

The Idea of Israel as a Jewish State

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Israel is often described as a Jewish state and as the locus of Jewish self-determination. How should these phrases be understood? How can they be squared with a commitment to equal citizenship for non-Jewish Israelis? This Article distinguishes between descriptive and normative answers to these questions. The descriptive answer interprets the phrases as referring to the fact that a majority of Israelis are Jewish. The normative answer reads into the phrases a special obligation to promote the common good of the Jewish people. The Article argues that the phrases are unobjectionable when taken in the descriptive sense, but problematic when understood in the normative sense. A state that is guided by the normative answer would offer inadequate protection to key interests of minorities. The critique of the normative answer also points to the more positive conclusion that Israel should foster an Israeli civic identity amongst all its citizens.

INTRODUCTION

The founding of modern Israel raises a number of difficult questions of justice. One group of questions concerns the initial period of settlement by Jews in Palestine from the 1880s to the 1940s. Was it morally permissible for Jewish immigrants to settle in Palestine in this period? Does the number of settlers and/or the intentions that they came with make a difference to the judgment about permissibility? And, assuming that justice did permit Jews

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to come and settle in Palestine, did they use justifiable means to acquire land to settle on? A second set of questions surrounds the founding of the State of Israel. Under the circumstances, was the establishment of the State of Israel a defensible action? States are seldom created by procedures that would satisfy ideal theories of justice, but did the creation of Israel at least satisfy minimal conditions of legitimacy given the circumstances? A third group of questions concerns the initial decisions about membership and territory in the new state. The new state found itself immediately at war with Arabs in the region, a war that resulted in the expulsion and mass exodus of hundreds of thousands of Palestinian Arabs from Israeli territory.² The displaced Palestinians have claimed a right to return ever since, a right that Israel has refused to acknowledge. Were defensible decisions made about who could live on the newly defined territory of the state?

My focus in this Article will be on a distinct, fourth kind of question. When Israel was founded, it was founded as a Jewish state. The *Declaration of the Establishment of the State of Israel* (1948) refers in a number of places to the new state it establishes as the “Jewish state,”³ a phrase that had been used in U.N. Resolution 181 (1947) that paved the way to Israel’s creation,⁴ and in the report of the Peel Commission of 1937.⁵ The *Declaration* says that the problem of the Jewish people’s “homelessness” should be “solved by re-establishing in *Eretz-Israel* the Jewish State.” And the founding text’s key sentence—the declaration itself—announces “the establishment of a Jewish state in *Eretz-Israel*, to be known as the State of Israel.”

Even if one gives affirmative answers to all the other questions posed above—that is, even if one thinks that it was justifiable for Jews to settle in Palestine in the pre-independence period, that it was justifiable for the State of Israel to be created in the way that it was, and that the initial decisions about territory and territorial presence were defensible—one might still wonder

2 Accounts of this pivotal moment in Israel’s history include TOM SEGEV, 1949: *THE FIRST ISRAELIS* (1986); ANITA SHAPIRA, *ISRAEL: A HISTORY* (2014); BENNY MORRIS, 1948: *A HISTORY OF THE FIRST ARAB-ISRAELI WAR* (2009).

3 *The Declaration of the Establishment of the State of Israel* (1948) (available in English at <https://www.jewishvirtuallibrary.org/the-declaration-of-the-establishment-of-the-state-of-israel>).

4 U.N. General Assembly Resolution 181, *Partition Plan* (29 November, 1947), <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253d>.

5 PALESTINE ROYAL COMMISSION, REPORT (1937) (Report of the Peel Commission) (hereinafter PEEL COMMISSION REPORT), <https://www.jewishvirtuallibrary.org/text-of-the-peel-commission-report>.

whether it was justifiable for the state that was created to be created as a Jewish state. My aim in this Article is to explore this question.

The main moral problem concerns the relationship between the idea of Israel as a Jewish state and the status and rights of non-Jewish citizens of Israel, especially Palestinian Arabs, the largest group of non-Jews, and the group most opposed to Israel's founding. The *Declaration* is careful to offer equal citizenship to Arab inhabitants of the Jewish state. It appeals "to the 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 due representation in all its provisional and permanent institutions." The chief puzzle is how to reconcile the Jewish character of the state with the principle of equal citizenship for Arabs. What could be meant by the idea of a Jewish state for that idea not to conflict with equal citizenship for Arabs? For instance, if the suggestion is that some kind of fundamental preference is to be given for Jewish citizens, how could such a preference possibly be consistent with full and equal citizenship?

The idea of Israel as a Jewish state is closely related to another idea that I will also examine in this Article: the idea that the Jewish people fulfills its right to self-determination in the State of Israel. A defining idea of Zionism—the central commitment of Israel's founders—is that the Jewish people should enjoy self-determination in the Land of Israel.⁶ This idea—Jewish self-determination in Israel—perhaps helps to explain the meaning of the idea of Israel as a Jewish state. Israel is a Jewish state in the sense that it is the state in which the Jewish people enjoys self-determination. But this just reformulates the moral problem described above without resolving it. Now we need to consider how thinking about Israel as the locus of Jewish self-determination could be rendered compatible with equal citizenship for non-Jewish citizens of Israel.

A range of answers to these problems seems possible. At one extreme, one could reject the idea of Israel as the site of Jewish self-determination, either on the grounds that self-determination is an incoherent or deeply flawed notion, or because one thinks there is something specifically illegitimate about Jewish self-determination in Israel. At the other end of the spectrum, one might view it as perfectly natural to think of Israel as the locus of the self-determination of the Jewish people. It is no more controversial than saying that the French people achieve self-determination in France, or the Hungarian people in Hungary. And having embraced the Zionist idea, one might then go

6 I follow Chaim Gans in identifying the "Zionist narrative" with the idea of Jewish self-rule in the Land of Israel. The many competing versions of Zionism represent different interpretations of this narrative. CHAIM GANS, *A POLITICAL THEORY FOR THE JEWISH PEOPLE*, ch. 1 (2016).

on to elaborate a set of further normative implications that seemingly follow from the idea. What could the practical import of the ideas of a Jewish state and Jewish self-determination be if they don't involve some special set of obligations to protect and promote the Jewish people?

The present Article avoids both these positions. I distinguish between two different conceptions of Israel as a Jewish state, and two corresponding understandings of Jewish self-determination. I argue that the first conception in each case is justifiable but has limited practical consequence. The second conception is normatively consequential but is unjust and ought to be rejected. The upshot is that there is a minimal sense in which Israel is reasonably regarded as a Jewish state and the locus of Jewish self-determination, but this minimal notion of Israel's Jewishness does not entail special obligations towards Israel's Jewish citizens. Instead, the reasons for stopping at the minimal notion are also reasons for thinking that Israel ought to foster among all its citizens a shared sense of Israeli national identity.⁷

I. THE DESCRIPTIVE AND NORMATIVE CONCEPTIONS OF A JEWISH STATE

A. The Descriptive Conception

One possible way of reconciling the idea of Israel as a Jewish state with the principle of equal citizenship for Arabs would be to construe the idea in purely descriptive, demographic terms. In its simplest form, the proposal is that one call Israel a Jewish state when and because a majority of its citizens are Jewish. In roughly the same way, we could call Poland the "Polish state," or even the "state of the Poles," Hungary the "state of the Hungarians," etc., when and because a majority of citizens are ethno-nationally Polish, Hungarian, and so on. I call this the *descriptive-demographic* or, more simply, the *descriptive* conception.

7 A nuanced view of the issues discussed in this Article can be found in Christopher Eisgruber & Lawrence Sager, *Equal Membership, Religious Freedom, and the Idea of Homeland*, in *RELIGION AND THE DISCOURSE OF HUMAN RIGHTS* 25 (Hanoch Dagan, Shahar Lipshitz & Yedidia Z. Stern eds., 2014). I agree with significant portions of this essay, including the authors' contention that justice in the Israeli context will ultimately require the formation of some form of pan-Israeli national identity (55–56). In the end, however, I am unpersuaded by their central proposition that it is possible to reconcile a notion of the Jewish state that involves partiality to the Jewish majority with the guarantees of equal citizenship found in Israel's founding *Declaration*.

The descriptive conception seems consistent with the reasons cited by some for creating a Jewish state in the first place. For instance, the Peel Commission recommended the creation of a Jewish state as part of a two-state partition of Palestine. Two considerations seemed to animate its thinking. One was the desirability of a state in which Jews could be in the majority, given the history of persecution of Jews in states where they were in the minority.⁸ A second was a perception that Arab-Jewish relations in Palestine were so poisoned that there was little or no prospect of a single successful binational state.⁹ Insofar as these were the animating concerns behind the demand for the creation of a Jewish state, the descriptive conception is all that is needed to make sense of the idea of such a state. If Jews were to be in the clear majority in a state, then they would not have to fear oppression by the majority, and they would not have to develop the state under conditions of intractable ethnic conflict with a similarly sized ethnic group.

The descriptive conception can also account for the attitude of non-Israeli Jews towards Israel. Many non-Israeli Jews feel a special attachment to Israel, and can think of it as a “Jewish state,” in virtue of the fact that Israel has a Jewish majority and indeed is the only state in the world that has such a majority. For the same reasons, ethnic Hungarians living outside of Hungary might feel a special attachment to Hungary in virtue of the country’s ethnic Hungarian majority. Of course, there are all sorts of reasons why people might feel attached to a particular state as their homeland, just as there were all sorts of reasons why different actors favored the founding of modern Israel. The descriptive conception is worth noting because it represents a particularly minimal and normatively uncontroversial way of interpreting the idea of Israel as a Jewish state.

There are other descriptive characterizations of the notion of a Jewish state that could be mentioned besides the demographic one that I have just highlighted. In calling Israel a Jewish state one could have in mind that certain important moments in Jewish history took place on the territory of the State of Israel and/or that that territory bears to this day enduring landmarks of, and testimony to, those important moments. Alternatively, one could have in mind that Israel is a country in which a distinctively Jewish culture is alive and well. I suspect that many Jews both within Israel and outside would appeal to these facts, among others, in explaining why they think of Israel as a Jewish state. Note, however, that by this logic Israel could also be considered an Arab

8 On the persecution of Jews, see PEEL COMMISSION REPORT, *supra* note 5, at ch. III. On Jews as a majority, see *id.* at the Conclusion: “They [the Jews] will cease at last to live a minority life.”

9 *Id.* at ch. XXI.

state, a Muslim state, a Christian state, and so on. Unlike the demographic variant of the descriptive conception, these other variants would not justify singling out Israel's Jewish character.

B. The Normative Conception

A different conception of Israel as a Jewish state holds that Israel has special moral obligations to the Jewish people that it does not have to non-Jews, including obligations to protect and promote the Jewish people's survival and flourishing as a distinct group. Call this the *normative conception*. In principle, different versions of the normative conception might be distinguished according to whether the Jewish people at whom special obligations are directed is assumed to include non-Israeli as well as Israeli Jews. I shall occasionally refer to this variation in what follows, but it does not turn out to be important to the theoretical and critical points that I seek to make. The normative conception need not deny that non-Jewish citizens in Israel have a significant range of rights, entitlements, and obligations, and should, in *most* areas of law and policy, be regarded as equal citizens. The important point for the normative conception is that there are at least *some* areas of law and policy in which Jews have specific rights, claims, and obligations that are not shared by non-Jews.

A number of key policies and legal decisions in Israel's history are hard to square with a merely descriptive understanding of Israel as a Jewish state but fit comfortably with the normative conception:

- The flag of Israel shows the Star of David, a symbol of Jewish identity and religion, without symbolically representing any non-Jewish groups or identities. The national anthem (*Hatikva*) previously served as an anthem of the Zionist movement.
- The Law of Return opens Israel's borders to immigration by Jews from anywhere in the world (no matter their circumstances), a privilege that is not (with limited exceptions) extended to non-Jews. This asymmetry not only creates an inequality between non-Israeli Jews and non-Israeli non-Jews, but also treats unequally the claims of Israeli Jews and Israeli non-Jews who want their respective communities to flourish and be replenished, or who want to renew specific ties of kinship.
- The normative conception best accounts for a series of legal decisions and opinions from the 1960s to 1980s. In these decisions, the Israeli Supreme Court discussed whether Arab-Israeli political parties were permitted to run a list of candidates for the Knesset if they proposed that Israel should be

regarded as a state of Jews *and* Arabs rather than as a Jewish state.¹⁰ It is difficult to see how someone assuming a merely descriptive conception of Israel as a Jewish state could have a problem with the characterization of Israel as a state of Jews and Arabs, which offers a more refined description. From the perspective of the normative conception, by contrast, the binational characterization is arguably problematic if it is taken to deny the special obligations owed to the Jewish people.

- Non-Jews do not face conscription into military service, although some (e.g., many Druze) do choose to serve. Non-Jews who do not serve are ineligible for a range of state benefits that are dependent on military service (or eligible only for a reduced amount). Religious Jews are offered an exemption from conscription for Yeshiva study, but in their case a lack of military service does not diminish their eligibility for benefits.¹¹
- The Jewish Land Agency, a nongovernmental agency that operated under the supervision of the state, gave priority to Jews in the allocation of land as part of an effort to “Judaize” the territory of Israel. That project received ostensibly constitutional recognition in 2018, when the Knesset enacted The Nation-State Basic Law. This Basic Law proclaims that Jewish settlement is a “national value” that should be encouraged and supported.”¹²
- The Nation-State Law also asserts that the exercise of the right to national self-determination in the state of Israel is “unique to the Jewish people.”

These policies and positions are hard to make sense of on the basis of the descriptive conception. Someone who thought of Israel as a Jewish state only in the sense that it contains a Jewish majority would not have a reason to favor the Jewish majority in the various ways that these policies and positions do. Someone who adopts a normative conception of Israel as a Jewish state, by contrast, might well have such a reason. Adopting the normative conception means committing oneself to the proposition that the state has special moral obligations to the Jewish people. The belief in such special obligations would explain why someone would regard the policies and positions in question as reasonable despite the fact that they recognize and/or favor Jews over non-Jews in fairly fundamental respects.

10 Yoav Peled & Doron Navot, *Ethnic Democracy Revisited: On the State of Democracy in the Jewish State*, 20 *ISR. STUD. F.* 3, 9–12 (2005).

11 *Id.* at 16. See also Michael Shalev & Amit Lazarus, *Horizontal Inequality in Israel's Welfare State: Do Arab Citizens Receive Fewer Transfer Payments?*, in *SOCIOECONOMIC INEQUALITY IN ISRAEL: A THEORETICAL AND EMPIRICAL ANALYSIS* 225, 234–35 (Nabil Khattab, Sami Miaari & Haya Stier eds., 2016).

12 Basic Law: Israel - The Nation State of the Jewish People (Isr.) (unofficial translation), <https://knesset.gov.il/laws/special/eng/BasicLawNationState.pdf>.

While I have introduced the distinction between descriptive and normative conceptions in the context of the State of Israel, it is worth noting that the distinction has wider application. Many states adopt policies favoring their own religious or ethnic majority. For instance, a number of European states have national flags bearing a cross, and some states have immigration policies that favor the majority's ethnic or linguistic kinfolk. If one took the idea of a Danish state to mean that it would be appropriate to privilege traditional Danish religious symbols on the flag, then one would be operating with a normative conception of the Danish state. By contrast, if one simply took the idea of Denmark as the Danish state to denote that a majority of citizens are ethnically or linguistically Danish, then one is working with the descriptive conception. Although this is an essay about the idea of Israel as a Jewish state, the distinction between the descriptive and the normative conceptions is a quite general one, as are the normative arguments adduced later in the Article for preferring the former to the latter.

II. TWO CONCEPTIONS OF JEWISH SELF DETERMINATION

With a little bit of conceptual work, we can make a similar distinction between two interpretations of the Zionist idea that the Jewish people achieve self-determination in the state of Israel.

In general, a people is self-determining when it is free to choose its own government on the basis of its own values and priorities.¹³ This general concept can be applied to both "internal" and "external" forms of self-determination.¹⁴ Internal self-determination is realized when appropriate institutions and procedures are in place within a state that allow a people to shape and direct its own affairs by choosing its own government. The right to internal self-determination is sometimes identified with a right to democracy, but this connection is not essential. There might conceivably be models of representation and consultation that fall short of democracy (e.g., by failing to establish political equality), but that count as instances of the people choosing

13 For important discussions of self-determination, see CHARLES BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1975); Michael Walzer, *The Moral Standing of States: A Reply to Four Critics*, 9 PHIL. & PUB. AFF. 209 (1980); Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439 (1990); ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* (1995); DAVID MILLER, *ON NATIONALITY* (1995); DAVID MILLER, *IS SELF-DETERMINATION A DANGEROUS ILLUSION?* (2020); ANNA STILZ, *TERRITORIAL SOVEREIGNTY: A PHILOSOPHICAL EXPLORATION* (2019).

14 CASSESE, *supra* note 13.

its own government on the basis of its own values and priorities.¹⁵ External self-determination concerns the treatment by external actors (other states, international institutions) of a people's efforts to choose its own government on the basis of its own values and priorities. Most obviously, external self-determination requires noninterference by others. In addition, it is sometimes said to require appropriate recognition by others.¹⁶ If a particular state is to be the vehicle for some people's self-determination, it must be acknowledged to be a state by the international community and must be accorded certain privileges and prerogatives that go with statehood.

These notions of self-determination seem straightforward enough when the self-determining people is defined territorially. For instance, we might, as a first approximation, define the Israeli people as consisting of all the Israeli citizens who live on the territory of the State of Israel. Of course there are well-known disagreements about the boundaries of that territory, but the concept of self-determination is not the focus of those disputes. The important point is that once the relevant territory has been identified, the identity of the self-determining people follows immediately. Having identified Israel and the Israeli people as the appropriate units of analysis, one could then proceed to ask whether the internal and external conditions of self-determination are satisfied or not.

Zionism, however, does not operate with a territorial conception of the people whose self-determination is to be enabled. There are several distinct strands in Zionism, but what they all share in common is the claim that the Jewish people should realize self-determination on some or all of the territory of the Land of Israel. The Jewish people could itself be defined in several different ways. It could, for instance, mean all Jews around the world, or it could refer more specifically to Israeli Jews. Either way, the Jewish people is not identical to the group defined as citizens of Israel.

Zionism's claims of self-determination thus give rise to the same puzzle that we found in connection with the idea of Israel as a Jewish state. How can Israel be considered the locus of Jewish self-determination given the presence of non-Jewish (e.g., Arab) minorities within the State of Israel? As with the previous problem, there are two main kinds of answers that one could

15 On this possibility, see Walzer, *supra* note 13; JOHN RAWLS, *THE LAW OF PEOPLES* (1999); Joshua Cohen, *Is There a Human Right to Democracy?*, in *THE EGALITARIAN CONSCIENCE: ESSAYS IN HONOUR OF G.A. COHEN* (Christine Synovitch ed., 2006); Charles Beitz, *The Moral Standing of States Revisited*, 23 *ETHICS & INT'L AFF.* 325 (2009).

16 ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW*, ch. 6 (2004).

give to this question, corresponding to two different conceptions of Jewish self-determination. As before, I call these the “descriptive” and “normative” conceptions.

On the descriptive conception, the Jewish people is self-determining within the State of Israel because Jews constitute a majority, or substantial majority, of the citizens of Israel who together choose their government through appropriate institutions and procedures. More generally, a group X is self-determining in some state or sub-state structure despite the presence of non-Xs within that structure when X is in the majority or substantial majority of the group who together choose their government through democratic (or perhaps, as we saw above, quasi-democratic) procedures.

It is this descriptive conception that commentators have in mind when they propose internal autonomy arrangements as a means of extending self-determination to national minorities. For example, the Québécois enjoy a degree of self-determination through the institutions of the Province of Quebec, even if not all citizens of Quebec are considered Québécois because the Québécois are a substantial majority of the population.¹⁷

One worry about the descriptive conception is that it seems to license some odd and disturbing judgments about self-determination. Would we say that Whites enjoy self-determination in Great Britain because they are in the substantial majority? But perhaps this implication seems disturbing because of a conflation of the descriptive with the normative notion of self-determination (to be introduced shortly). We are suspicious of the idea of white self-determination because it smacks of white privilege—the notion that the state does or should show special concern for its white majority. In other contexts, the idea of racial self-determination might not seem so problematic. For instance, imagine that the boundaries of American states had been drawn after the Civil War so that one or more states had a Black majority. It does not seem objectionable to think that these states could be considered loci of Black self-determination in virtue of the Black majorities in each. In any case, while I will not pursue the point further here, it is open to the proponent of the descriptive conception to defend certain restrictions on which sorts of groups are to be considered eligible for self-determination. Maybe a racial group like Whites in Britain are not the right kind of group for self-determination.

Another challenge for the descriptive conception arises because of possible differences within the Jewish people about who should govern them and how. This is the problem of the outvoted minority: how can those Jews who are outvoted by other Jews about government or policy be considered part of a

17 WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 27–28 (1995).

self-determining collective? One reply would be that substantive differences of these kind do not matter for the concept of self-determination, although they may raise questions about the *value* of self-determination for the outvoted minorities in question. Outvoted minorities might be better off in a different configuration of decision-making where their people is not in the majority. A different reply would be to insist that a group is self-determining only when there is some agreement—perhaps at a pretty fundamental level—about the values and principles that should govern it. But this is to shift to a distinct conception of self-determination, the “normative” conception.

On the normative conception of self-determination, the Jewish people is self-determining only if the decisions that apply to it are based on values and priorities that are shared by members of the Jewish people. For group X to be self-determining, in other words, the decisions concerning X contribute to the realization of a common good among members of X. As noted previously, one could imagine different variants of such a view depending on whether the Jewish people referred specifically to Israeli Jews, or whether it encompassed worldwide Jewry.

One final complication is that a conception of self-determination need not choose between the descriptive and normative approaches. It is possible to hold that self-determination requires both descriptive and normative elements. On this view, the Jewish people is self-determining in the State of Israel if, and only if,

- Jews are in the majority in the decision-making institutions and procedures that decide government and policy in Israel

and

- the decisions that are realized through these institutions and procedures help to realize a common good for members of the Jewish people.

In sum, the descriptive/normative distinction leads to several different interpretations of the idea of Jewish self-determination. The descriptive conception implies that Jews are self-determining in Israel so long as they make up a clear majority of the citizens of Israel, and Israel governs itself (quasi-)democratically. The normative conception requires that decisions that apply to Israeli Jews reflect the values and priorities—the common good—of Israeli Jews.

As the labels are intended to suggest, these conceptions of Jewish self-determination in Israel line up more or less exactly with the two different notions of Israel as a Jewish state explored previously. The descriptive conception, in addition to requiring that Israel be a democracy or quasi-democracy, is demographic in character: the Jewish people’s self-determination in Israel

hinges on whether Jews are a clear majority in Israel. The second, normative conception, by contrast, has more substantive implications. For Israel to be the site of Jewish self-determination, on this view, Israeli democracy has to be oriented to the common good of the Jewish people.

III. THE DIFFERENT CONCEPTIONS AS A BASIS FOR A JEWISH STATE

So we have two pairs of conceptions. One sees Israel as a Jewish state because it is majority Jewish, and regards it as the locus of Jewish self-determination because it is democratic and demographically mostly Jewish. The second interprets the idea of Israel as a Jewish state to imply a special normative commitment to advancing the good of the Jewish people; and it understands Jewish self-determination in Israel to entail Israel's dedication to advancing the common good of Israeli Jews.

Would it be morally defensible to consider Israel a Jewish state, or as the locus of Jewish self-determination, in either or both of these senses? These are obviously very large questions, so to make them a little more tractable let me ask a somewhat narrower one. Would it be defensible for someone committed to a broadly liberal and democratic view of justice to consider Israel a Jewish state, or the locus of Jewish self-determination, in either or both of these senses? I shall begin with the descriptive conception and argue, with some qualifications, that it is reconcilable with liberal justice. I'll then turn to the normative conception and argue that it is associated with some troubling forms of injustice and thus vulnerable to serious objection.

A. The Descriptive Conception

In assessing the descriptive conception, it is helpful to distinguish between two sub-questions:

(a) If a state is already established with a particular set of boundaries, and that state is democratic and recognizes the equal rights and status of all citizens, would the fact that a clear majority of the state's citizens are members of a particular ethno-religious group diminish in any way its claim to be just?

(b) Would it ever be compatible with justice to deliberately draw (establish, adjust) the boundaries of a state so that members of one particular ethno-religious group are in the clear majority, assuming that the state is expected to be democratic and recognize the equal rights and status of all citizens?

The answer to question (a) is, I think, pretty clearly *no*. To take an extreme example, imagine a state that governs perfectly in accordance with liberal

democratic principles. Surely, the mere fact that a majority of citizens in such a state happen to form a distinct ethno-religious group does not weaken the state's claim to justice. Of course, confidence in this conclusion might diminish as one moves away from the imaginary ideal case. A remedy for incomplete justice in some cases might be to blur the difference between the ethno-national majority and minority by seeking to foster instead a civic identity based on common political membership. Imagine, for instance, a prosperous liberal democracy that has an unacceptably high rate of illiteracy that is especially concentrated in an ethnic minority population. One long-term, indirect strategy for tackling this problem would be to foster a shared civic national identity such that members of the majority perceive the problem as afflicting "some of us" rather than "some of them." I am sympathetic with this view, and return to it in the Conclusion below. I do think, however, that if a state managed to govern itself perfectly, or if its imperfections had nothing to do with ethnic differences, then the mere presence of an ethno-national majority does not detract from the state's claim to justice. If all that is meant in characterizing Israel as a Jewish state is to draw attention to the presence of a Jewish majority, then the characterization seems innocent enough.

Question (b) is more difficult and contentious, but again I think it is possible to defend a particular answer, with certain important qualifications. It certainly does not seem right to say that every ethno-national group has a right to a state in which it forms a majority. As Ernest Gellner observed in his classic book on nationalism, such a right would imply an extraordinary proliferation of states in the world.¹⁸ Self-determination becomes a phrase "loaded with dynamite," to quote Robert Lansing (who was Wilson's Secretary of State), when it is thought to entail such a consequential right.¹⁹ In the case of Jews in pre-1948 Palestine, there might in principle have been other ways of accommodating the desire for autonomy and self-government in a more limited way besides the creation of the State of Israel. For instance, in Chapter XXI of its report, the Peel Commission briefly considered "cantonisation" as an alternative solution to partition.

But question (b) is asking something different. It is asking whether it is *ever* permissible, as a matter of justice, to deliberately draw or redraw the boundaries of a state in order to leave a particular ethno-national group in the majority. While this question is germane to debates about secession, it is plainly relevant to cases where the *status quo ex ante* can no longer be continued, such as the breakup of an empire. The creation of modern Israel was a complicated, multi-step instance of the latter kind of scenario. In cases

18 ERNEST GELLNER, *NATIONS AND NATIONALISM* 2 (1983).

19 ROBERT LANSING, *THE PEACE NEGOTIATIONS*, ch. VII (2012).

of this kind, there are, I think, some situations in which it is permissible to deliberately draw boundaries to put a particular group in the majority:

(i) *Prospect of oppression*. Suppose that there are well-grounded fears that a particular group would be oppressed if boundaries are drawn in such a way as to leave it in the minority. This looks like a good reason to deliberately draw boundaries to put the group in the majority, at least insofar as there are not equally good reasons to think that, as a majority, they would turn around and oppress the minority.

(ii) *Prospect of ethnic instability*. Suppose there are good reasons to think that a state in which a particular group is in the minority, or in which the group is roughly the same size as an ethno-national rival, would face a future of intractable, disabling ethnic conflict. This looks like a good reason to deliberately draw boundaries to put the group in a clear majority, at least insofar as there are reasons to expect greater stability in a state constructed along these lines.

(iii) *Opportunity for equal recognition*. Suppose a realistic opportunity presents itself to create a confederal arrangement in which both the ethno-national groups in a region enjoy some significant form of recognition and autonomy.²⁰ If this involves drawing borders so a particular ethno-national group is in the majority in one of the participating states, then there is good reason to do so.

It is easy to describe these scenarios in the abstract, but much harder to apply them to the creation of Israel. Israel was deliberately created as a state with a Jewish majority. It does seem that Jews in Palestine in the aftermath of the Second World War had reasonable fears of persecution and oppression. Jews had faced decades of pogroms in Europe and then the extreme persecution of the Nazis in the 1930s and the death camps of the 1940s. Throughout this period, much of the rest of the world had treated their calls for help with hostility and indifference. And Jews could not be expected to ignore eliminativist rhetoric on the part of some (though by no means all) Arab leaders in the region. Given the level of conflict and instability throughout the period of the British mandate, it was prudent to expect that a binational state would face, at best, an uncertain and unstable future. The Peel Commission concluded that cantonization (one version of a binational state) “presents most, if not all, of the difficulties presented by Partition without Partition’s one supreme advantage--the possibilities it offers of eventual peace.”²¹

20 ALAN PATTEN, *EQUAL RECOGNITION: THE MORAL FOUNDATIONS OF MINORITY RIGHTS* 232–69 (2014).

21 PEEL COMMISSION REPORT, *supra* note 5, at ch. XXI.

The much harder question to assess is what could have been expected in 1947 concerning an Israeli Jewish majority's treatment of its Arab minority. We know that several wars were fought after Israel's Declaration of Independence, and that the 1948 conflict resulted in the *Naqba*—the expulsion and flight of hundreds of thousands of Palestinian Arabs from the territory of the new state. It is hard to know whether these facts, or facts about Israel's subsequent treatment of its non-Jewish minority, undermine the justification of the original decision to create a state with a Jewish majority. To assess, one would have to examine more closely how dire the emergency was that faced the Jews—what they could reasonably fear—and whether and to what extent the Arabs shared some responsibility for the conflict. These are some of the issues that are relevant to assessing whether it was legitimate in 1948 to aspire to create a Jewish state, and to establish Jewish self-determination, if these acts are assumed to imply the deliberate establishing of a state with a Jewish majority.

In sum, the descriptive conception of Israel as a Jewish state and of Jewish self-determination in Israel is not fundamentally objectionable from a liberal-democratic point of view. The mere fact that Israel has an ethno-religious national majority does not make it unjust, although there may be reasons of justice to try to weaken the ethno-religious divisions in the country by building up a shared sense of Israeli identity. Considering Israel a Jewish state, or the locus of Jewish self-determination, in this minimal, descriptive sense seems unobjectionable. It is also plausible to think that it was justifiable in 1948 to deliberately create a state that had a Jewish majority, though I acknowledge that there are some difficult historical and counterfactual questions that would have to be tackled in defending this claim convincingly. It may also be unobjectionable, then, to consider Israel a Jewish state, and the locus of Jewish self-determination, because it was deliberately created with a Jewish majority.

B. The Normative Conception

On the normative conception, Israel, in virtue of being a Jewish state and the locus of the Jewish people's self-determination, has certain special responsibilities to advance the common good of the Jewish people. Is it defensible to consider Israel as a Jewish state, or as the locus of Jewish self-determination, in the sense that it has such responsibilities? There would be no problem, in my view, if the common good of the Jewish people were assumed to be identical with the common good of all Israeli citizens. States have some responsibilities to non-citizens, but it is fairly uncontroversial that they have at least some special responsibilities to their own citizens. But suppose that the common good of the Jewish people and the Israeli common good diverge

in certain respects. Would it be objectionable to say that Israel has special responsibilities to promote the common good of its Jewish majority?

I believe that assigning a state special responsibilities to promote the good of its ethno-religious majority is objectionable because it leaves important interests of minorities inadequately protected. I shall call this the *inadequate protection* objection. The objection can point to a number of different interests that would be left vulnerable by a state that adopted the normative conception. Three such interests stand out in particular: (i) the security of basic rights and entitlements; (ii) equal standing in the political community; and (iii) fair opportunity to realize one's ends and attachments. I develop the inadequate protection objection by considering how the normative conception poses a threat to each of these interests. Although the Article's focus remains on the case of Israel, I develop the objection in a fairly general way and regard it as having implications beyond the Israeli case. If the objection is sound, then any case of a state that acts as if it has special responsibilities to its majority ethno-national or ethno-religious group is objectionable from the standpoint of liberal-democratic justice.

1. Basic Rights and Entitlements

Even the most minimal liberal-democratic conception of justice is bound to recognize some basic set of rights and entitlements that all citizens should be guaranteed. While there is no single definitive list of those rights and entitlements, most liberals would insist that the following are important minimal requirements:

- the protection of a set of basic liberties (e.g., as specified by Rawls) including freedom of the person, liberty of conscience and thought, the freedoms of speech and assembly, the equal political liberties, and the various rights and guarantees associated with the rule of law;²²
- freedom from discrimination in the economy and civil society;
- a social minimum consisting of an income floor and/or various goods and services (e.g., schools, healthcare) provided in kind;
- programs and policies that provide all citizens with at least some minimal form of equality of opportunity.

A state that sets out to promote the good of its ethno-religious majority poses both a direct and an indirect threat to basic rights and entitlements such as these.

The normative conception poses a direct threat when the measures that the state adopts to promote the good of the majority themselves violate or conflict with one or more of the basic rights and entitlements. Imagine that

22 JOHN RAWLS, *A THEORY OF JUSTICE* 53 (1999).

state officials come to believe that the good of the majority is endangered by otherwise reasonable actions or demands of the minority, or by the growing economic prosperity of the minority. To promote the good of the majority, the officials might seek to limit the political rights, or the freedoms of speech and assembly, or the access to economic opportunities and benefits, of the minority. These actions, I take it, would be objectionable *because* they violate the basic rights and entitlements of the minority. Arguably, at least some of the earlier examples of the normative conception at work in Israeli law and policy could be analyzed in this way. For instance, the restrictions on the platforms of Arab-Israeli parties (in the 1960s to 1980s) were violations of equal political liberty. And the unequal access to land given to Jewish and non-Jewish citizens in Israel raised questions about whether equality of opportunity was being adequately extended to non-Jews. In these instances, the policies adopted by the Israeli government to promote the good of the Jewish majority were objectionable because they violated standard requirements of a liberal-democratic conception of justice.

In other cases, the normative conception poses an indirect threat to basic rights and entitlements. While the measures taken to promote the good of the majority do not themselves conflict with basic rights and entitlements, they do render those rights and entitlements less secure. Consider the example of the Israeli flag. This is a purely symbolic matter, which does not inherently touch on any of the basic rights or entitlements that are standardly associated with liberal democratic justice. But symbolism can have consequences. By privileging the Star of David, the flag marks out one group—Israeli Jews—as being at the core, as being “insiders,” while designating others as peripheral, perhaps even regrettable, outsiders. And once a group is marked as outsiders in this way it becomes less likely that the basic rights and entitlements that its members can claim under a standard conception of liberal democracy will in fact be protected. Even if there are formal commitments in the law to the equal treatment of insiders and outsiders, once the distinction is made by public policies and symbols, the political system (officials, parties, voters) may interpret and apply it in its own way, perhaps with pernicious consequences for the basic rights and entitlements of those who are stamped as outsiders.²³

23 Eisgruber and Sager, *supra* note 7, seem to agree that “homeland” states, which are partial in certain ways to the majority ethnoreligious or national group, “have a tendency to neglect or discriminate actively against minorities” (54). But they believe that such a tendency is neither inherent nor “inevitable.” I agree that the tendency is contingent but this does not diminish its relevance to thinking about the homeland conception of states from the perspective of justice.

2. Equal Standing

Public policies and symbols that favor the good of the majority communicate a message of exclusion and subordination to minorities. They announce that, from the state's point of view, minorities are not full members of the political community and that, in at least some ways, their lives and interests count for less than those of members of the majority population. As we have just seen, one problem with such a message is that it might lead, through the political system, to violations of basic rights and entitlements. But even apart from this contingent, instrumental effect, such a message seems objectionable in itself. The best way to understand this, I think, is to say that in addition to the specific rights and entitlements that every individual is owed as a matter of basic liberal conception of justice, individuals also have a more general right to equal standing in their political community. This is a right to be recognized and treated as a full and equal member of the community. To stick with the earlier example, a flag that privileges the symbol of the dominant majority is objectionable in part because it threatens the equal standing of minorities. There may be mitigating factors. The flag might be centuries old and it might over the course of that time come to have been embraced by minorities in the context of shared national struggles and triumphs. But in the absence of such mitigating factors it is hard to interpret the prominent public display of a symbol associated with the majority as anything other than a statement of ownership of the state by the majority, a statement that violates the equal standing of minorities.

3. Fair Opportunity

When the state acts as if it has special responsibilities to its majority ethno-religious group, it offers members of that group legal, material, and symbolic resources that it does not offer to members of the minority. Depending on the nature of these resources, majority-group members find it easier to realize their ends, whatever they might be. They might find it easier to obtain employment, start a business, rent an apartment, travel to visit relatives, and so on. But the state's special concern for the good of the majority may also involve intervening on behalf of some kinds of ends over others. Some ends that people have are associated with their community membership. For instance, membership in a religious community might mean eating certain foods, worshipping at particular times and places, traveling to certain locations, and associating with certain people. And membership in a linguistic community will often lead people to value certain associations, to engage in particular habits of reading, listening, and viewing, and to value the use, the survival and the flourishing of the language itself. The state's intervention thus makes it easier to pursue and fulfill some ends more than others. For instance, if a state declares an

official religion or an official language, it assists some particular ends and impedes others. Rather than maintain a posture of neutrality, in which the state establishes a fair framework and leaves it to individuals to decide which ends are worth pursuing, the state intervenes on behalf of certain ends and against others. It thereby denies individuals who have the disfavored ends a fair opportunity to realize their ends.²⁴

* * *

The *inadequate protection* objection draws on liberal assumptions about what kinds of interests people have, so one possible response might be to reject the liberal framework. Perhaps the normative conception is based on a nonliberal conception of justice? An influential 1992 article by Yoav Peled suggests exactly that.²⁵ He distinguishes between a liberal conception of citizenship, which assigns equal rights to all citizens, and a republican one, which is centered on a conception of the common good and offers an enhanced set of duties and privileges to citizens who devote themselves to the realization of this shared moral purpose. According to Peled, writing in the early 1990s, Israeli citizenship is a hybrid construction, differentiated along ethnic lines, in which Jews enjoy full republican citizenship while Arab-Israelis are offered a package of liberal rights. On this picture, the Zionist embrace of the normative conception is predicated on a partial rejection of liberalism in favor of the republican outlook.

While I have not directly addressed the republican conception, the *inadequate protection* objection articulates some of the reasons a liberal might have for remaining skeptical of it. Such a conception renders less secure the basic rights and entitlements of Arab-Israelis. It threatens their equal standing as citizens. And it denies them a fair opportunity to pursue and fulfill those ends that they have which are connected to their community membership.

24 On the ideas of neutrality and fair opportunity, see PATTEN, *supra* note 20, at ch. 4. The argument from fair opportunity is ignored by Eisgruber and Sager, *supra* note 7, and helps to account for our divergent conclusions. They contend that the interest in the “comforts of recognition” help to justify limited forms of state partiality to the majority homeland group. But minorities also have an interest in recognition and a fair way for a state to respond to the competing interests would be through an evenhanded stance that favors neither.

25 Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State*, 86 AM. POL. SCI. REV. 432 (1992).

IV. REJOINDERS

In response to the critique of the normative conception that has just been sketched, one can imagine a number of rejoinders. First, it might be argued that there clearly are situations where a state is justified in favoring its majority cultural group. For instance, a state may establish the majority language as the national language and implement a calendar that reflects the majority's traditions. Thus, the preceding argument is too strong if it implies that it is always wrong for a state to promote the common good of its majority ethno-religious group. Second, it might be argued that Israel's dedication to the good of its Jewish majority is simply a continuation of the logic of its founding. Just as concerns about oppression and instability made it justifiable to deliberately create a state with a Jewish majority, those same concerns make it justifiable for Israel to take measures aimed at ensuring that Jews remain in the majority in Israel. Third, it might be argued that there would be something oppressive about insisting to Israeli Jews that they should avoid treating Israeli political institutions as vehicles for promoting the common good of the Jewish majority. This is tantamount to telling Israeli Jews that a core part of their identity should be confined to the private sphere. And, fourth, it might seem that the above argument overlooks an alternative approach to protecting minority interests, which consists in extending to the minority some of the same rights of self-determination that are enjoyed by the majority.

I shall examine each of these arguments more closely. While they each introduce important nuances and complexities into the issues we have been considering, I maintain that none of them undermines my core proposition. It remains true that a state should not act as if it has special obligations to its ethno-religious majority, and thus any interpretation of the idea of Israel as a Jewish state, or of Jewish self-determination in the State of Israel, that relies on positing such special obligations should be rejected.

A. The Cultural Format of the State

According to the first rejoinder, then, it is obviously defensible for a state to make certain decisions about the cultural format of its own institutions. It can establish a single official language: the language in which public services are offered and public business is conducted. And it can decide about certain other social conventions, e.g., by designating a calendar, a system of weights and measures, and so on, to be adopted and promoted by public institutions. In Israel, Hebrew is the official language of the state, and the state officially recognizes the Hebrew calendar (alongside the Gregorian calendar). Since it is permissible for a state to take these actions, it must be permissible for a

state to act as if it has a special obligation to promote the good of its ethno-religious majority.

I reject both the premise and the inference of this first rejoinder. First, consider the premise. It is not generally true that a state can simply designate the majority language or cultural format as the language or format of all public institutions. Versions of the same problems that were considered in the previous Part apply to these formatting decisions. The requirement that all official business be conducted in the majority language might conflict with basic rights and entitlements (e.g., if the accused are tried in a language they cannot understand) or might encourage the political system to treat linguistic minorities as second-class citizens, thereby endangering their basic rights and entitlements. A policy of majority-language monolingualism also threatens the equal standing of minority-speakers and aligns the state with the language-related ends and aspirations of one community in the society and against those of the other, thus departing from a stance of neutrality. Instead, in my view, the fundamental principle that should guide the state when it makes decisions about language or other cultural formatting matters is equal recognition. Whatever resources (legal, material, or symbolic) the state gives to assist the majority's ends and aspirations, it should give an equivalent share (on a per capita basis) to assist the ends and aspirations of minorities.²⁶ Thus a multilingual state like Israel, where the Jewish majority and Arab minority alike care about the use and preservation of their languages, should (as it to some extent does do) offer public services, and conduct public business, in both Hebrew and Arabic. It would normally be wrong, in such a context, for the majority to declare its own language as the sole language of public institutions.

The inference from the premise is also mistaken. Equal recognition is a weighty *pro tanto* demand rather than an absolute requirement, as are the values of neutrality and fair opportunity that underlie it. There may be situations where unequal recognition is impossible to avoid or where avoiding it would be unacceptably costly in terms of other values. For example, there are only so many languages that can be used by public institutions before an unreasonably high proportion of public time and resources are devoted to interpretation, translation, parallel services, and the like. And public multilingualism may be an obstacle to democratic deliberation and the formation of a common civic bond. In some situations, then, it may be justifiable all things considered to privilege a small number of public languages, and it is even possible that in some contexts it is justifiable to privilege only one. But notice that this possibility does not support an inference to the conclusion that a state may

26 PATTEN, *supra* note 20, at ch. 5.

act as if it has special obligations to promote the good of its ethno-cultural majority. The reason for limiting the number of public languages is not that some speakers have a special or privileged claim for recognition. Rather, it is that it would be costly for *everyone* if public institutions were to function in too many different languages. There is no loss of equal standing when a reasonable judgment of this kind is made, though there is a setback to the defeated *pro tanto* values of neutrality and fair opportunity.

A related and more general point is that nothing in the argument above implies that Israel could never make laws or policies that especially address Jewish needs or concerns. In any population, some people will have more pressing needs and claims than others, and when they do it is consistent with the liberal principles that I have invoked to give them more political attention and resources than others receive. When Jewish refugees arrived in Israel from places where they faced persecution, they had special needs that merited high-priority attention. And the problem of anti-Semitism has not gone away, so it is perfectly reasonable for the Israeli state to take special measures to protect its Jewish citizens (and to support Jews abroad) from threats that are associated with it. But these circumstantial arguments do not rest on, or justify, a general, standing commitment to privileging the common good of the Jewish majority. Indeed, if responsiveness to special needs and claims is the guiding principle, then it might be argued that Arab-Israelis—and for that matter non-Israeli Palestinians over whom the Israeli state has power—have especially pressing claims.

B. Preserving the Majority?

A second rejoinder to my central argument seizes upon the earlier suggestion that it may have been justifiable—in light of threats of oppression and instability—for the founders of Israel to deliberately create a state with a Jewish majority. Have these same threats not persisted in the years since Israel's founding? If they have, then would the same logic not imply that the State of Israel was justified in making laws and policies designed to *preserve* a Jewish majority? While this view presents itself as interested only in the fact whether a Jewish majority continues to exist, the demographic pressures that Jews in Israel perceive themselves to be facing mean that the argument could be used to justify a fairly wide range of measures designed to protect the Jewish people in Israel.

I see several difficulties with this rejoinder. One is that there is an important difference between the normative logic of founding and the normative principles that became salient once the State of Israel had been founded. Think again about the post-WWII moment. The question of what states there would be

in Palestine and what their borders would be could not be avoided. The British Mandate was barely functioning and certainly could not be continued indefinitely. And there was obviously no return to the Ottoman Empire. There were only a small number of options for drawing the regional map and none of them came without risks, some of which had the potential to eventuate quite immediately and catastrophically. In *this* context, I have suggested, it was permissible for decision-makers to deliberately create a state with a Jewish majority. But the context of post-independence Israel was and is different. After independence, policymakers had, over time, an alternative to aiming at the preservation of the Jewish majority, which was to adopt a stance of neutrality with respect to the demographic balance within Israeli society. The moral strictures that govern state-making are different than the strictures that face a state once it is up and running. To be sure, Israel and its Jewish majority still faced serious dangers in the years after independence. At the same time, once an Israeli state was created, its successive governments had the power to shape and influence the outcomes and risks that were associated with various demographic configurations. Risk factors that could reasonably have been treated as exogenous by decision-makers in 1947 became increasingly endogenous to the Israeli political system in the decades after the establishment of the State of Israel.

Whether Israel can legitimately aim to preserve its Jewish majority is obviously related to a difficult set of questions concerning immigration, the Law of Return, and the right to return claimed by Palestinian refugees who live outside of Israel. While I do not attempt to resolve these questions here, it is worth noting that neutrality, as I understand it, with respect to the demographic balance in Israel is consistent with thinking that a majority Jewish state could adopt a policy in which a majority of immigrants are Jewish. Neutrality need not always mean taking a “hands-off” approach; it can also be realized through evenhandedness, or what I call “equal recognition.”²⁷ In a context where different ethno-religious groups each want to preserve their own communities, and reconnect with their kinsfolk, a fair and neutral approach would be to establish quotas pro-rated according to the existing numbers in each group. Such an approach would not justify a Jewish-only immigration policy, but it would justify a majority-Jewish one. Obviously, a reasonable immigration policy would need to take other factors into consideration as well, including the urgent claims of Jews around the world who face persecution, and the claims of Palestinian refugees. The point is that, as with policies concerning language and the calendar, there are possible justifications for pursuing a policy tilted towards the preferences of the Jewish majority that

27 PATTEN, *supra* note 20, at ch. 4.

are not predicated on the idea that Israel has a fundamental duty to promote the Jewish common good or preserve a Jewish majority.

The underlying objection to policies designed to preserve a Jewish majority is again the *inadequate protection* objection. Some measures adopted in pursuit of such an end conflict with basic rights and entitlements of non-Jewish Israelis. Even where there is no such conflict, those measures communicate a not-so-subtle message to non-Jews that they are second-class citizens. This message may encourage the political system to adopt measures that conflict with basic rights and entitlements, and it threatens the equal standing of non-Jewish citizens. It effectively treats their mere presence—not to mention their desires to have families, to receive kinsfolk as immigrants, or simply to participate fully in Israeli society—as unfortunate and regrettable facts. Finally, by aligning the state with one community’s continued success, measures of this kind undermine the state’s neutrality, thus denying minorities a fair opportunity to see their communities survive and prosper.

C. Identity and Oppression

In a recent book, Chaim Gans argues that the post-Zionist rejection of Zionism is oppressive. It makes Jews “divest themselves of their national identity as Jews,” a demand that he calls “exceptionally demanding as well as insulting.”²⁸ I do not consider the position defended in the present article to be an inherently post- or anti-Zionist one, as my argument allows that a minimal, descriptive version of Zionism is defensible, and is open to the possibility that the deliberate creation of Israel with a Jewish majority was justifiable. At the same time, it might be thought that a version of Gans’s objection applies against my claim that only the minimal form of Zionism can be justified. For the sake of argument, suppose it is stipulated that the Jewish national identity is constituted in part by the idea that the Jewish people should treat Israel as a vehicle for realizing its own common good. On *that* assumption, my claim is that the Jewish national identity should not be given space to express itself. It might seem that this claim would mean rejecting or denying Jewish identity, something Gans thinks would be oppressive: “In effect, it requires that they discard or replace fundamental aspects of their identity that have a profound effect on their lives, personalities, values, and at times even their perception of reality... Moreover, the demands in question are in effect demands to change one’s identity because it is false, or supposedly perverted.”²⁹ He adds to this that the expectation that Jews in Israel give up their national identity would

28 GANS, *supra* note 6, at 8–9. See also *id.* at 117–18.

29 *Id.* at 9.

parallel the obviously illiberal demand that a gay man give up his sexual orientation and become straight.³⁰

But this objection is unconvincing.³¹ Consider to begin with the analogy with sexual orientation, since it nicely highlights what is distinctive about national identity. Of course, a liberal-democratic conception of justice would accommodate people with a gay identity. Such an identity is primarily exercised in non-political contexts, and insofar as it is legitimately exercised politically it is to advocate for a more equal and inclusive society. By contrast, a national identity is inescapably political. It specifies who the “we” is when some group of people exercise power through the institutions of the state over everyone living on a particular territory. People do not have a legitimate interest in the sexual orientation of their neighbors, nor do they have reasonable complaints when their neighbors politicize a particular identity in the name of greater equality and inclusion. But they do have a legitimate interest in the character of the national identity of the majority that controls the state. As I argued earlier, a national identity that privileges the common good of a majority ethno-religious group makes the rights and interests of minorities vulnerable to abuse and neglect. Given that the legitimate interests of excluded minorities are at stake, it does not seem oppressive to reject an interpretation of the national identity that requires privileging the majority. In particular, while it may be fine for individual Jews to possess such an identity, this would not give them a claim that the structure or policies of the state should be designed to accommodate that identity.

Does this imply that the Jewish national identity (insofar as it focuses on the common good of Jews) should be relegated to the private sphere? The relegation of religious identity to a private sphere fits comfortably with Protestant outlooks but much less so with the belief systems of other religions. The beliefs associated with many religions refer directly to matters that are public and political. These beliefs are suppressed when religion is excluded from the public sphere. If this is true for religion, it is even truer for ethno-cultural national identities. By their very nature, these identities are constituted by the desire of an ethno-cultural group to be a political community and to enjoy respect and self-determination as a group. My argument thus seems to ignore the inherently political character of ethno-religious nationalism. But this response misses the point of the liberal position. A liberal-democratic conception of justice need not argue that every religious and ethno-cultural

30 *Id.* at 9–10, 118.

31 My critical comments here and in the next subsection draw on my contribution to a symposium on Gans’s book. See Alan Patten, *Zionism and Post-Zionism*, 20 JERUSALEM REV. LEGAL STUD. (2019).

identity *can* be adequately realized in a just society, nor that justice fits equally comfortably with every conceivable identity. Perhaps some forms of identity are incompatible with realizing a just society, and thus need to be confined to the private realm. The core of the liberal position is that whether an identity has a right to be publicly accommodated depends in part on its implications for other people who would be affected. If an ethno-cultural national identity would predictably jeopardize the legitimate rights and interests of minority citizens, then it has no right to public accommodation in its present form, and should be relegated to the sphere of private beliefs and/or adapted and reformed to suit the conditions of a pluralistic society.

D. Egalitarian Zionism?

A fourth possible rejoinder is also adapted from Gans's recent book. It might be argued that a two-state solution to the Israel-Palestine conflict would undercut the *inadequate protection* objection. In the context of a well-devised two-state solution, each people—the Jews and the Palestinian Arabs—could enjoy self-determination in the Land of Israel/Palestine. There would be no objection to an Israeli state that dedicated itself to promoting the Jewish common good *if* there was also a well-functioning Palestinian state devoted to promoting the Palestinian common good. Gans calls this version of Zionism, which acknowledges and leaves space for the self-determination of Palestinians, “egalitarian Zionism.”

While I am sympathetic with Gans's proposal, I do not think it answers the inadequate protection objection. An important shortcoming of the approach is that, on any feasible proposal for drawing the boundaries of the two states, significant minorities would remain on the “wrong” side of the border. There would be Palestinian villages in the heart of Israel, and Jewish settlements in the heart of the West Bank. These minorities would face the problems of inadequate protection outlined above. Gans recognizes this problem and adds that, within each of the states, there ought to be structures that allow for at least limited forms of autonomy by the minority group.³² In this way, whether a group lives in Israel or in Palestine, and whether it is in the majority or in the minority, there exists for it some institutional forum in which it can realize self-rule. Through a complex structure of this kind, Gans believes that Jewish self-determination in Israel can be reconciled with Palestinian self-determination. The objection that Jewish self-determination in Israel imposes unacceptable costs on non-Jews thus loses its force.

32 GANS, *supra* note 6, at 98–99.

But in the end I believe the proposal faces a dilemma, which arises when one seeks to identify the institutions and procedures through which Jewish self-determination is supposed to take place in Israel. One possibility is that the major state institutions of Israel are regarded as the instruments of Jewish self-determination, while Arab self-rule is achieved through official language status, Muslim courts, local institutions, and autonomy over schools and certain cultural and religious matters. This would be a lopsided form of equality, but arguably the appropriate metric of equality would take into account differences in numbers (and remember that the roles of majority and minority would be reversed in the Palestinian state).³³ But if this is how the proposal is institutionalized then it is hard to see how it avoids the inadequate protection objection. It is true that the Arab minority would now enjoy some limited forms of autonomy. But the fact that the major political institutions of Israel—the legislature, the high court, the civil service, the military, and so on—are regarded as the locus of Jewish self-determination leaves the broader problem unresolved. The interests of minorities would be poorly protected in a system where the major political institutions making decisions that apply to minorities are generally regarded as belonging to the majority ethno-religious group.

The other major possibility which egalitarian Zionists might envision insists that Israel's central institutions should have a binational orientation. They would have a special responsibility to promote both the Jewish and Arab peoples and to facilitate self-determination for each group. Legislators, judges, civil servants, and so on, are to regard members of both groups as being full (if numerically unequal) members of a binational political community. One puzzling feature of this view is that it leaves unclear what the locus is of Jewish self-determination. If not the Knesset, the Supreme Court, and so on, then through what institutions is Jewish self-determination realized? Would there be a sub-state layer of institutions that provides a locus for this self-determination in parallel with the sub-state accommodations offered to Arabs? The more important point for our purposes is that this second version of the egalitarian Zionist view no longer serves as a rejoinder to the inadequate protection objection. On the view under consideration, the major institutions of Israeli government would not set for themselves a special obligation to promote the common good of the Jewish people. Instead, they would aim for the common good of the *Israeli* people.

33 *Id.* at 98.

CONCLUSION: JUSTICE REQUIRES CIVIC NATIONALISM

Suppose that Israel is regarded as a Jewish state, and as the locus of Jewish self-determination. What would follow from accepting these characterizations of the Israeli state? On one view—what I've termed the descriptive conception—not very much. The characterizations tell us that Israel has a substantial Jewish majority and that that majority is the preponderant element in Israeli democracy. On a different view—the normative conception—they tell us something much more consequential. They imply that Israel has special obligations to promote the common good of the Jewish majority, even where that common good diverges from the common good of all Israelis.

Stated so baldly, the descriptive view is unobjectionable, given its lack of normative implications. The claim that it was morally permissible for Israel's founders to deliberately create a state with a Jewish majority is more controversial, but is also, I think, plausible given the circumstances of the 1940s. By contrast, I have argued that the normative conception is deeply problematic. A state animated by such a conception would fail to adequately protect legitimate interests of its minorities, a conclusion that I have argued is robust to a number of rejoinders that might be offered on behalf of the normative conception.

In sum, then, while I have no objection to characterizing Israel as a Jewish state, or as a locus of Jewish self-determination, if these phrases are understood along the lines of the descriptive conception, I do think these characterizations are objectionable when they are construed in terms of the normative conception. The basic reason for this is that I do not think a state should consider itself to have special obligations to promote the good of its ethnocultural majority. Instead, it has a responsibility to promote the common good of all its citizens. This conclusion is relevant to what observers should make of claims about Israel as a Jewish state. But even more than this it is relevant to the crucial question of how Israeli Jews themselves should think about the relationship between their Jewish identity and their state. If my arguments are correct, then Jews should not treat the Israeli state as a vehicle for publicly affirming and expressing their identity as Jews or for pursuing their common good as a Jewish people (insofar as this diverges from the common good of all Israelis). The arguments thus have implications for the kind of identity Jewish Israelis should seek to foster and express through their political system.

The chief implication, as I see it, is that Jewish Israelis ought to look for ways to supplement their Jewish identity with an Israeli civic identity that could be shared among all Israeli citizens. A Jewish political identity, as I understand it, involves a disposition to privilege the Jewish people and its common good when acting politically. It is this disposition, when possessed

by a majority of the population, that fails to adequately protect the minority. A civic Israeli identity, by contrast, would regard every Israeli citizen as a fully equal member. As with any civic identity, an Israeli one would have to be defined in terms of a common commitment to certain political values and to the project of realizing them in a particular setting. This would include a dedication to establishing and maintaining the social prerequisites (including a common language or small number of societal languages) needed to live together as citizens of a single state. But in shaping these prerequisites, a civic political project would be attuned to the interests and the good of all citizens.

The general principle I am relying on here is a very old one in political theory. The ruling group, in a political community, ought to be motivated to realize the common good of the whole community. Since a democracy is a regime in which every citizen is a part of the ruling agent, the motivational commitment to the common good of the whole political community should be fostered among everyone. In modern terms, democratic citizens require a political “identity” focused not on their religious, ethnic, or cultural *part* of the political community but on the community as a whole. This is to say that they need a civic identity. Insofar as Israel aspires to be a just and democratic political community, it ought to foster in its citizens an identity of this kind.

