of Greek origin” must reside in Greece for ten years before he can apply for citizenship. Ethnic Greeks, however, need only pass a background check and may be granted citizenship without any residence period.⁷³ In practice, Greece grants automatic citizenship to ethnic Greek immigrants on arrival.⁷⁴ Since the collapse of the Soviet Union, some 200,000 ethnic Greeks have arrived in Greece and become citizens. As in Germany, the Greek Constitution distinguishes between citizens of the Greek state and members of the Greek nation. In Greece, “national affiliation prevails over citizenship and nationalism is a regulatory component of the Greek legal order.”⁷⁵ Ethnic Greeks, or *homogeneis* (“people of the same lineage”) are considered Greek regardless of their actual citizenship status. Ethnic Greeks who hold non-Greek citizenship are still entitled to a special identity card—equivalent to a residence and work permit—which allows them access to social security, health, and education benefits. Non-ethnic Greeks, or *allogeneis* (“people of a different lineage”) remain non-Greek even if they possess Greek citizenship. Until recently, non-ethnic Greeks could be stripped of their Greek citizenship more easily than their fellow citizens. As Greece’s supreme administrative court, the State Council, has explained:

Greek citizens of non-Greek descent are those whose origin, whether distant or not, is from persons coming from a different nation and who, by their actions and general behavior have expressed sentiments testifying to the lack of a Greek national consciousness, in a way that [shows that]

⁷² *Id.*

⁷³ KODIKAS ELLENIKES ITHAGENEIAS [KEI] [CODE OF GREEK CITIZENSHIP] A:10, translated at <http://www.greekembassy.org/embassy/content/en/Article.aspx?office=11&folder=919&article=20574>.

⁷⁴ See Tinguy, *supra* note 66, at 125.

⁷⁵ Konstantinos Tsitselikis, *Citizenship in Greece: Present Challenges for Future Changes*, in MULTIPLE CITIZENSHIP AS A CHALLENGE TO EUROPEAN NATION STATES 145, 154–55 (Devorah Kalekin Fishman & Pirkko Pitkänen eds., 2007).

they cannot be considered as having assimilated into the Greek nation.⁷⁶

Thus, Greece recognizes a legal category of “alien of Greek descent,” a person who lacks the citizenship of the Greek state but is nevertheless part of the Greek nation. Such a person can apply for citizenship through special procedures (and in any case enjoys special privileges under the Greek Constitution). Greece provides such ethnic preferences in its immigration law in the name of repatriation, or returning ethnic Greeks to their homeland, even though many of the immigrants—such as the Pontic Greeks from the former Soviet Union—have no connection to the modern Greek state. “In Greece,” writes Tinguy, “solidarity with the diaspora is the keyword for the policy: it is linked to its perception of the Greek nation.”⁷⁷ Greek law also prohibits a Greek from renouncing his nationality.

Article 52 of Poland’s constitution, adopted in 1997, affirms that “[a]nyone whose Polish origin has been confirmed in accordance with statute may settle permanently in Poland.”⁷⁸ The Polish Parliament has also passed a “repatriation law” guaranteeing the right of ethnic Poles in areas of the former Soviet Union to resettle in Poland. Ethnic Poles receive government assistance for repatriation and acquire Polish citizenship automatically.⁷⁹

In 1956, the Irish Parliament passed the Irish Nationality and Citizenship Act, which provides that “where the applicant is of Irish descent or Irish associations” the Minister of the Interior “may, in his absolute discretion, grant an application for a certificate of naturalisation . . . although the conditions for naturalisation (or any of them) are not complied with.”⁸⁰ In Italy, “[i]f the foreigner is of Italian descent,” he may obtain citizenship by serving

⁷⁶ *Id.* at 155 (alteration in original).

⁷⁷ Tinguy, *supra* note 66, at 122.

⁷⁸ KONSTYTUCJI RZECZYPOSPOLITEJ POLSKIEJ [POLISH CONSTITUTION], 1997, nr 78 poz 483, art. 52(5), Rodział VII, *translated at* [http://www.poland.pl/info/information about poland/constitution/ch2.htm](http://www.poland.pl/info/information%20about%20poland/constitution/ch2.htm).

⁷⁹ See FOCUS MIGRATION, COUNTY PROFILE: POLAND 3 (2005) *available at* [http://www.focus migration.de/typo3 upload/groups/3/focus Migration Publikationen/Laenderprofile/CP03 Poland.pdf](http://www.focusmigration.de/typo3_upload/groups/3/focus%20Migration%20Publikationen/Laenderprofile/CP03_Poland.pdf) (comparing this preferential treatment to “that given to the Aussiedler in Germany”).

⁸⁰ Irish Nationality and Citizenship Act 1956 (Act No. 26/1956) § 16, *available at* <http://www.acts.ie/en.act.1956.0026.1.html>.

in the Italian military, working for the Italian government, or residing in Italy for two years. Applicants of other ethnicities must complete 10 years of legal residence and meet an income test.⁸¹ Likewise, Armenia's constitution holds that "Armenians by birth shall acquire citizenship of the Republic of Armenia through a simplified procedure."⁸²

The Constitution of Bulgaria provides: "[a] person of Bulgarian origin shall acquire Bulgarian citizenship through a facilitated procedure."⁸³ Thus, the Bulgarian Citizenship Act declares that "[a]ny person who has been fathered by a Bulgarian citizen or whose descent from a Bulgarian citizen has been established by way of a court ruling shall be a Bulgarian citizen by origin."⁸⁴ The Act also provides for an expedited naturalization procedure towards citizenship if a person "is of a Bulgarian origin."⁸⁵ The Finnish Aliens Act permits those coming from the former Soviet Union who are of Finnish ancestry to receive permanent residence in Finland.⁸⁶ The Lithuanian Constitution also includes a right of return: "Every Lithuanian person may settle in Lithuania," it reads.⁸⁷

Nations with large diasporas will often encourage repatriation of their kinfolk who live beyond their borders and otherwise seek to maintain a sense of fellow-feeling with them. Since the collapse of the Soviet Union, Russia has encouraged the repatriation of millions of ethnic Russians who found themselves a minority in other former Soviet Republics. Ethnic Russians receive automatic citi-

⁸¹ EMBASSY OF ITALY IN WASHINGTON, *Citizenship* (2004), [http://www.ambwashingtondc.esteri.it/Ambasciata Washington/Menu/Informazioni e servizi/Servizi consolari/Cittadinanza/](http://www.ambwashingtondc.esteri.it/Ambasciata%20Washington/Menu/Informazioni%20e%20servizi/Servizi%20consolari/Cittadinanza/).

⁸² CONST. ARM., ch. 2, art. 14, *available at* <http://www.armeniaforeignministry.com/htms/conttitution.html>.

⁸³ CONST. BULG. art. 25, § 2, *available at* <http://www.servat.unibe.ch/icl/bu00000.html>.

⁸⁴ Bulgarian Citizenship Act art. 9, *available at* http://www.bulgarianembassy.london.org/index.php?option=com_content&task=view&id=107&Itemid=175.

⁸⁵ *Id.* art. 15, § 1.

⁸⁶ See Finnish Immigration Service, *Returnees from the Former Soviet Union*, <http://www.migri.fi/netcomm/content.asp?path=8,2475,2525&language=EN> (describing nationality, language, and accommodations requirements applicants must meet in order to be eligible for a residency permit).

⁸⁷ CONST. LITH. art. 32, § 4, *available at* <http://www.servat.unibe.ch/icl/lh00000.html>.

zenship upon arrival as repatriates.⁸⁸ In 2001, the former president Vladimir Putin declared that the Kremlin is “interested in the repatriation of Russians living abroad,” and that “[n]o obstacles should prevent us from feeling that we are a unified people.”⁸⁹ “He also promised to defend the rights and the cultural heritage of Russians who suddenly found themselves living outside Russia following the collapse of the Soviet Union.”⁹⁰

The Czech Republic, meanwhile, maintains official “policy principles regarding the resettlement of foreigners of Czech origin living abroad.”⁹¹ Between 1995 and 2000, the Czech government worked with a private foundation to resettle 752 Russian and Kazakh citizens of Czech origin in the Czech Republic.⁹² The Czech Act on Citizenship was amended in 1995 to provide an expedited citizenship process to several hundred “Volnya Czechs,” ethnic Czechs that the government had resettled from Ukraine.⁹³ At the same time, non-Czech ethnics such as Roma who are long-term residents of the Czech Republic face greater obstacles to citizenship.⁹⁴

States may use their repatriation laws to establish a desired demographic balance. The Greek government, for example, settled most of the Pontic Greek repatriates in Western Thrace and Macedonia as a way of strengthening the ethnic Greek presence in those areas with the largest concentrations of ethnically Turkish (and

⁸⁸ See Tinguy, *supra* note 66, at 115.

⁸⁹ Sergei Blagov, *New Fears Arise over Repatriation of Ethnic Russians*, ASIA TIMES (Oct. 23, 2001), <http://www.cdi.org/russia/johnson/55048.cfm>.

⁹⁰ *Id.*

⁹¹ Czech Republic of Labour and Social Affairs, Outcome of the World Summit for Social Development, ch. 7.2, <http://www.mpsv.cz/files/clanky/2060/report.pdf>.

⁹² See People in Need Czech TV Foundation, ANNUAL REPORT 2000, at 11 (2000), available at <http://www.clovekvtisni.cz/download/vz00en.pdf> (noting that this program has resettled “almost all of those who applied”).

⁹³ Beata Struhárová, *Disparate Impact: Removing Roma from the Czech Republic*, EUROPEAN ROMA RIGHTS CENTRE, (July 7, 2004), <http://www.errc.org/cikk.php?cikk=549>.

⁹⁴ See, e.g., HUMAN RIGHTS WATCH, ROMA IN THE CZECH REPUBLIC: FOREIGNERS IN THEIR OWN LAND 24 (June 1996), available at <http://www.hrw.org/reports/pdfs/c/czechrep/czech966.pdf> (“There is no question that the citizenship law has left some long term or life long residents of the Czech Republic without Czech citizenship, almost all of them Roma.”).

Muslim) citizens of Greece.⁹⁵ The European Union did not object to such demographic engineering; in fact, it helped to finance the settlement of the Pontics.

The demographic predicament of Latvia is similar to Israel's, though the former has managed to guarantee an ethnically Latvian majority through its own law of return.

In Latvia, the measures taken fall within a policy aimed at re-establishing the demographic and national balance. In fact, the demographic situation of Latvia deteriorated badly during the Soviet period: Latvians, who accounted for 77% of the population in 1935 and about 80% in 1940–41 – within the present frontiers – constituted only 52% by the time of the 1989 census. In the 1990s, for the first time since the war, partly due to repatriations, ethnic Latvians represent a gradually increasing proportion, reaching in 1998 55,5% of the total according to the Central Statistical Bureau (to 57,1% according to the population register).⁹⁶

As the Latvian example demonstrates, laws of return are most crucial for nation-states in which the dominant ethnic group is in danger of losing its majority status. Democratic states may act purposively to ensure that their own national group and its culture remain dominant. Even France – which, unlike most European states, does not transfer citizenship by *jus sanguinis* – still maintains protectionist laws that aim to maintain French cultural dominance and to limit non-French cultural influences.⁹⁷ The Netherlands, among other European liberal democracies, is finding that many of

⁹⁵ See Tinguy, *supra* note 66, at 122 (noting that the Greek government also hopes the Pontic settlement will revitalize sparsely populated farming regions).

⁹⁶ *Id.* at 123.

⁹⁷ See PHILIP H. GORDON & SOPHIE MEUNIER, *THE FRENCH CHALLENGE: ADAPTING TO GLOBALIZATION* 41 (2001) (“Like others in Europe and elsewhere around the world, but even more so, the French are concerned that globalization, and the accompanying harmonization of culture, threatens their distinctive identity and many of the values, customs, and traditions of which they are so proud.”); Kevin M. McDonald, *How Would You Like Your Television: With or Without Borders and With or Without Culture – A New Approach to Media Regulation in the European Union*, 22 *FORDHAM INT’L L.J.* 1991, 2015 (1999) (“The [European] Community, and especially France, view culture as an arm of the state, indicative of a nation’s health and power.”); Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 *MICH. J. INT’L L.* 1, 38 (2000) (“France has long maintained quotas limiting foreign film, television, and music.”).

its liberal political traditions are culturally rooted, and immigration policy can preserve a majority that will maintain those traditions.⁹⁸ Still other countries aim to guarantee a safe-haven to diaspora populations who live under precarious conditions. In any case, privileged access to immigration and citizenship are common and remain largely uncontroversial throughout Europe and elsewhere.⁹⁹

3.2. Europe's Constitutional Heritage

The democratic states of Europe see no contradiction between a country's ethnonational commitment and liberal democracy. "The concern of the 'kin-States' for the fate of the persons belonging to their national communities . . . who are citizens of other countries . . . and reside abroad is not a new phenomenon in international law," concludes an October 2001 report by the European Commission for Democracy Through Law.¹⁰⁰ The Venice Commission, as it is otherwise known, is the Council of Europe's advisory body on constitutional matters and "has played a leading role in the adoption of constitutions that conform to the standards of Europe's constitutional heritage."¹⁰¹

The commission's study, *Report on the Preferential Treatment of National Minorities by Their Kin-State*, was prompted by a Hunga-

⁹⁸ See Tom Hundley, *Dutch to Muslims: Do You Really Want to Settle Here?*, CHI. TRIB., Apr. 9, 2006, at 1 (reporting that the Netherlands has implemented a residency test based on the liberal cultural norms of the Netherlands; Britain and Germany are contemplating similar tests); see also Lucia Kubosova, *EU Has Limits in Respecting Muslim Traditions, Says Frattini*, EUOBSERVER (Oct. 9, 2006), <http://euobserver.com/9/22591> ("The vice president of the European Commission Franco Frattini has said Europe can only respect Muslim traditions if they do not contradict the bloc's own basic values, such as freedom of speech or equality between men and women.").

⁹⁹ Cf. Jerry Z. Muller, *Us and Them: The Enduring Power of Ethnic Nationalism*, 87 FOREIGN AFF. 18, 33 (2008) ("Americans, accustomed by the U.S. government's official practices to regard differential treatment on the basis of ethnicity to be a violation of universalist norms, often consider such policies exceptional, if not abhorrent. Yet in a global context, it is the insistence on universalist criteria that seems provincial.").

¹⁰⁰ EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, REPORT ON THE PREFERENTIAL TREATMENT OF NATIONAL MINORITIES BY THEIR KIN STATE (2001), available at [http://www.venice.coe.int/docs/2001/CDL_INF\(2001\)019_e.asp](http://www.venice.coe.int/docs/2001/CDL_INF(2001)019_e.asp) [hereinafter VENICE COMMISSION REPORT].

¹⁰¹ COUNCIL OF EUROPE, http://www.venice.coe.int/site/main/presentation_E.asp (last visited Oct. 15, 2010).

rian law that conferred economic benefits on Hungarians living in neighboring countries. The Venice Commission aimed to determine whether "the preferential treatment by a State of its kin-minorities abroad . . . could be said to be compatible with the standards of the Council of Europe and with the principles of international law."¹⁰²

Israel's concern for Jews in other countries has often been taken to indicate an illiberal or undemocratic ethnonational preoccupation. Thus, Smootha labels Israel an "ethnic state" because, *inter alia*, "[t]he welfare of world Jewry is a major consideration of Israeli foreign policy."¹⁰³ Judt complains, "Israel is not the state of all its citizens, much less all its residents; it is the state of (all) Jews. Its leaders purport to speak for Jews everywhere."¹⁰⁴

The Venice Commission found this sort of attitude towards a state's "kin-minority" group in other countries neither novel nor uncommon. "Kin-States," the commission found, "have shown their wish to intervene more significantly, and directly . . . in favour of their kin-minorities."¹⁰⁵ The commission favorably noted the efforts of nation-states to protect their kin-minorities abroad, citing the 1969 "package agreements" between Italy and Austria to secure the rights of the German-speaking minority in South Tyrol. "Nowadays, Austria continues to supervise the implementation of the 'package,'" the commission observes, and "Italy does not challenge Austria's right to do so."¹⁰⁶

Germany also pursued bilateral agreements during the 1990s to protect ethnic Germans living outside its borders in Poland, Bulgaria, Hungary, and Romania.¹⁰⁷ At the same time, Hungary concluded similar agreements with three of its neighbors: Ukraine,

¹⁰² VENICE COMMISSION REPORT, *supra* note 100.

¹⁰³ Smootha, *supra* note 13, at 205-06.

¹⁰⁴ Tony Judt, *Goodbye to All That?*, THE NATION, Jan. 3, 2005, at 15-16.

¹⁰⁵ VENICE COMMISSION REPORT, *supra* note 100.

¹⁰⁶ *Id.*

¹⁰⁷ Treaty on Good Neighborly Relations and Friendly Cooperation, Ger. Pol., June 17, 1991, 1708 U.N.T.S. 463; Treaty on Friendly Cooperation and Partnership in Europe, Bulg. Ger., Oct. 9, 1991, 1931 U.N.T.S. 75; Treaty on Friendly Cooperation and Partnership in Europe, Ger. Hung., Feb. 6, 1992, 1909 U.N.T.S. 147; Treaty Concerning Friendly Cooperation and Partnership in Europe, Ger. Rom., Apr. 21, 1992.

Croatia, and Slovenia.¹⁰⁸ The Council of Europe's Framework Convention for the Protection of National Minorities of 1995 encouraged the negotiation of bilateral agreements regarding the protection of minorities. According to Article 18 of the Framework Convention, "[t]he Parties shall endeavor to conclude, where necessary, bilateral and multilateral agreements with other States, in particular neighboring States, in order to ensure the protection of persons belonging to the national minorities concerned."¹⁰⁹ The European Union endorsed such bilateral treaties as a tool for guaranteeing stability in Central and Eastern Europe. The Pact on Stability in Europe, signed by 52 states and adopted in 1995, called on signatories to intensify "their good-neighbourly relations in all their aspects, including those related to the rights of persons belonging to national minorities."¹¹⁰ Under the Pact's auspices, further bilateral treaties were signed between Hungary and Slovakia and between Hungary and Romania.¹¹¹

"In the context of these bilateral agreements, kin-States attempt to secure a high level of protection to their minorities," explains the Venice Commission, which regards such efforts by states on behalf of their kinfolk as both legitimate and beneficial.¹¹² Such efforts are common. The commission's report notes that following the collapse of communism, the countries of Central and Eastern Europe even wrote into their constitutions their identification with their ethnic diasporas.¹¹³ For example, Article 6 of the Hungarian Constitution (revised in 1989) provides that:

¹⁰⁸ Treaty on the Foundations of Good Neighborly Relations and Cooperation, Hung. Ukr., Dec. 6, 1991; Treaty on Friendship and Cooperation, Hung. Slov., Dec. 1, 1992; Treaty on Friendly Relations and Cooperation, Hung. Croat., Dec. 16, 1992.

¹⁰⁹ Council of Europe, *Framework Convention for the Protection of National Minorities*, art. 18, § 1, Feb. 1, 1985, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm>.

¹¹⁰ VENICE COMMISSION REPORT, *supra* note 100.

¹¹¹ Treaty of Good Neighborliness and Friendly Cooperation, Hung. Slov., Mar. 1995; Treaty of Understanding, Cooperation and Good Neighborliness, Hung. Rom., Sept. 16, 1996, 1966 U.N.T.S. 77.

¹¹² VENICE COMMISSION REPORT, *supra* note 100.

¹¹³ See *id.* for the excerpts that follow.

The Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary.¹¹⁴

Article 7 of the Romanian Constitution (1991) provides that:

The State shall support the strengthening of links with Romanians living abroad and shall act accordingly for the preservation, development and expression of their ethnic, cultural, linguistic, and religious identity under observance of the legislation of the State of which they are citizens.¹¹⁵

Article 5 of the Slovenian Constitution (1991) provides that:

Slovenia shall maintain concern for autochthonous Slovene national minorities in neighboring countries and shall foster their contacts with the homeland . . . Slovenes not holding Slovene citizenship may enjoy special rights and privileges in Slovenia. The nature and extent of such rights and privileges shall be regulated by law.¹¹⁶

Article 49 of the Constitution of the Former Yugoslav Republic of Macedonia (1991) states that:

The Republic cares for the status and rights of those persons belonging to the Macedonian people in neighboring countries . . . assists their cultural development and promotes links with them.¹¹⁷

Article 10 of the Croatian Constitution (1991) provides that:

Parts of the Croatian nation in other states are guaranteed special concern and protection by the Republic of Croatia.¹¹⁸

Article 12 of the Ukrainian Constitution (1996) states that:

¹¹⁴ A MEGYAR KÖZTÁRSASÁ ALKOTMÁNYA [CONST. HUNG.], art. 6 (revised 1989).

¹¹⁵ CONST. RO. art. 7.

¹¹⁶ CONST. SLOVN. art. 5.

¹¹⁷ CONST. MACED. art. 49.

¹¹⁸ CONST. CROAT. art. 10.

Ukraine provides for the satisfaction of national and cultural, and linguistic needs of Ukrainians residing beyond the borders of the State.¹¹⁹

Article 6(2) of the Polish Constitution (1997) provides that:

The Republic of Poland shall provide assistance to Poles living abroad to maintain their links with the national cultural heritage.¹²⁰

Article 7a of the Slovak Constitution (amended in 2001) provides that:

The Slovak Republic shall support national awareness and cultural identity of Slovaks living abroad and their institutions for achieving these goals as well as their relationships with their homeland.¹²¹

The Venice Commission report “deals primarily with the protection of minorities in the context of Central and Eastern Europe in the last decade,” but the Commission recognized that “there are numerous other examples (the protection of the Slovenian and the Croatian minorities in Austria by virtue of Article 7 of the Austrian State Treaty of 1955) that can be relevant for its conclusions.”¹²² The practice of these states represents a European norm, one in conformity with Europe’s constitutional heritage and international law.

European states also enact domestic legislation conferring special benefits on members of their diasporas. In February 1997, Slovakia adopted an Act on Expatriate Slovaks. Under the law, Slovak “ethnic origin” derives from “direct ancestors up to the third generation.”¹²³ Expatriate Slovaks qualify for an “Expatriate Card,” which admits the bearer to Slovak territory without written invitation, visa, or permit of stay.¹²⁴ Bearers of the card are not re-

¹¹⁹ CONST. UKR. art. 12.

¹²⁰ Art. 6(2), Rozdział VII, Konstytucja Rzeczypospolitej Polskiej; CONST. PO. art 6(2).

¹²¹ CONST. SLOVK. art. 7a.

¹²² VENICE COMMISSION REPORT, *supra* note 100, at n.6.

¹²³ Act on Expatriate Slovaks and Changing and Complementing Some Laws art. § 2(3), No. 70, Feb. 14, 1997.

¹²⁴ *Id.* § 4(2).

quired to apply for a work permit or for permanent residence.¹²⁵ Slovak expatriates may request exemption from Social Security payments in their home state if they qualify for receiving their rights on Slovak territory.¹²⁶

Similarly, the Act on Hungarians Living in Neighboring Countries (2001) provides for a "Certificate of Hungarian Nationality" that entitles the bearer to participate in Hungary's health insurance and pension programs.¹²⁷ The Act grants Hungarian work permits and subsidized travel to ethnic Hungarians living in Slovakia, Ukraine, Romania, Yugoslavia, Croatia, and Slovenia.¹²⁸ Work permits may be granted for three months annually without prior assessment of the needs of the labor market, and kin-foreigners may apply for reimbursement of the costs incurred in meeting the legal conditions of employment.¹²⁹ The Act also provides scholarships for ethnic Hungarian students to attend Hungarian universities,¹³⁰ and even offers support to ethnic Hungarians studying at universities in the students' home states regardless of the language or the curriculum.¹³¹ The Act enables Hungarian teachers to receive training in Hungary, while the Hungarian government provides assistance to organizations operating abroad to promote knowledge of the Hungarian language, literature, and cultural heritage.¹³² To the same end, the Act offers financial assistance to ethnic Hungarian families living outside of Hungary if they have at least two children who attend a Hungarian-language school.¹³³

In the Act, Hungary announces its intention to support:

[T]he preservation, furtherance and research of Hungarian national traditions[;] the preservation and fostering of the Hungarian language, literature, culture, and folk arts[;] the promotion of higher education of Hungarians living abroad

¹²⁵ *Id.*

¹²⁶ *Id.* § 6(1)(2).

¹²⁷ Act LXII of 2001 on Hungarians Living in Neighboring Countries arts. 7, 19, 40 I.L.M. 1242 (2001).

¹²⁸ *Id.* arts. 8, 15.

¹²⁹ *Id.* arts. 15-16.

¹³⁰ *Id.* art. 9.

¹³¹ *Id.* art. § 10(1).

¹³² *Id.* arts. 11, 13, 18.

¹³³ *Id.* art. 14.

by facilitating the work of instructors from Hungary as visiting lecturers[;] [and] the restoration and maintenance of monuments belonging to the Hungarian cultural heritage.¹³⁴

Besides language and culture, Hungary also concerns itself with the material well-being of ethnic Hungarians living abroad. The Act aims at “the enhancement of the capacity of disadvantaged settlements in areas inhabited by Hungarian national communities living abroad to improve their ability to preserve their population and to develop rural tourism” and “the establishment and improvement of conditions of infrastructure for maintaining contacts with the Republic of Hungary.”¹³⁵ Unmistakably, the welfare of ethnic Hungarians abroad is a central concern of Hungarian foreign policy.

Russia too has adopted a law favoring its ethnic diaspora, the Federal Law on the State Policy of the Russian Federation in Respect of the Compatriots Abroad. Adopted in March 1999, Article 1 of the law defines compatriots as those who “share a common language, religion, cultural heritage, traditions and customs, as [well as] their direct descendants.”¹³⁶ Compatriots are promptly granted citizenship upon their request. Other preferential laws include Austria’s Law on the Equation of the South Tyrolese with the Austrian Citizens in Particular Administrative Fields (1979); Italy’s Law on the Measures in Favor of the Italian Minority in Slovenia and Croatia (2001); Romania’s Law Regarding the Support Granted to the Romanian Communities From All Over the World (1998); and Bulgaria’s Law for the Bulgarians Living Outside the Republic of Bulgaria (2000).¹³⁷

As for the legitimacy of these laws, the Venice Commission concludes that “[a] State can legitimately issue laws or regulations concerning foreign citizens without seeking the prior consent of the

¹³⁴ *Id.* art. 18(2)(a) (d).

¹³⁵ *Id.* art. 18(2)(e) (f); see also Christin J. Albertie, Note, *The Act on Hungarians Living Abroad: A Misguided Approach to Minority Protection*, 24 MICH. J. INT’L L. 961, 993 (2003) (“Other goals which the Status Law mandates for Hungarian organizations operating abroad relate more to economic advancement of ethnic Hungarians than the advancement of culture or language.”).

¹³⁶ Federal Law on the State Policy of the Russian Federation in Respect of Compatriots Abroad, art. 1 (Mar. 5, 1999).

¹³⁷ VENICE COMMISSION REPORT, *supra* note 100.

relevant States of citizenship, *as long as the effects of these laws or regulations are to take place within its borders only.*"¹³⁸ But "[w]hen the law specifically aims at deploying its effects on foreign citizens in a foreign country," its legitimacy depends on the aim pursued.¹³⁹ Fostering the cultural link between a kin-state and its kin-minority, for example, has become an "international custom":

In certain fields such as education and culture, certain practices, which pursue obvious cultural aims, have developed and have been followed by numerous States. It is mostly accepted, for instance, at least between States, which have friendly relations, that States grant scholarships to foreign students of their kin-minorities for their studies in the kin-language in educational institutions abroad. These institutions, on the other hand, are often financed by the kin-States. Similarly, it is common for States to promote the study of their language and culture also through incentives to be granted to foreign students, independently of their national background.

In these fields, if there exists an international custom, the consent of the home-State can be presumed and kin-States may take unilateral administrative or legislative measures.¹⁴⁰

In fact, promoting the study of the states' languages and cultures abroad is not merely a custom but an obligation of states under the European Cultural Convention.¹⁴¹ Under that agreement, each contracting party agrees to "endeavour to promote the study of its language or languages, history and civilisation of the other Contracting Parties"¹⁴² This would be a strange obligation if liberal-democratic norms required a state to act only as a "state of all its citizens" without any transgeographical ethnocultural identity.¹⁴³ European political history and practice reveal that democratic na-

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* (footnotes omitted).

¹⁴¹ European Cultural Convention, Dec. 19, 1954, 218 U.N.T.S. 139 (1955).

¹⁴² *Id.* art. 2(b).

¹⁴³ See *supra* note 104 and accompanying text.

tion-states are the stewards not merely of geographic groupings of individuals, but also of distinct cultural heritages, which typically rest on ethnic ties.¹⁴⁴

With regard to aims other than language and culture, the Venice Commission maintained that kin-States must take care not to infringe the home-state's sovereignty and must respect treaty obligations. Several treaties—the U.N. Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Framework Convention for the Protection of National Minorities—prohibit discrimination. Yet the Commission concluded that when “part of the population is given a less favourable treatment on the basis of their not belonging to a specific ethnic group,” the disparate treatment “is not, of itself, discriminatory, nor contrary to the principles of international law. Indeed, *the ethnic targeting is commonly done, for example, in laws on citizenship.*”¹⁴⁵ Ethnic-based preferences in citizenship laws—that is, *Laws of Return*—are not only legal, but so common that the Venice Commission mentions it in passing as an obviously accepted practice.

Thus, ethnic preferences are justified when the kin-state acts to protect its kinfolk abroad or to foster cultural bonds with them. From the Venice Commission's exposition of the European constitutional heritage and international law, it would seem that Israel—far from being an anachronism—finds itself increasingly in the mainstream of international practice. “The practice of stipulating bilateral treaties on friendly co-operation or on minority protection is already the object of encouragement and assistance as well as of close scrutiny by the international community[,]” the commission observes, but there has been a “more recent tendency of kin-States to enact domestic legislation or regulations conferring special rights to their kin-minorities” and “the emerging of new and original forms of minority protection, particularly by the kin-States, constitutes a positive trend”¹⁴⁶ In the aftermath of the population displacements and the redrawing of borders following the

¹⁴⁴ See ANTHONY D. SMITH, NATIONAL IDENTITY 19–42 (1991) (discussing the ways in which ethnic communities transformed into nations); cf. ELIE KEDOURIE, NATIONALISM 66 (4th ed. 1993) (discussing the linguistic and racial elements of national identity).

¹⁴⁵ VENICE COMMISSION REPORT, *supra* note 100 (footnotes omitted) (emphasis added).

¹⁴⁶ *Id.*

Second World War and the political shake-up of the Soviet Union's collapse, more and more countries find their kinfolk living outside their borders. These nation-states have always maintained a concern for their national identities, but the new reality of diaspora has led them to act in ways that Israel always has acted. Thus, Israel appears less unique because states and peoples in similar circumstances have become more common.

3.3. *Diaspora Peoples*

Yet despite the accepted practice of fostering cultural links with a nation's diaspora, Israel still finds itself singled out for criticism. Oxford philosophy professor, Brian Klug, for example, identifies Israel's commitment to the Jewish people as exceptional among modern states. "Israel does not regard itself as a state that just happens to be Jewish," he writes. "It sees itself as (in Prime Minister Sharon's phrase) 'the Jewish collective,' the sovereign state of the Jewish people as a whole."¹⁴⁷ Klug criticizes Sharon for calling Israel "a national and spiritual center for all Jews of the world" and identifying Jewish immigration as "the central goal of the State of Israel."¹⁴⁸ Yet Israel's aim to preserve and promote Jewish cultural heritage—along with its desire for its kin-group living abroad to resettle at home—appears thoroughly unexceptional in the contemporary practice of democratic states.

Nevertheless, some critics allege that Israel's national identification with the Jewish people uniquely implicates Jews worldwide in the actions of the Israel government, even justifying anti-Jewish attacks in Europe and elsewhere. As Judt writes:

Diaspora Jews cannot influence Israeli policies, but they are implicitly identified with them, not least by Israel's own insistent claims upon their allegiance. The behavior of a self-described Jewish state affects the way everyone else looks at Jews. The increased incidence of attacks on Jews in Europe and elsewhere is primarily attributable to misdirected efforts, often by young Muslims, to get back at Israel.¹⁴⁹

Judt elaborates elsewhere:

¹⁴⁷ Brian Klug, *The Myth of the New Anti-Semitism*, NATION, Feb. 2, 2004, at 29.

¹⁴⁸ *Id.*

¹⁴⁹ Judt, *Israel: The Alternative*, *supra* note 6, at 10.

It is the policies of Israeli governments, especially in the past two decades, that have provoked widespread anti-Jewish feelings in Europe and elsewhere. This may seem absurd, but there is a certain tragic logic to it. Zionists have always insisted that there is no distinction between the Jewish people and the Jewish state. The latter offers a right of citizenship to Jews anywhere in the world. Israel is not the state of all its citizens, much less all its residents; it is the state of (all) Jews. Its leaders purport to speak for Jews everywhere. They can hardly be surprised when their own behavior provokes a backlash against . . . Jews.¹⁵⁰

Taking out one's opposition to Israeli policies on one's Jewish neighbors makes sense, according to this logic, because Israel speaks on behalf of the Jewish people as a whole, which, as Klug puts it, "is liable to give the unreflective onlooker the impression that Jews are, as it were, lumping themselves together; that Israel is indeed 'the Jewish collective.'"¹⁵¹

But, as noted above, it remains commonplace for countries to hold themselves out as *a national and spiritual center* for a particular people. Some states, such as Greece or Bulgaria, even have national churches in which a particular religion is explicitly associated with an ethnic group in the way ethnic Jews are associated with Judaism. Under Bulgarian law, for example, the Bulgarian Orthodox Church may issue a "proof of nationality" of an ethnic Bulgarian living abroad.¹⁵² More generally, Sharon's language is unexceptional among contemporary leaders. The presidents of France have routinely spoken "on behalf of the French people."¹⁵³ The Chinese president makes statements on behalf of not only his gov-

¹⁵⁰ Judt, *supra* note 104, at 16.

¹⁵¹ Klug, *supra* note 147, at 29.

¹⁵² VENICE COMMISSION REPORT, *supra* note 100.

¹⁵³ See, e.g., Nicholas Sarkozy, President of Fr., Address to a Joint Session of Cong. (Nov. 7, 2007); Nicholas Sarkozy, President of Fr., Statement at Franco German Meeting (May 16, 2007), available at <https://pastel.diplomatie.gouv.fr/editorial/actual/ael2/bulletin.gb.asp?liste=20070518.gb.html> ("I wanted to come and extend greetings to the German government and people, on behalf of the French people."); Letter from Jacques Chirac, President of Fr., to George W. Bush, President of the United States (Apr. 17, 2007), available at http://www.ambafrance-uk.org/Virginia_Tech_University_shooting.html (expressing condolences "[b]oth personally and on behalf of the French people").

ernment, but also the Chinese people as a whole.¹⁵⁴ Upon being elected president of Mexico in 2000, Vicente Fox “said that he intends to be President to ‘all Mexicans’ –at home and abroad.”¹⁵⁵ Fox called for Mexican emigrants to vote in Mexican elections, and he “transformed the Office of Mexicans Abroad into a top-level presidential agency” to serve as an advocate for Mexican migrants in the United States.¹⁵⁶ Indeed, the Palestine Liberation Organization has long held itself out as the “sole and legitimate representative of the Palestinian people” living in exile around the world.¹⁵⁷

In 2000, the Indian government established the High Level Committee on the Indian Diaspora to recommend the establishment of institutional connections to ethnic Indians living abroad. India’s rhetorical commitment to its diaspora had been longstanding. “The subject of overseas Indians is one which is very dear to our hearts. . . . Everyone of Indian origin, overseas, is a representative of India and retains many aspects of our cultural traditions and civilization,” the then-Minister of External Affairs (and future Prime Minister), Atal Behari Vajpayee, said in 1977.¹⁵⁸ “Though our sons and daughters have gone abroad to work or to reside there, India will never disown them or fail to appreciate and respect their essential loyalty to the culture and heritage of the mother country.”¹⁵⁹ The report of the High Level Committee noted that many countries worldwide maintain official linkages with their national communities living abroad, including not only the European states of Greece, Italy, and Poland, but also Japan and South Korea:

Many countries with successful Diasporas have created viable structures for handling issues related to their Diaspora. The Greek, Italian and Polish Governments had created

¹⁵⁴ See, e.g., *World Leaders Lament Shuttle Disaster*, BBC NEWS, Feb. 2, 2003, http://news.bbc.co.uk/1/hi/not_in_website/syndication/monitoring/media_reports/2718207.stm (“The Chinese Government and people deeply regret the disaster. . .”).

¹⁵⁵ Peter Katel, *Don’t Stop Thinking About Mañana*, TIME, Jun. 11, 2001, at 73.

¹⁵⁶ *Id.*

¹⁵⁷ *Palestine Political Leaders*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/palestine/leaders.htm> (last visited Oct. 21, 2010).

¹⁵⁸ INDIAN MINISTRY OF EXTERNAL AFFAIRS, REPORT OF THE HIGH LEVEL COMMITTEE ON THE INDIAN DIASPORA (2000), available at <http://indiandiaspora.nic.in/contents.htm>.

¹⁵⁹ *Id.*

well-staffed departments within their respective Ministries of Foreign Affairs, which are apart from the several semi and non-governmental initiatives both at home and abroad complementing official efforts to cultivate their Diasporas. Poland's Parliament has committees dealing with Diaspora issues. Its Ministries of Culture and for Education are also involved in servicing the Diaspora's educational and cultural needs. Japan has created a "Council on the Movement of People Across Borders" to advise the Prime Minister and the Minister of Foreign Affairs as well as a cell in its foreign affairs ministry on the Japanese Diaspora. Italy has devised supplementary mechanisms to strengthen links with its Diaspora and is considering enabling legislation to give it representation in the Italian Parliament. South Korea has created a 15-member ministerial "Committee of Korean Residents Abroad," headed by the South Korean Prime Minister, as well as parallel autonomous organisations.¹⁶⁰

Japan and the Philippines also maintain preferential repatriation laws. Both the People's Republic of China and the Republic of China (Taiwan) have created cabinet-level ministries to maintain relations with overseas Chinese communities, and both provide some legislative representation to them as well. The People's Republic especially has fostered links with the diaspora to its economic advantage.¹⁶¹

The contemporary trend is to strengthen, rather than eliminate, ties between kin-states and their peoples abroad. One outcome of the High Level Committee's report, for example, was the establishment of the Ministry of Overseas Indian Affairs. In 2003, India amended its citizenship law to permit "persons of Indian origin" who hold citizenship in other countries to retain a qualified form of

¹⁶⁰ *Id.* at xxiv.

¹⁶¹ See generally PAUL J. BOLT, CHINA AND SOUTHEAST ASIA'S ETHNIC CHINESE: STATE AND DIASPORA IN CONTEMPORARY ASIA (2000) (detailing the Chinese government's efforts to attract foreign investment from the Chinese community abroad); see also *China's Diaspora Turns Homeward*, ECONOMIST, Nov. 27, 1993, at 33 ("Official Chinese figures show that some \$44 billion of foreign money was invested in China between 1979 and the middle of 1993 [T]he overseas Chinese are responsible for some 80% of total investment.").

Indian citizenship, called “overseas citizenship of India.”¹⁶² An OCI passport allows a nonresident Indian to enter the country without a visa, to own and transfer immovable property in India, and to receive access to economic, financial, and educational resources provided by the Indian government.¹⁶³ Overseas citizenship strengthens ethnic Indians’ “emotional and cultural bonds with their country of origin” and “facilitate[s] [the] Diaspora’s contribution in India’s social [d]evelopment,” according to the Federation of Indian Chambers of Commerce and Industry.¹⁶⁴ To that end, the Ministry of Overseas Indian Affairs hosts an annual conference in New Delhi “which aims to connect more [than] 25 [m]illion Indians with India’s Economic and Social development” and provides a platform for overseas Indians to help bond with India.¹⁶⁵ By reaching out to Indians overseas, the Indian government aims at “bringing together the Indian Diaspora and leveraging the potential offered by the global Indian family.”¹⁶⁶

Identification of the nation-state with its diaspora is a recent—and increasingly significant—phenomenon, not an anachronism. Greece established its General Secretariat for Greeks Abroad only in 1983.¹⁶⁷ The secretariat maintains a number of divisions to address the issues of expatriates in different parts of the world, assisting them with social welfare and strengthening their ties with

¹⁶² The Citizenship (Amendment) Act, 2003, No. 6, Acts of Parliament, 2003 (India); *see also* Citizenship (Amendment) Ordinance, 2005, *available at* [http://www.manupatra.com/downloads/2005 data/Citizenship %20Amendment%20Ordinance%202005/Citizenship%20Amendment%20Ordinance%202005.htm](http://www.manupatra.com/downloads/2005%20data/Citizenship%20Amendment%20Ordinance%202005/Citizenship%20Amendment%20Ordinance%202005.htm) (amending the conditions and requirements for registration of overseas citizens of India).

¹⁶³ Embassy of India, *Union Home Minister Announces PIO Card Scheme*, INDIA NEWS ONLINE (Mar. 31, 1999) <http://www.indianembassy.org/inews/April99/PIO.html>.

¹⁶⁴ *Dual Citizenship*, THE INDIAN DIASPORA, <http://indiandiaspora.nic.in/DUALCITIZENSHIP.htm> (last visited Oct. 26, 2010).

¹⁶⁵ Ministry of Overseas Indian Affairs, PBD 2008, <http://web.archive.org/web/20071209172702/http://moia.gov.in/showinfo1.asp?linkid=465>.

¹⁶⁶ E mail from Pravasi Bharatiya Divas, Secretariat, Fed’n of Indian Chambers of Commerce and Indus., *Dual Citizenship Now a Reality* (Dec. 23, 2004), *available at* <http://www.immigrationportal.com/printthread.php?t=140033> (Oct. 17, 2010, 19:05 EST) (posted to webforum).

¹⁶⁷ *See* General Secretariat for Greeks Abroad, *available at* <http://www.ggae.gr/frontoffice/portal.asp?cpage=NODE&cnode=1&clang=1> (“[GGAE] is the Greek government body responsible for the planning, coordination, and implementation of policy regarding Diaspora Hellenes.”).

Greece. In 1995, the Greek government created the World Council of Hellenes Abroad to coordinate the activities of the some 3,500 grassroots organizations established by the Greek diaspora.¹⁶⁸ In 1989, Greece established specific institutions to connect the state with the Pontic Greeks: the National Bureau for Pontic Affairs in the Ministry of Foreign Affairs and the National Foundation for the Reception and Settlement of Repatriated Greeks.¹⁶⁹

Ukraine established a Ministry of Nationalities and Migration in 1993. Following the adoption of a new constitution in 1996, the body was renamed the State Committee on Citizenship, National Minorities, and Migration. In 1991, Latvia established its Department for Citizenship and Immigration, which contains a Repatriation Center, under the aegis of the Ministry of Internal Affairs.¹⁷⁰

In 2001, the Irish government established a "Task Force on Policy Regarding Emigrants," which recommended "[t]he adoption of a strategic and integrated approach to meeting the needs of the Irish Abroad which includes policy objectives, an action plan and the necessary structures and resources to achieve these ends."¹⁷¹ Such an effort would include a permanent "Agency for the Irish Abroad" to coordinate the provision of services (including welfare services) to Irish expatriates.¹⁷² The Irish have considered a constitutional amendment that would provide for the election of three members to the Senate by Irish emigrants.¹⁷³ Ireland has begun offering grants to organizations that provide welfare to Irish living abroad and promote repatriation.¹⁷⁴

¹⁶⁸ EUR. PARL. ASS., COMM. ON MIGRATION, REFUGEES AND DEMOGRAPHY, LINKS BETWEEN EUROPEANS LIVING ABROAD AND THEIR COUNTRIES OF ORIGIN, Doc. No. 8339, para. 69 (Mar. 5, 1999), available at <http://assembly.coe.int/Documents/WorkingDocs/Doc99/EDOC8339.htm> [hereinafter PARLIAMENTARY ASSEMBLY REPORT].

¹⁶⁹ Tinguy, *supra* note 66, at 119.

¹⁷⁰ *Id.* at 120.

¹⁷¹ BRIAN COWEN, TASK FORCE ON POLICY REGARDING EMIGRANTS, IRELAND AND THE IRISH ABROAD 3 (Aug. 2002), available at <http://www.dfa.ie/uploads/documents/task%20force%20on%20policy%20regarding%20emigrants.pdf>.

¹⁷² *Id.* at 9.

¹⁷³ PARLIAMENTARY ASSEMBLY REPORT, *supra* note 168, para. 54.

¹⁷⁴ See Press Release, Irish Dep't of Foreign Affairs, Minister Roche Announces Dion Grants, Grants for Irish Emigrant Welfare Services in Britain (July 1, 2003), available at <http://www.dfa.ie/home/index.aspx?id=26020> (describing the Dion grants, which provided €2.5 million in welfare payments to Irish citizens living in Great Britain in 2002).

Similarly, Italy established the Committees of Italians Abroad in 1985 under the aegis of its individual consulates. The committees represent not only Italian citizens living abroad, but also "foreign nationals of Italian origin." The committees' activities focus on preserving cultural, social, and economic ties with the Italian state, and they also defend the rights of expatriates. The General Council of Italians Abroad, chaired by the Minister for Foreign Affairs, was established in 1989. The council "advises the government on all issues affecting Italian expatriates, and also proposes new legislative initiatives."¹⁷⁵

Spain maintains links with its diaspora through the Councils of Spanish Residents, which are attached to the Spanish consulates, and the General Emigration Council.¹⁷⁶ Portugal's Council of the Portuguese Communities represents Portuguese community organizations abroad, along with five regional councils for Europe, North America, South America, Africa, and Asia.¹⁷⁷ France maintains a Senior Council of the French Abroad, which acts as an advisory body attached to the Ministry of Foreign Affairs.¹⁷⁸

The Council of Europe's Parliamentary Assembly, in a report on *Links Between Europeans Living Abroad and Their Countries of Origin*, concluded that current demographic realities are leading to an increased separation—rather than identification—of the concepts of nationality and citizenship. For European states, "citizenship, meaning equality before the law and participation in public affairs, has traditionally been bound up with the concept of nationality, which strictly speaking refers to membership of a cultural community having a variety of roots (ethnic, linguistic, religious and historical)."¹⁷⁹ The Assembly further explains that "the concept of the nation as a sovereign state with its own territory and frontiers . . . has naturally been undermined by social and political developments of the last ten to fifteen years . . ."¹⁸⁰ Contemporary Europeans speak of "a tendency towards 'deterritorialisation of politics,' which is in fact in line with the wishes of individuals, who

¹⁷⁵ PARLIAMENTARY ASSEMBLY REPORT, *supra* note 168, para. 67.

¹⁷⁶ *Id.* para. 68.

¹⁷⁷ *Id.* para. 66.

¹⁷⁸ *Id.* para. 65.

¹⁷⁹ *Id.* para. 74

¹⁸⁰ *Id.*

want their home countries to grant them more rights and afford them greater protection.”¹⁸¹

Relatively recent historical developments have placed European states in a situation similar to Israel: a democratic state with a national community—“ethnic, linguistic, religious, and historical”—spread across territorial borders. Faced with that circumstance, the European states more fully appreciate the role of the state in representing a national community as well as administering a given territory. The Parliamentary Assembly concludes that “[m]any problems could certainly be solved by making a clear distinction between two sets of rights. . . . those linked with residence in a given geographical area (‘citizenship rights’) and those linked with possession of a given cultural, civic and national identity. . . .”¹⁸²

This recognition is especially significant for Europe, where the project of European integration and increased immigration from non-European communities has made EU member states worried about guarding their distinct ethnocultural identities. One proposal would grant citizenship rights to non-EU nationals who live in Europe but would also allow member-states to grant the same rights, as rights of nationality, to their peoples living anywhere in the world:

This should hold the key to solving the problem of non-EU nationals on EU territory: all residents might, after spending a specified number of years in a member state, be granted European citizenship, carrying certain residence, social, civic and political rights, with rights pertaining to nationality (and thus attributable to European expatriates) remaining the member state’s prerogative. European citizenship, being closely bound up with residence for a jointly agreed minimum period, could be lost by expatriates returning for good to home countries outside the EU. But it would also be granted automatically to all EU nationals, whether or not they lived on European Union territory.¹⁸³

¹⁸¹ *Id.*

¹⁸² *Id.* para. 108.

¹⁸³ *Id.* para. 109.

As such a vision becomes increasingly realized in Europe, the *primary* function of the state would be to represent specific national communities—defined by ethnic, linguistic, or religious ties, but *not* by geography—while the citizenship rights pertaining to actual residence within the state would be ceded to a supranational organization, the European Union.

The Parliamentary Assembly's observation that citizenship has traditionally been bound up with nationality parallels Hannah Arendt's argument about the implicit relationship between human rights and national emancipation.¹⁸⁴ As Arendt observed, when a disjunction emerges between the nation's self-definition and its political expression in the state, national rights take on primary significance.

The debate within Europe over nationality and citizenship provides insight into the political ideals underlying the European concept of self-determination and the nation-state. Historians have observed that "self-determination" for the countries of Western Europe emerged as an ideal tied to popular sovereignty and democratic self-government while in Central and Eastern Europe self-determination was more closely tied to nationalism, especially the aspiration of various ethnic groups to political sovereignty. But the difference is largely illusory. The supposedly more liberal and democratic model of the West depended on a prior experience of social homogenization in Western Europe.¹⁸⁵ There, "the body of citizens empowered to participate in political matters was identical with the nation."¹⁸⁶ The emerging states of Central and Eastern Europe had yet to undergo a process of ethnic homogenization.¹⁸⁷ "There was no correlation in Central and Eastern Europe between

¹⁸⁴ See *supra* text accompanying note 26.

¹⁸⁵ See Muller, *supra* note 99, at 21 (observing that "[l]iberal nationalism . . . was not apt to emerge in states that already possessed a high degree of ethnic homogeneity").

¹⁸⁶ Yael Tamir, *The Right to National Self-Determination*, in *PHILOSOPHICAL PERSPECTIVES ON THE ISRAELI PALESTINIAN CONFLICT* 47, 49-50 (Tomis Kapitan ed., 1997).

¹⁸⁷ See Muller, *supra* note 99, at 21 ("As late as 1914, most of central, eastern, and southeastern Europe was made up not of nation states but of empires . . . Each of these empires was composed of numerous ethnic groups . . .").

states and ethnic groups In such circumstances identity became an issue of primary importance."¹⁸⁸

Thus the notion that some states were simply states of all their citizens could emerge because of the coincidence of ethnic demography and political boundaries. But there is little doubt that even these states saw themselves as expressions of the cultural identity of a distinct people. In the second volume of his wartime memoirs, Charles de Gaulle recalls telling Franklin Roosevelt that "Western Europe, despite its dissention and its distress, is essential to the West. *Nothing can replace the value, the power, the shining example of these ancient peoples.*"¹⁸⁹ The political traditions of the states of democratic Europe, for de Gaulle, emerged from the cultural expressions of a distinct people exercising sovereignty.¹⁹⁰

It may be that the dependence of the liberal-democratic state on a particular national tradition becomes clearly evident only when the confluence between state and nation has been interrupted through political or demographic change, as the Parliamentary Assembly report illustrates. The French republican tradition of *laïcité*, to take another example, has long been understood as a liberal and universalist principle of the separation of church and state, but now it causes controversy in France between defenders of the tra-

¹⁸⁸ THOMAS D. MUSGRAVE, *SELF DETERMINATION AND NATIONAL MINORITIES* 5 (1997).

In the United Kingdom and France there existed a politically unified state and a relatively homogenous culture which facilitated the pursuit of political ideals such as popular sovereignty and representative government. In Central and Eastern Europe this was not the case There was, for example, no single state in the early nineteenth century within which all ethnic Germans or Italians resided. On the other hand, in the Austro Hungarian and Russian Empires there were many diverse ethnic groups within a single state.

Id.

¹⁸⁹ JOHN LAMBERTON HARPER, *AMERICAN VISIONS OF EUROPE* 114 15 (1994) (emphasis added). De Gaulle further warned Roosevelt that in his opinion, "his plan risked endangering the Western world. By considering Western Europe a secondary matter, was he not going to weaken the very cause he meant to serve that of civilization?" *Id.* at 114.

¹⁹⁰ See, e.g., Muller, *supra* note 99, at 31 ("When French textbooks began with 'Our ancestors the Gauls' or when Churchill spoke to wartime audiences of 'this island race,' they appealed to ethnonationalist sensibilities as a source of mutual trust and sacrifice.").

dition and recent immigrants from Muslim countries.¹⁹¹ What was once considered essential to liberal democracy is now derided as illiberal, an imposition of French cultural chauvinism over the rights to freedom of expression and religion of, say, Muslim schoolchildren who wish to wear headscarves. Defenders now champion *laïcité* not as a requirement of universal human rights—its original justification—but as the expression of the cultural traditions of the French people. Indeed, French republicanism was always *both* liberal *and* culturally specific, but the dependence of the liberal tradition on the national one only emerges in periods of disruption.

As the comment of the Parliamentary Assembly that a “deterritorialization of politics” is “in line with the wishes of individuals” indicates, many Europeans want their nationality expressed in public law.¹⁹² Non-governmental organizations such as the Federal Union of European Nationalities or think tanks such as the Munich-based International Institute for Ethnic-Group Rights and Regionalism therefore promote a “law of ethnic groups” within Europe.¹⁹³ Because Jews are not considered to be “autochthonous” to Europe—meaning their national origins are elsewhere—this trend only makes it more imperative for Jews to exercise political

¹⁹¹ See generally BBC, *French Secularism Laïcité* (Oct. 15, 2004), <http://www.bbc.co.uk/dna/h2g2/A2903663> (last visited Oct. 21, 2010) (outlining the development and current debates surrounding *laïcité* in France).

¹⁹² PARLIAMENTARY ASSEMBLY REPORT, *supra* note 168, para. 74 (internal quotation marks omitted).

¹⁹³ See John Rosenthal, *Anti-Semitism and Ethnicity in Europe*, 121 POL'Y REV. 17, 35 (2003) (stating that this “law of ethnic groups” is meant to create a legal framework that takes into account both ethnological and political facts). According to this view:

[t]he traditional states of Europe are supposed to be inhabited, apart from the members of their “majority” nations, by those of any number of other “nationalities” or “national minorities,” each reputedly concentrated in regions to which they are “autochthonous” and some being in principle just “branches” of the “majority” nation of a neighboring state. As they are evidently not constituted by political membership in the state or, in other words, by the *citizenship* of their countries of residence, which the putative members of these “national minorities” in any case hold such “nationalities” must, then, be conceived in “ethnic” terms, that is, as being constituted by real or imagined commonalities of “culture” and ancestry.

Id.

sovereignty in their own national state.¹⁹⁴ Indeed, the idea that the Jews represent a distinct nation is not alien even from current European politics and law.¹⁹⁵

Jewish nationality was not simply the invention of Zionism, but of other national peoples who defined themselves in such a way as to exclude Jews. As the founder of Zionism, Theodor Herzl, put it: "We are a nation—the enemy makes us a nation whether we like it or not."¹⁹⁶ The foundations of nationalism are discussed below, but here it suffices to say that peoples, even those organized in contemporary liberal democracies, continue to conceive of themselves in national terms—as evidenced by the growing prevalence of diasporic bonds. "While diasporas are as old as history, diasporas at the turn of the millennium maintain bonds to their homelands and among their members that are stronger than ever," writes Anupam Chander.¹⁹⁷ "Today, the diaspora—people dispersed from their homelands, yet maintaining ties to those homelands and to each other—votes, invests capital, participates in political life, and even takes up arms, all for a distant homeland. These expressions are markers of citizenship and nation, not only private association and culture."¹⁹⁸ As populations become more geographically interspersed, national identity is becoming *more* important to national governments.

4. NATIONAL SELF-DETERMINATION

The idea that a sovereign democratic government represents a particular ethnonational community has its root in the principle of "self-determination of peoples" espoused at the foundation of the

¹⁹⁴ See *id.* at 36.

¹⁹⁵ As John Rosenthal writes of a German law providing for the immigration of former Soviet subjects to Germany:

[t]he immigrants are thus treated as refugees—so called "contingent refugees," meaning they are not required to pass through the usual asylum procedure—and classified by the German authorities, following former Soviet and current German practice, as being "of Jewish nationality." Unlike refugees from former Soviet lands presumed to be "of German nationality" (i.e., "ethnic Germans"), they are not given German citizenship.

Id. at 29 (emphasis added).

¹⁹⁶ STRAUSS, *supra* note 20, at 142 (internal quotation marks omitted).

¹⁹⁷ Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1006 (2001).

¹⁹⁸ *Id.*

League of Nations and the United Nations, and it has been ratified by subsequent practice.¹⁹⁹ International law and practice recognize a right of national self-determination.²⁰⁰ The State of Israel represents a straightforward application of these commonly accepted principles, and its experience highlights the dependence of liberal democratic government on a political community constituted by mutual affection and identification.²⁰¹

4.1. "Self-Determination of Peoples"

If the ethnonational identity of a sovereign democratic government is not unique to the Israeli experience, neither is the solidarity felt by members of the diaspora towards their national state. In 1975, Nathan Glazer and Daniel Patrick Moynihan observed that ethnic influences had become "the single most important determinant of American foreign policy."²⁰² The efforts of ethnic groups to influence American foreign policy on behalf of their homelands have only grown—in extent as well as in influence—since that time.²⁰³ Political scientists speak of "transnational nationalism," in which far-flung diaspora communities identify politically and culturally with their kin-states.²⁰⁴ Moreover, the ethnically based migrations that the world has seen since World War II and again after the break-up of the Soviet Union were not merely the result of preferential immigration policies on the part of the receiving coun-

¹⁹⁹ See *infra* Part 4.1 (discussing the principle of "self determination of peoples").

²⁰⁰ See *infra* Part 4.2 (discussing the role of national self determination in international law and practice).

²⁰¹ See *infra* Part 4.3 (discussing how Israel is illustrative of liberal democratic politics).

²⁰² ETHNICITY: THEORY AND EXPERIENCE 23 24 (Nathan Glazer & Daniel P. Moynihan eds., 1975) ("Foreign policy responds to [America's] ethnic composition. It responds to other things as well, but probably *first of all* to the primal facts of ethnicity.").

²⁰³ See Yossi Shain, *Ethnic Diasporas and U.S. Foreign Policy*, 109 POL. SCI. Q. 811, 812 (1995) ("[T]he ability of U.S. diasporas to affect American foreign policy toward their homeland has grown (and is likely to expand) . . .").

²⁰⁴ See Victor Roudometof, *Transnationalism and Globalization: The Greek Orthodox Diaspora between Orthodox Universalism and Transnational Nationalism*, 9 DIASPORA 361, 362 (2000) ("[T]ransnationalism is perhaps best described as a process involving cultural practices and experiences that are no longer confined within state boundaries and local, territorially bound traditions.").

tries. Rather, ethnic migrants specifically sought to return to their national homelands.

Ethnic groups have likewise aspired to national statehood. “Diasporic communities of stateless nations have historically played an integral part and often led in the struggle for political independence in their claimed homelands,” writes Yossi Shain.²⁰⁵ Not merely in the remote past, but also currently: “More recent manifestations of a diaspora’s effort on behalf of an independent homeland include North American Sikhs’ campaign for an independent Sikh country, Khalistan, and the crusade of Palestinian and Arab-Americans for Palestinian self-determination.”²⁰⁶ The ongoing struggles in Iraq involve the aspirations to self-determination of the Kurds, whose national population extends into Turkey and Iran, as well as the Iraqi Shiites and Sunnis.²⁰⁷

Such nationalistic aspirations have in fact been nurtured by the United States through Wilsonian notions of self-determination. “With the outbreak of World War I, ethnic Americans became increasingly preoccupied with their native countries,” writes Shain.²⁰⁸ “Woodrow Wilson’s proclamation of the principle of self-determination further ignited the political commitment of Poles, Slovaks, Ukrainians, Lithuanians, Armenians, Albanians, and Croats. They all lobbied vigorously for American recognition of and support for postwar independence”²⁰⁹ In setting out America’s war aims, Wilson said that the United States was fighting “for the liberty, self-government, and the undictated development of all peoples” because no people should “be forced under sovereignty under which it does not wish to live.”²¹⁰ Wilson’s conception of self-determination began with a focus on democratic self-government, not necessarily national independence, but his thinking—and American policies—evolved in the direction of ethnonational self-determination. When he presented his Fourteen

²⁰⁵ Shain, *supra* note 203, at 817.

²⁰⁶ *Id.* (footnote omitted).

²⁰⁷ Cf. Peter W. Galbraith, *Make Walls, Not War*, N.Y. TIMES, Oct. 23, 2007, at A29 (“The absence of a shared identity is a main reason the Bush administration has failed to construct workable national institutions in Iraq.”).

²⁰⁸ Shain, *supra* note 203, at 817.

²⁰⁹ *Id.*

²¹⁰ Woodrow Wilson, *Communication from the President of the United States to the Provisional Government of Russia*, 11 AM. J. INT’L L. 156, 157 (1917).

Points to a joint session of Congress on January 8, 1918, Wilson "was certainly thinking in terms of self-determination for some subject nationalities."²¹¹ In Article XIII, he called for an independent Polish state to be constituted from "those territories inhabited by indisputably Polish populations."²¹² A month later, Wilson was stressing the importance of national self-determination for all "well-defined national elements," as he told Congress on February 11, 1918:

Peoples are not to be handed about from one sovereignty to another by an international conference or an understanding between rivals and antagonists. National aspirations must be respected; peoples may now be dominated and governed by their own consent. Self-determination is not a mere phrase, it is an imperative principle of action which statesmen will henceforth ignore at their peril.²¹³

Wilson's principle of national self-determination drove American foreign policy. By 1918, Wilson had concluded that the principle required the dismemberment of Austria-Hungary. That October, he rejected an Austrian proposal of autonomy for the nationalities of Austria-Hungary, saying that it was for the particular nationalities themselves to decide "what action on the part of the Austro-Hungarian Government will satisfy their aspirations and their conception of their rights and destiny as members of the family of nations."²¹⁴ By the time of the Peace Conference, Wilson had embraced the notion that "all nationalities were entitled to self-determination."²¹⁵ As Rupert Emerson observes, "the *peoples* involved in the Wilsonian period were ethnic communities, nations or nationalities primarily defined by language and culture . . ."²¹⁶ Wilson believed so strongly that nationalities were defined by ob-

²¹¹ MUSGRAVE, *supra* note 188, at 23.

²¹² *Id.* at 23-24. The Fourteen Points did not foresee independence for every people. In Articles X and XI, Wilson proposed "autonomous development" as a means of addressing "the problem of the various ethnic groups of Austria-Hungary and the Ottoman Empire." *Id.* at 24.

²¹³ *Id.* at 24.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Rupert Emerson, *Self Determination*, 65 AM. J. INT'L L. 459, 463 (1971) (emphasis added).

jective ethnic traits that he and other American delegates at Versailles even argued that “their team of experts could provide better evidence of the lines of national divisions and affiliations than could be obtained from plebiscites of the populations concerned.”²¹⁷

Though the Allies had declared their intention to make self-determination the guiding principle of the Peace Conference, they ultimately applied the principle only to the territory of the defeated powers. Moreover, despite Wilson’s efforts, the Allies declined to include it in the Covenant of the League of Nations as a general principle of international law.²¹⁸ The principle of self-determination gained legal recognition only insofar as it formed the implicit background of Article 22, which governed the administration of the mandate system and embraced “the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.”²¹⁹ This applied, of course, only to those “peoples” living in the mandated territories. The political status of those peoples living under the mandate system was reaffirmed, at least by implication, in Article 80 of the United Nations Charter of 1945.²²⁰

The U.N. Charter also declares, in Article 1.2, that one of the purposes of the United Nations is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”²²¹ The definition of “peoples” remains unclear, but the term was surely meant to indicate something other than sovereign states, as indicated by the *tra-*

²¹⁷ ALFRED COBBAN, *THE NATION STATE AND NATIONAL SELF DETERMINATION* 71 (1970) (footnote omitted).

²¹⁸ See MUSGRAVE, *supra* note 188, at 30–31 (describing discussions surrounding the potential inclusion of the principle of self-determination in the Covenant and citing, in particular, Secretary of State Lansing’s view that “self-determination would become a source of political instability and domestic disorder, and a cause of rebellion”).

²¹⁹ League of Nations Covenant art. 22, para. 1.

²²⁰ See U.N. Charter art. 80, para. 1 (“Except as may be agreed upon in individual trusteeship agreements . . . placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.”).

²²¹ *Id.* art. 1, para. 2.

vaux préparatoires to the Charter. During the drafting of Article 1.2 the Belgian delegate suggested that the word "states" would be more appropriate than "peoples." His proposal was rejected by the drafting committee, however, which explained that the word "peoples" in Article 1.2 did not signify "states" because the two terms represent separate and distinct concepts. The committee explained that Article 1.2 was meant "to proclaim the equal rights of peoples as such, [and] consequently their right to self-determination. Equality of rights therefore extends to states, nations, and peoples" under the Charter.²²² The U.N. confirmed the distinction between a "people" and a "state" with General Assembly Resolution 2625 (XXV), which declared, "[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations," that "*all peoples have the right* freely to determine, without external interference, their political status and to pursue their economic, social, and cultural development, and *every State has the duty to respect this right* in accordance with the provisions of the Charter."²²³

During the drafting of the Charter, the Belgian delegate argued that the term "people" in Article 1.2 denoted "national groups which do not identify themselves with the population of a state."²²⁴ A memorandum by the Secretariat expounded on the distinction between "peoples" and "nations." The Secretariat concluded that "the word 'nation' is broad and general enough to include colonies, mandates, protectorates, and quasi-states as well as states."²²⁵ With regard to the use of the terms "nations" and "peoples" in Article 1.2, the Secretariat held that "there appears to be no difficulty in this juxtaposition since 'nations' is used in the sense of all political entities, states and non-states, whereas 'peoples' refers to groups of human beings who may, or may not, comprise states or

²²² See United Nations Conference on International Organization, Apr. 25 June 26, 1945, *Report of Rapporteur Subcommittee I/1/A to Committee I/1*, U.N. Doc. 723, I/1/A19, (June 1, 1945), reprinted in 6 U.N.C.I.O. Docs. 696, 704 (1945).

²²³ G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082 at 123 (Oct. 24, 1970) (emphasis added).

²²⁴ United Nations Conference on International Organization, Apr. 25 June 26, 1945, Belgian Delegation Amendment to Paragraph 2 of chapter 1, para. 1, U.N. Doc. 374 I/1/17 (working draft) (May 17, 1945), reprinted in 6 U.N.C.I.O. Docs. 300, 300 (1945).

²²⁵ Memorandum from the Secretary of the United Nations to the Coordination Committee (June 18, 1945), reprinted in 18 U.N.C.I.O. Docs. 654, 657 (1945).

nations.”²²⁶ As to a definition of “peoples,” the Secretariat could only appeal to the commonsense understanding: “[T]he word ‘peoples’ [is] used in connection with the phrase ‘self-determination of peoples’ . . . This phrase is in such common usage that no other word seems appropriate.”²²⁷ In common usage, the term generally applied to ethnic groups. The Secretariat expounded on the principle of self-determination of peoples by noting that “the principle as one whole extends as a general basic conception to a possible amalgamation of nationalities if they so freely choose.”²²⁸ The implication of this statement, however, is that the principle would ordinarily apply to individual nationalities.

In a separate opinion in the International Court of Justice’s 1966 decision in the *South West Africa Cases (Ethiopia v. South Africa, Liberia v. South Africa)*, Judge *ad hoc* van Wyck noted that Article 73 of the Charter refers to “territories whose peoples have not yet attained a full measure of self-government,” prescribes “due respect for the cultures of the *peoples concerned*,” and insists that states administering such territories take due account “of the political aspirations of the peoples.”²²⁹ The aim, ultimately, is “free political institutions according to the particular circumstances of each Territory *and its peoples* . . .”²³⁰ Because Article 73 refers to “territory” in the singular, but “its peoples” in the plural, the judge concluded that more than one people could inhabit a particular trust territory.²³¹ Moreover, the language of Article 73 does not “support the existence of a general prohibition of the allotment of rights, burdens, privileges, etc. on the basis of group, class, or race,” according to van Wyck.²³² Rather, the judge concluded, a

²²⁶ *Id.* at 658.

²²⁷ *Id.*; accord Pius L. Okoronkwo, *Self Determination and the Legality of Biafra’s Secession Under International Law*, 25 LOY. L.A. INT’L & COMP. L. REV. 63, 99–100 (2002) (discussing debates surrounding the use of the word “peoples”).

²²⁸ United Nations Conference on International Organization, Apr. 25–June 26, 1945, *Report of Rapporteur Subcommittee I/1/A to Committee I/1*, U.N. Doc. 723, I/1/A19, (June 1, 1945), reprinted in 6 U.N.C.I.O. Docs. 696, 704 (1945).

²²⁹ *South West Africa Cases*, Second Phase, (Eth. v. S. Afr.; Liber. v. S. Afr.) 1966 I.C.J. 67, 166 (July 18) (separate opinion of Judge van Wyk) (quoting U.N. Charter art. 73).

²³⁰ *Id.* (quoting U.N. Charter art. 73(b)).

²³¹ See *id.* (concluding that Articles 55 and 73, when read together, require such an interpretation).

²³² *Id.*

state such as South Africa could pursue “a policy aimed at separate self-determination for the various population groups of South West Africa.”²³³ By the same logic – viz., that the Charter assumes there could be more than one people entitled to self-determination in a given territory – Turkey has maintained that the Turkish Cypriots are a separate people from their Greek neighbors.²³⁴

The General Assembly itself has been willing to divide territories along ethnic lines. As noted above, the GA sanctioned the partition of Palestine into two states for two peoples: the “Arab and Jewish peoples,” who “live physically and spiritually apart, nurture separate aspirations and ideals, and have widely divergent cultural traditions. . . .”²³⁵ In 1958, the General Assembly elected to divide the trust territory of the British Cameroons into two separate regions, based on the ethnic and linguistic differences between them, so as to ascertain the political desires of each region separately. A Special Mission sent to the British Cameroons by the GA concluded that “the natural affinities of these broad groups of peoples in terms of language, customs and social intercourse tend to be stronger with their immediate neighbors” in the adjoining territories than between one another.²³⁶ Separate plebiscites in each region, conducted under U.N. auspices, “resulted in the incorporation of the northern half of the territory into Nigeria, and the southern half into the Republic of the Cameroons.”²³⁷ Similarly, in 1962 the General Assembly endorsed partition for the trust territory of Ruanda-Urundi along ethnic lines. The resultant independent states, Rwanda and Burundi, were dominated by the Hutu and Tutsi tribes, respectively.²³⁸

The approach of dividing territories along ethnic lines fell into disfavor with the adoption of Resolution 1514 (XV), “Declaration on the Granting of Independence to Colonial Countries and

²³³ *Id.* at 196.

²³⁴ See *Cyprus Issue*, TURKISH REPUBLIC OF N. CYPRUS PUB. INFO. OFFICE, <http://bit.ly/cpK00k> (last visited Oct. 22, 2010) (“There are two peoples in Cyprus, namely the Turkish Cypriot people and the Greek Cypriot people.”).

²³⁵ See U.N. Special Comm. on Palestine *supra* note 59, ch. 5, § A (reporting on the proposed recommendations for the Palestinian partition).

²³⁶ MUSGRAVE, *supra* note 188, at 158.

²³⁷ *Id.*

²³⁸ *Id.*

Peoples," in 1960.²³⁹ Paragraph 2 of the resolution reaffirmed that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."²⁴⁰ But Paragraph 6, which declared "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country" to be "incompatible with the purposes and principles of the Charter," had the effect of excluding from the definition of "peoples" those ethnic groups that had not yet achieved self-government.²⁴¹ The International Court of Justice has reinforced this interpretation by affirming that the principle of *uti possidetis* has become a general principle of international law with regard to decolonization.²⁴²

Nevertheless, the General Assembly has continued to recognize ethnic groups as peoples entitled to self-determination in contexts other than decolonization. For example, the GA has recognized "that the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations."²⁴³ It has called for "the cessation of practices which deprive the Tibetan people of their fundamental human rights and freedoms, including their right to self-determination."²⁴⁴ In 1974, the General Assembly admitted Bangladesh to the United Nations, after it successfully seceded from Pakistan.²⁴⁵ The ethnically distinct Bengalis had declared independence "in due fulfillment of the legi-

²³⁹ Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), ¶2, U.N. GAOR, 947th plen. mtg., U.N. Doc. A/4684 at 16-17 (Dec. 14, 1960).

²⁴⁰ *Id.*

²⁴¹ *Id.* at ¶6; see also MUSGRAVE, *supra* note 188, at 158 ("Ethnic groups within non self governing territories, however, could not now be considered as 'peoples' because they were prohibited by paragraph 6 from establishing their own nation state, and therefore were unable 'freely [to] determine their political status,' as 'peoples' were entitled to do under paragraph 2.").

²⁴² Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 567, para. 26 (Dec. 22) (noting the importance of *uti possidetis* among legal principles).

²⁴³ G.A. Res. 2672C (XXV), ¶C1, U.N. GAOR, (XXV), U.N. Doc. A/8028 (Dec. 8, 1970).

²⁴⁴ G.A. Res. 1723 (XVI), ¶2, U.N. GAOR, U.N. Doc. A/5100 (Dec. 20, 1961).

²⁴⁵ G.A. Res. 3203 (XXIX), at 2, U.N. GAOR, U.N. Doc. A/L.728/Add.1 (Sept. 17, 1974) (announcing the admission of Bangladesh to the United Nations).

itimate right of self-determination of the people of Bangladesh.”²⁴⁶ The General Assembly implicitly endorsed this view by admitting Bangladesh into the United Nations as a sovereign and independent state. Only a “people,” after all, is legally entitled to determine its own political status.

At the time, the International Commission of Jurists established a Commission of Enquiry into the events in East Pakistan (the region which ultimately became Bangladesh). Among the questions addressed in the commission’s report was whether the population of East Pakistan constituted a distinct “people” entitled to self-determination under international law. The commission first considered the meaning of the term and its discussion is worth quoting at length, especially because it cites the example of Jewish nationalism to illustrate the concept:

If we look at the human communities recognized as peoples, we find that their members usually have certain characteristics in common, which act as a bond between them. The nature of the more important of these common features may be:

- historical,
- racial or ethnic,
- cultural or linguistic,
- religious or ideological,
- geographical or territorial,
- economic,
- quantitative.

This list, which is far from exhaustive, suggests that none of the elements concerned is, by itself, either essential or sufficiently conclusive to prove that a particular group constitutes a people. Indeed, all the elements combined do not necessarily constitute proof: large numbers of persons may live together within the same territory, have the same economic interests, the same language, the same religion, belong to the same ethnic group, without necessarily constituting a people. On the other hand, a more heterogeneous

²⁴⁶ Proclamation of Independence of Bangladesh (Apr. 10, 1971), available at http://www.banglapedia.org/httpdocs/HT/P_0289.HTM.

group of persons, having less in common, may nevertheless constitute a people.

To explain this apparent contradiction, we have to realise that our composite portrait lacks one essential and indeed indispensable characteristic—a characteristic which is not physical but rather ideological and historical: *a people begins to exist only when it becomes conscious of its own identity and asserts its will to exist. A modern example is the ancient Jewish people who have exerted their will to exist as a separate Israeli nation only during the present century. This leads us to suggest that the fact of constituting a people is a political phenomenon, that the right of self-determination is founded on political considerations and that the exercise of that right is a political act.*²⁴⁷

The commission found sharp cultural and linguistic differences between East and West Pakistan, but “it was only in the later political evolution of the state of Pakistan that one finds significant evidence that the people of East Pakistan thought of themselves as a separate people.”²⁴⁸ Thus, the commission concluded, “assuming as we do that an independent nation state may include more than one ‘people’, we consider that by 1970 the population of East Pakistan constituted a separate ‘people’ within the ‘whole people’ of the state of Pakistan.”²⁴⁹

Thus, a change of consciousness among the population of East Pakistan transformed the Bengalis from an ethnic group within the Pakistani people to an independent people in its own right, entitled to assume responsibility for its own political destiny. Theorists of nationalism have also identified this element of national self-consciousness as a necessary component of a nation. Ernest Renan identifies two elements that constitute a nation: “One is the common possession of a rich legacy of memories; the other is actual consent, the desire to live together, the will to continue to value the heritage that has been received in common.”²⁵⁰ Accordingly, Al-

²⁴⁷ SECRETARIAT OF THE INTERNATIONAL COMMISSION OF JURISTS, *THE EVENTS IN EAST PAKISTAN, 1971*, at 70 (1972) (emphasis added).

²⁴⁸ *Id.* at 71–72.

²⁴⁹ *Id.* at 72.

²⁵⁰ Ernest Renan, *What is a Nation?*, in *NATIONALISM IN EUROPE, 1815 TO THE PRESENT: A READER* 48, 58 (Stuart Woolf ed., 1996) (1882).

fred Cobban concludes that "any territorial community, the members of which are conscious of themselves as members of a community, and wish to maintain the identity of their community, is a nation."²⁵¹ Ethnic groups may also see national consciousness forced upon them through persecution or discrimination. "Collective identities, because they derive from social relations with others, in particular can often be the result of an external imposition as much as of an internal evolution," writes Stuart Woolf, citing the examples of the Jews and the peasant emigrants from southern and eastern Europe in the 1880s.²⁵² Part of the genesis of the Bengali

A nation is therefore the expression of a great solidarity, constituted by a feeling for the common sacrifices that have been made and for those one is prepared to make again. It presupposes a past; however, it is epitomized in the present by a tangible fact: consent, the clearly expressed desire that the common life should continue. The existence of a nation is (excuse the metaphor) an everyday plebiscite.

Id.; see also SMITH, *supra* note 144, at 19 (discussing the importance of the idea of an "ethnic basis" in understanding the formation of modern national identity). Likewise, Yael Tamir writes:

[A]ll attempts to single out a particular set of objective features — be it a common history, collective destiny, language, religion, territory, climate, race, ethnicity — as necessary and sufficient for the definition of a nation have ended in failure. Although all these features have been mentioned as characteristic of some nations, no nation will have all of them. A nation could thus be understood as a cluster concept, that is, in order to count as a nation a group has to have a "sufficient number" of certain characteristics. Although they do not necessarily share the same set of identifying features, all members within the category "nation" will, therefore, show some family resemblance. Only one factor is necessary, although not sufficient, for a group to be defined as a nation — *the existence of national consciousness.*

Yael Tamir, *LIBERAL NATIONALISM* 65 (1993) (emphasis added).

²⁵¹ COBBAN, *supra* note 217, at 107 (emphasis omitted). According to the British historian Ernest Barker:

[a] nation is not the physical fact of one blood, but the mental fact of one tradition. A gulf is fixed between the race and the nation. The one is a common physical type: the other is a common mental content. The one is a natural fact which is already given at the dawn of history: the other is an artificial structure acquired by the thinking, feeling, and willing of human minds in the course of history.

ERNEST BARKER, *NATIONAL CHARACTER AND THE FACTORS IN ITS FORMATION* 12 (1927).

²⁵² Stuart Woolf, *Introduction to NATIONALISM IN EUROPE, 1815 TO THE PRESENT: A READER* 1, 29–30 (Stuart Woolf ed., 1996).

nation, to take another example, was the oppression by the Pakistani army in East Pakistan. To some theorists, the brutal treatment of the Bengalis by Pakistan triggered a “right of reversion” by which the Bengalis—denied self-determination through the Pakistani government—assumed the status of a people with its own right to self-determination.²⁵³ In the *Aaland Islands* case of 1920, the International Court of Justice acknowledged that while minorities were not normally entitled to self-determination, an oppressed minority would “in the last resort” be allowed to secede from a state that lacked “either the will or the power to enact and apply just and effective guarantees” for their protection.²⁵⁴

However it happens, communities that develop a national self-consciousness become entitled to self-determination as an international norm. The Soviet Union and Yugoslavia, for example, both dissolved into a number of ethnically based nation-states, which were recognized by the international community and admitted to the United Nations on the basis that an act of self-determination had occurred.²⁵⁵

The norm has a respectable democratic pedigree. In his *Considerations on Representative Government*, John Stuart Mill identifies a similar fellow-feeling as the hallmark of a nationality, a group of people who are united “by common sympathies, which do not exist between them and any others—which make them co-operate with each other more willingly than with other people, desire to be

The intensity of Jewish identity cannot be dissociated from the millenary religious and racial persecution of Jews. The vast majority of peasants who emigrated massively from southern and eastern Europe across the oceans from the 1880s carried with them a cultural baggage which related primarily to family, village and region, local dialect and religion, rather than to nation or state; they became Italians, Greeks, Poles or Russians less because of the solidarity they initially sought in their new alien environment (a solidarity which related predominantly to kin and village of origin rather than to co nationals), but far more because they were described and treated as such by the local inhabitants and officialdom.

Id.

²⁵³ See, e.g., LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF DETERMINATION 213 (1978) (examining the notion of self determination by discussing Pakistani oppression of the Bangladeshi people and their eventual secession).

²⁵⁴ MUSGRAVE, *supra* note 188, at 171.

²⁵⁵ *Id.* at 123–25 (discussing the “dissolution of the Soviet Union and . . . Yugoslavia” as an expression of the Western ideal of self determination).

under the same government, and desire that it should be government by themselves or a portion of themselves, exclusively."²⁵⁶ Where "the sentiment of nationality exists," he writes, "there is a *primâ facie* case for uniting all the members of the nationality under the same government, and a government to themselves apart."²⁵⁷ That sentiment, which facilitates democratic government, rests upon ethnocultural ties.²⁵⁸

4.2 "Peoples" and Nations

A parenthetical note on the language of the U.N. Charter may be useful. What scholars identify as a nation or nationality falls within the ambit of what the Charter calls a "people." Several resolutions of the General Assembly identify the right of self-determination as belonging to "peoples and nations."²⁵⁹ Resolution 545 (VI) of 1952, for example, called for the inclusion of an article related to self-determination in the International Covenants on Human Rights. The resolution stated that an article "on the right of all peoples *and nations* to self-determination in reaffirmation of the principle enunciated in the Charter" should be drafted in the following terms:

²⁵⁶ JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 295 (3d ed., Longman, Green, & Co. 1865) (1861).

²⁵⁷ *Id.* at 297.

²⁵⁸ *Id.* at 295.

This feeling of nationality may have been generated by various causes. Sometimes it is the effect of identity of race and descent. Community of language, and community of religion, greatly contribute to it. Geographical limits are one of its causes. But the strongest of all is identity of political antecedents; the possession of a national history, and consequent community of recollections; collective pride and humiliation, pleasure and regret, connected with the same incidents in the past.

Id.

²⁵⁹ See, e.g., The Right of Peoples and Nations to Self Determination, G.A. Res. 637 (VII) A, U.N. GAOR, 7th Sess., Supp. No. 20, U.N. Doc. A/2361 (Dec. 16, 1952) ("the right of peoples and nations to self determination is a prerequisite to the full enjoyment of all fundamental human rights"); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (Dec. 21, 1965) ("All States shall respect the right of self determination and independence of peoples and nations, to be freely exercised without any form of foreign pressure.").

All peoples shall have the right of self-determination, and shall stipulate that all States, including those having responsibility for the administration of Non-Self-Governing Territories, should promote the realization of that right, in conformity with the Purposes and Principles of the United Nations, and that States having responsibility for the administration of Non-Self-Governing Territories should promote the realization of that right in relation to the peoples of such Territories.²⁶⁰

The sentence "All peoples shall have the right to self-determination" could guarantee "the right of all peoples *and nations* to self-determination" only if "peoples" encompassed "nations." Indeed, an article "on the right of all peoples and nations to self-determination" could represent a "reaffirmation of the principles enunciated in the Charter" only if the guarantee in Article 1.2 of "self-determination of peoples" included nations within its ambit. As Harold S. Johnson writes:

In the discussions in the United Nations concerning the definition of the terms "people" and "nation" there was a tendency to equate the two. When a distinction was made, it was to indicate that "people" was broader in scope. The significance of the use of this term centered on the desire to be certain that a narrow application of the term "nation" would not prevent the extension of self-determination to dependent peoples who might not yet qualify as nations.²⁶¹

Thus, if "peoples" and "nations" differed in meaning at all, it was because "peoples" encompassed not only nations but proto-nations, groups with the potential for national consciousness. Functionally, however, "self-determination of peoples" meant national self-determination.

²⁶⁰ Inclusion in the International Covenant on Human Rights of an Article Relating to the Right of Peoples to Self Determination, G.A. Res. 545 (VI), U.N. GAOR, 6th Sess., Supp. No. 20, U.N. Doc. A/2119 (Feb. 5, 1952).

²⁶¹ HAROLD S. JOHNSON, SELF DETERMINATION WITHIN THE COMMUNITY OF NATIONS 55 (1967).

4.3 A Normal People

Some critics of Israel question whether the Jewish people “constitute a nation in the relevant sense, the sense in which the principle of self-determination applies.”²⁶² Klug argues that Zionism “was unlike other national movements” because “[t]here was no pre-existing nation . . . where both territory and language are already in place. Traditionally, the idea of the Jewish people was centered not on a state but on a book, the Torah, and the culture (or cultures) that developed around that book.”²⁶³ It is true that before Zionism promoted a political and national identity, Jews composed one of what Eric Hobsbawm calls “proto-nations” because the Jews “long possessed a marked sense of the separateness of their nationality without any political claims to a territory or a state . . .”²⁶⁴ But this status changed when “their sense of being discriminated against or persecuted—in an age when the nation state had become the dominant mode—made their elites more receptive to political arguments.”²⁶⁵ Political persecution combined with religious and ethnocultural ties gave rise to the sentiment of nationality identified by Mill, Renan, and others. As Herzl explained: “We are a nation—the enemy makes us a nation whether we like it or not.”²⁶⁶

Even if the Jews did not see themselves as a separate nation, there was the stubborn reality that everyone else did. As Arendt wrote of the German-Jewish writer Rahel Varnhagen, “[a]lthough being born a Jewess might seem to Rahel a mere reference to something out of the remote past, and although she may have entirely eradicated the fact from her thinking, it remained a nasty present reality as a prejudice in the minds of others.”²⁶⁷ Arendt herself, though born and raised in Germany, never “considered myself a

²⁶² Klug, *supra* note 147, at 25.

²⁶³ *Id.*

²⁶⁴ Woolf, *supra* note 252, at 21.

²⁶⁵ *Id.*

²⁶⁶ STRAUSS, *supra* note 20, at 142 (quoting Herzl).

²⁶⁷ HANNAH ARENDT, RAHEL VARNHAGEN: THE LIFE OF A JEWESS 90 (Liliane Weissberg ed., Richard & Clara Winston trans., Johns Hopkins Univ. Press 1997) (1958).

German—in the sense of belonging to the people as opposed to being a citizen”²⁶⁸

The national identities of the European states, it turned out, were not incidental to liberal democracy; the latter depended on the former. The nation-state’s legitimacy rested on its commitment to the national culture, which in turn promoted a sense of shared social responsibility and mutual commitment to the state. Members of other nation-states were part of a system of mutual recognition in which each nation cultivated its own identity and maintained allegiance to a distinctly national state. “Treaties of reciprocity and international agreements have woven a web around the earth that makes it possible for the citizen of every country to take his legal status with him no matter where he goes,” writes Arendt.²⁶⁹

Nationalism even promoted mutual respect between nations. Thus, Giuseppe Mazzini could address his fellow Italians by asking:

What is it that makes our heart beat when hearing the story of battles for national liberation taking place in far and remote places? . . . A people, Greek, Polish, Circassian, raises the banner of the fatherland and of independence, fights, conquers, or dies for it, what is it that makes our heart swell with joy at its victories, and sorrow over its defeats? . . . And why do you eagerly read the miracles of patriotic love recorded in Greek story, and repeat them to your children with a feeling of pride, almost as if they were stories of our own fathers? ²⁷⁰

The Jews appeared alien within this system because they lacked the dignity of national independence. The dilemma could not be solved by seeking integration into societies that regarded them as foreign elements, even if that were possible. “The Jews are not a living nation; they are everywhere aliens; therefore they are despised,” wrote the early Zionist Leo Pinsker in his *Auto-Emancipation*. “The civil and political emancipation of the Jews is

²⁶⁸ HANNAH ARENDT, “What Remains? The Language Remains”: A Conversation with Gunter Gaus, in *THE PORTABLE HANNAH ARENDT* 3, 8–9 (Peter Baehr ed., 2000) (1964).

²⁶⁹ ARENDT, *supra* note 23, at 294.

²⁷⁰ TAMIR, *supra* note 250, at 92 (quoting Giuseppe Mazzini).

not sufficient to raise them in the estimation of the peoples.”²⁷¹ The proper remedy “would be the creation of a Jewish nationality, of a people living upon its own soil, the auto-emancipation of the Jews; their emancipation as a nation among nations by the acquisition of a home of their own.”²⁷²

The international system presumed that non-national peoples would develop such a national identity. The Covenant of the League of Nations placed those “peoples not yet able to stand by themselves under the strenuous conditions of the modern world” under the “tutelage” of the “advanced nations” of Western Europe.²⁷³ Moreover, the League judged that “[c]ertain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.”²⁷⁴ The League legally recognized the Jewish people’s right to form a homeland in Palestine pursuant to the Balfour Declaration, and this recognition was incorporated into the Palestine mandate.²⁷⁵

But if the Jewish people reinterpreted their cultural inheritance in order to promote a national self-consciousness, they can be accused of doing nothing more than any other national group. “Nations, old or new, tend to reshape their past, reinterpret their culture, forget differentiating features, and embrace common characteristics in order to create the illusion of a ‘natural’ unit with a long, mostly glorious history and a promising future.”²⁷⁶ That, in fact, is what makes a people into a nation.

It is not even clear, in any event, that Israel’s national identity can even be described as “ethnic”: “In what sense does ‘ethnic’ describe the common identity of Israeli Jews from Argentina, Eng-

²⁷¹ Leo Pinsker, *Auto Emancipation: An Appeal to His People by a Russian Jew*, in *THE ZIONIST IDEA* 181, 198 (Arthur Hertzberg ed., 1997) (1882).

²⁷² *Id.*

²⁷³ League of Nations Covenant art. 22, paras. 1–2.

²⁷⁴ *Id.* para. 4.

²⁷⁵ James Crawford, *Israel (1948–1949) and Palestine (1998–1999): Two Studies in the Creation of States*, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 95, 104 (Guy S. Goodwin Gill & Stefan Talmon eds., 1999).

²⁷⁶ TAMIR, *supra* note 250, at 67. Cf. KEDOURIE, *supra* note 144, at 67 (“In nationalist doctrine, language, race, culture, and sometimes even religion, constitute different aspects of the same primordial entity, the nation.”).

land, Ethiopia, Germany, Morocco, Russia, and Yemen?" asks Gadi Taub, who argues that Israel is much "less ethnically homogeneous than, say, France, Germany, Greece, Holland, Poland, or Sweden."²⁷⁷ However that may be, it is important to recall Mill's definition of the nation as being "united among themselves by common sympathies which do not exist between them and any others, which make them cooperate with each other more willingly than with other people, [and] desire to be under the same government."²⁷⁸ It is that sentiment which makes liberal democracy function. As Arendt recognized, human rights and democracy presuppose a polity "which makes opinions significant and actions effective."²⁷⁹ Self-government requires a political partnership in which individuals are willing and able to regard one another as equal members of the political community.²⁸⁰ To sustain such a political partnership, Aristotle knew, "involves the element of affection."²⁸¹ People form a polity precisely through "common sympathies which do not exist between them and any others" – as Mill defined nationality – because affection and solidarity are necessarily particular rather than indiscriminate.²⁸² In this way, democratic

²⁷⁷ Gadi Taub, *Liberalism, Democracy, and the Jewish State*, CHRON. HIGHER EDUC., at B7 (2007).

²⁷⁸ See *supra* notes 256–58 and accompanying text.

²⁷⁹ See *supra* Part 2.2.; see also ARISTOTLE, *THE POLITICS* 37 (Carnes Lord trans., University of Chicago Press 1984) (350 B.C.E.) (arguing "the city is both by nature and prior to each individual").

²⁸⁰ See Manent, *supra* note 21, at 96 (discussing the importance of the "political community" where people consent to "put things in common"). Aristotle called the city "the political partnership," ARISTOTLE, *supra* note 279, at 35, or "the community that is political," ARISTOTLE, *THE POLITICS OF ARISTOTLE* 8 (Peter L. Phillips Simpson trans., Univ. of North Carolina Press 1997). Regarding the term "community," the Greek is "koinōnia, a derivative of koinos ('common'), and so means a community in the literal sense of sharing in common." *Id.* at 8 n.1.

²⁸¹ ARISTOTLE, *supra* note 279, at 134 (noting further that "[t]he city wishes . . . to be made up of equal and similar persons to the extent possible"); see also Kenneth Newton, *Trust, Social Capital, Civil Society, and Democracy*, 22 INT'L POL. SCI. REV. 201, 205 (2001) ("In many ways the idea of political trust and political capital is a modern social science version of the classical concept of fraternity – together with liberty and equality, it is a necessary condition for democracy.").

²⁸² See FRANCIS FUKUYAMA, *OUR POSTHUMAN FUTURE: CONSEQUENCES OF THE BIOTECHNOLOGY REVOLUTION* 127 (2002) (noting that "the natural inclination to favor kin and private property" precludes political arrangements that expect on species level altruism); see also John Hutchinson & Anthony D. Smith, *Introduction to ETHNICITY*, at 3 (John Hutchinson & Anthony D. Smith eds., 1996) (noting that ethnicity, as "the sense of kinship, group solidarity, and common culture," has

self-government depends on national fellow-feeling: the capacity of citizens to identify with each other, to respect their competing political claims, and to trust that others will do the same.²⁸³

Ethnic ties provide the groundwork for social trust and political solidarity and, universalist aspirations notwithstanding, continue to do so.²⁸⁴ At the same time, social scientists have found

"always constituted one of the basic modes of human association and community.").

²⁸³ As Francis Fukuyama argues, a liberal regime of equal rights emerges from the struggle to have one's human dignity and worth recognized by others. As such, it depends on bonds of mutual recognition and social trust. FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 358-59 (1996). Robert D. Putnam has described the dependence of liberal democracy on "social capital," features of social organization such as trust, norms, interpersonal networks, and community ties that facilitate cooperation and enable citizens "to make credible commitments to one another." ROBERT D. PUTNAM, ROBERT LEONARDI & RAFFAELLA Y. NONETTI, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 164-67 (1993); see also ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 21 (2001) ("Civic engagement and social capital entail mutual obligation and responsibility for action."). This is a common finding of social science. See, e.g., GABRIEL ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* 239-43 (1963) (arguing that a sense of interpersonal trust is a prerequisite for democracy); Newton, *supra* note 251, at 202 ("Trust is a probably the main component of social capital, and social capital is a necessary condition of social integration, economic efficiency, and democratic stability."); Ronald Inglehart, *Trust, Well Being, and Democracy*, in *DEMOCRACY AND TRUST* 88, 101-05 (Mark E. Warren ed., 1999) (arguing that "a culture of trust" and a sense that political arrangements are "legitimate in the eyes of their citizens" are necessary to maintaining a democratic regime); Seymour Martin Lipset, *The Social Requisites of Democracy Revisited*, 59 *AM. SOC. REV.* 1, 3 (1994) ("Democracy requires a supportive culture, the acceptance by the citizenry and political elites of principles underlying freedom of speech, media, assembly, religion, of the rights of opposition parties, of the rule of law, of human rights, and the like."). For the roots of the idea of social capital in social theory, see JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 300-22 (1994).

²⁸⁴ Fredrik Barth's description evokes the connection between ethnicity and social trust.

[T]he ethnic boundary canalizes social life—it entails a frequently quite complex organization of behaviour and social relations. The identification of another person as a fellow member of an ethnic group implies a sharing of criteria for evaluation and judgment. It thus entails the assumption that the two are fundamentally "playing the same game."

FREDRIK BARTH, *ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURAL DIFFERENCE* 15 (1969); see also Muller, *supra* note 99, at 35 (noting that ethnonationalism "corresponds to some enduring propensities of the human spirit that are heightened by the process of modern state creation, it is a crucial source of both solidarity and enmity, and in one form or another, it will remain for many generations to come").

that greater ethnic heterogeneity is associated with lower social trust.²⁸⁵ Ethnically heterogeneous societies exhibit less political and civic engagement,²⁸⁶ less effective governing institutions,²⁸⁷ and fewer public goods.²⁸⁸ The sociologist Robert Putnam has concluded that greater ethnic diversity weakens social solidarity, fosters social isolation, and inhibits social capital:

[I]nhabitants of diverse communities tend to withdraw from collective life, to distrust their neighbours, regardless

²⁸⁵ See Alberto Alesina & Eliana La Ferrara, *Who Trusts Others?*, 85 J. PUB. ECON. 207, 231 (2002) (explaining that “interpersonal trust is lower in more racially heterogeneous communities”); Christopher J. Anderson & Aida Paskeviciute, *How Ethnic and Linguistic Heterogeneity Influence the Prospects for Civil Society: A Comparative Study of Citizenship Behavior*, 68 J. POL. 783, 791 (2006) (finding that ethnic and linguistic heterogeneity “reduce . . . trust” in democratic countries); Jan Delhey & Kenneth Newton, *Predicting Cross National Levels of Social Trust: Global Pattern or Nordic Exceptionalism?*, 21 EUR. SOC. REV. 311, 318 (2005) (finding that ethnic heterogeneity has a “strong negative correlation” with the belief that people will not deliberately or knowingly bring harm to one another); Stephen Knack & Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross Country Investigation*, 112 Q. J. ECON. 1251, 1282–83 (1997) (“Ethnic and linguistic divisions coincide with weakened trust and civic norms.”); Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty First Century*, 30 SCANDINAVIAN POL. STUD. 137, 153 (2007) (finding that “greater ethnic diversity is associated with less trust in neighbours”). Ethnically heterogeneous communities exhibit distrust not only between ethnic groups but also within ethnic groups; ethnic diversity depresses generalized social trust rather than aggravating intergroup tensions. *Id.* at 148–50 (noting that “in group trust, too, is lower in more diverse settings”).

²⁸⁶ Putnam found that communities of greater ethnic heterogeneity exhibit lower confidence in government and the political process, lower voter registration, lower participation in community projects, lower rates of charitable giving and volunteering, and fewer close friends and confidants. *Id.* at 149–50; see also Alberto Alesina & Eliana La Ferrara, *Participation in Heterogeneous Communities*, 115 Q. J. ECON. 847, 850–51 (2000) (finding that “racial and ethnic heterogeneity reduce the propensity to participate in a variety of social activities including recreational, religious, civic, and educational groups” and therefore that “social capital is lower” in more heterogeneous communities).

²⁸⁷ Rafael La Porta et al., *The Quality of Government*, 15 J. L. ECON. & ORG. 222, 265 (1999) (“Ethnolinguistically homogeneous countries have better governments than the heterogeneous ones.”).

²⁸⁸ Alberto Alesina, Reza Baqir & William Easterly, *Public Goods and Ethnic Divisions*, 114 Q. J. ECON. 1243, 1274 (1999) (noting that more ethnically diverse jurisdictions “devote lower shares of spending to core public goods like education and roads”); see also WELFARE, ETHNICITY, AND ALTRUISM: NEW FINDINGS AND EVOLUTIONARY THEORY (Frank Kemp Salter ed., 2004) (arguing that more ethnically mixed populations exhibit greater resistance to redistributive social welfare policies).

of the colour of their skin, to withdraw even from close friends, to expect the worst from their community and its leaders, to volunteer less, give less to charity and work on community projects less often, to register to vote less, to agitate for social reform *more*, but have less faith that they can actually make a difference, and to huddle unhappily in front of the television.²⁸⁹

These findings confirm that the solidarity underlying democratic politics rests in large part on ethnic identification.

Surely, it does not serve the cause of liberal democracy to ignore this reality. The trouble, however, is that "the democratic principle does not define the framework within which it operates."²⁹⁰ Because it embraces a principle of universalistic human equality, modern democratic thinking cannot justify the particularistic national context in which liberal democracy was nurtured and continues to thrive. The difficulty with the modern attitude is that it assumes human equality exists prior to political society and that liberal democracy springs logically from this preexisting fact. But this gets the chronology wrong. "We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights," writes Arendt.²⁹¹ "Equality, in contrast to all that is involved in mere existence, is not given us, but is the result of human organization insofar as it is guided by the principle of justice."²⁹²

People face the reality of difference; there are not only the distinctions of ethnicity, sex, religion, and so on, but also each individual's particular attributes. People *become* equal through a mutual decision to disregard such differences in the distribution of

²⁸⁹ Putnam, *supra* note 285, at 150-51.

²⁹⁰ Manent, *supra* note 21, at 95.

For example, a vote for self-determination, a democratic act *par excellence*, takes place within a framework previously established by undemocratic means and principles, generally by tradition, corrected or confirmed by force. Before the French, considering themselves a nation, could take "sovereignty" for themselves in 1789, "forty kings" (as the monarchists said) had first "made France" through marriage and war.

Id.

²⁹¹ ARENDT, *supra* note 23, at 301.

²⁹² *Id.*

political rights. In this way, human equality is the product of liberal democracy rather than its source.

It is important to recognize equality “as a working principle of a political organization in which otherwise unequal people have equal rights” because otherwise equality “will be mistaken for an innate quality of every individual, who is ‘normal’ if he is like everybody else and ‘abnormal’ if he happens to be different.”²⁹³ A political order may insist that certain human differences are irrelevant while people themselves regard those differences as meaningful and are consequently reluctant to recognize others as their equals. Where the political order does not account for differences which correspond to deeply felt allegiances, the fact of difference becomes a threat to the political order. “The dark background of mere givenness, the background formed by our unchangeable and unique nature, breaks into the political scene as the alien which in its all too obvious difference reminds us of the limitations of human activity—which are identical with the limitations of human equality.”²⁹⁴ Thus, the Weimar Republic saw no difference between Jews and Gentiles while a majority of Germans found the difference all too meaningful—and their insistence upon difference found horrific violent expression.

Sometimes, then, differences must be openly acknowledged in the political sphere so that equality can be established on the basis of our differences rather than in denial of them. National rights—and national governments—serve this role. Of course, national consciousness—and therefore national identity—can change or evolve.²⁹⁵ But this consciousness is prior to liberal democracy, which presupposes a political community of people united by common sympathies and willing to recognize each other as equals.

²⁹³ *Id.* at 54 (“This perversion of equality from a political into a social concept is all the more dangerous when a society leaves but little space for special groups and individuals, for then their differences become all the more conspicuous.”).

²⁹⁴ *Id.* at 301.

²⁹⁵ See EUROPEAN COMMISSION, REPRESENTATIONS OF EUROPE AND THE NATION IN CURRENT AND PROSPECTIVE MEMBER STATES: MEDIA, ELITES, AND CIVIL SOCIETY: FINAL REPORT 51 (2004), available at http://ec.europa.eu/research/social_sciences/pdf/euronat_en.pdf (noting that European national identities are “a process of ethnic and civic elements intertwined” and that “[b]oth concepts seem to be interacting and entangled in an open dialectical process, and it is increasingly difficult, in operational as well as in conceptual terms, to separate the one from the other”).

Without the nation, the abstract ideals of liberal democracy remain abstractions.

From the point of view of liberal democracy, the nation appears contingent and arbitrarily defined. But it is precisely because the nation exists in the messy realities of human history that it can give concrete expression to liberal-democratic aspirations and ideals. "Abstract liberty," as Edmund Burke observed, "like other mere abstractions, is not to be found."²⁹⁶ People do not exist in an abstract universal humanity. The abstract individual, stripped of particularity and political attachments, is no longer recognizably human.

5. CONCLUSION

Identification with a particular national group is a commonplace of liberal democracy. As the experience of Israel illustrates, the achievement of human rights depends on national self-determination. Liberal democracies implement laws of return, promote the welfare of co-ethnics living abroad, and maintain political ties to ethnonational communities living in diaspora. As globalization disrupts the coincidence of ethnic demography and political boundaries, the ethnonational identification of liberal democratic states is becoming more, not less, significant. International law and practice acknowledge national self-determination as a fundament of democracy. Liberal democracy requires a national community if it is to become more than an ineffectual abstraction.

²⁹⁶ *Mr. Burke's Speech on Moving His Resolutions for Conciliation with the Colonies, March 22, 1775*, in *THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE* 17, 34 (John West 1807) (1775).