

# The Ethics of Secession and Postinvasion Iraq

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Since the fall of Saddam Hussein's regime, one of the most important political debates in which Iraqis have engaged is whether or not one or more groups in Iraq may have cause—and the will—to secede. One of the aims of this essay is to outline the central arguments or theories of the ethics of secession and examine whether or under what conditions these normative theories would be satisfied in a postinvasion Iraq. This involves specifying what conditions, or what train of events, generate obligations to permit secession. Postinvasion Iraq is an important case study, because most of the normative theories of secession were developed with more ideal, much tamer cases in mind (for example, advanced liberal-democratic multinational states). The case of Iraq reveals the complexities and range of issues that bear on our moral theories about secession.

I argue that our moral judgments about any particular secession involve comparing the moral goods that are likely to be realized through secession with the goods that may be realized by nonsecessionist political institutions. The two dominant normative theories of secession focus on the secessionist group, which national self-determination theories conceive as a nation holding a right to self-determination, and just-cause theories conceive as having a remedial right to secession as a victim of injustice. The Iraq case suggests that this is a flawed way of thinking about the issue. I argue that secession is more legitimate when fair multinational arrangements are not on offer; and that the fairness requirement involves examining constitutional arrangements from the point of view of all groups.

The argument is divided into four parts. Part one begins by outlining three important social facts that provide the necessary backdrop to any normative evaluation of secession in a post-Saddam Hussein, postinvasion Iraq. These are then

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connected to the two central justifying arguments in the ethics of secession—national self-determination and just-cause theories of secession—that are outlined in sections two and three of the paper. In these two sections, I argue that the case for secession is more compelling when fair multinational arrangements are not on offer. Unfortunately, both national self-determination and just-cause arguments tend to focus on the seceding group as the potential right-holder (either because it constitutes a “nation” or because it has a remedial right as a past victim of injustice). This perspective is too limited, since the issue of “fairness” requires us to consider constitutional arrangements from the point of view of all groups. This leads into part four, which examines the Iraqi Draft Constitution of summer 2005 as a baseline from which to reason about secession. More precisely, this paper considers whether this agreement represents a fair or just constitutional alternative to secession.

## BACKGROUND

Three social facts provide important background information to any normative discussion of secession in a postinvasion Iraq. These are the type and degree of diversity in society, the past history of injustice, and the degree to which the population in the would-be secessionist region is mobilized behind the national independence (or secessionist) project.

Iraq is characterized by deep diversity along different dimensions, particularly, ethnicity, religion, language, and nationality. It is ethnically diverse, comprised respectively of Arabs (75–80 percent of the population), Kurds (15–23 percent), Turkomen (3–10 percent), and Assyrians and Armenians (3–5 percent).<sup>1</sup> It is religiously diverse within the majority Arab population between Sunni (32–37 percent) and Shi’a (60–65 percent), and there are also pockets of other minority religious groups, such as Christians and Yazidis.<sup>2</sup> It is linguistically diverse, with the dominant languages being Arabic (80 percent) and Kurdish (20 percent), although many Kurds are effectively bilingual. It is nationally diverse, for Kurds almost certainly view themselves as a separate national group.

National diversity, in particular, poses a significant threat of secession, which a territorially concentrated national group such as the Kurds would typically initiate.

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<sup>1</sup> See Brendan O’Leary and Khaled Salih, “The Denial, Resurrection, and Affirmation of Kurdistan,” in Brendan O’Leary, John McGarry and Khaled Salih, eds., *The Future of Kurdistan in Iraq* (Philadelphia: University of Pennsylvania Press, 2005), p. 16. See their footnotes for their sources.

<sup>2</sup> *Ibid.*, pp. 16–17.

This fact is clear from the social science literature on the likelihood of secession, which shows that even controlling for differences in institutional arrangements, diversity that takes a territorially concentrated form greatly increases the prospects for secession.<sup>3</sup> To ameliorate the secessionist threat, then, deep social diversity requires that the constitutional arrangements for postinvasion Iraq be fully inclusive and fair to all groups in society.

The second fact relevant to the ethics of secession is the Baathist regime's brutal and indeed genocidal repression, particularly of the Shi'a Arabs of the south and the Kurdish population of the north. According to Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), genocide is defined as acts committed "in order to destroy in whole or in part a national, ethnic, racial, or religious group." It lists the acts as follows: "(a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."<sup>4</sup>

This test certainly was met by Hussein's repressive regime. Estimates by respectable, neutral sources of the number of people killed in the spring of 1991 in the counter-attack against Kurdish and Shi'a rebels are in the region of 300,000, and some estimates run even higher.<sup>5</sup> In the 1988 Anfal campaign alone, in which the Hussein regime gassed Kurds in more than 40 villages, approximately 182,000 people were killed, and many more were blinded and maimed. The regime practiced systematic repression, torture, rape, and imprisonment of political opponents and leaders of ethnic minorities. These practices have been well documented by impartial international observers such as Human Rights Watch and other NGOs, as well as independent journalists.<sup>6</sup>

A third fact relevant to the ethics of secession is that the Kurdish minority in northern Iraq appears to be overwhelmingly mobilized behind a national self-determination project. Typically, this support is difficult to gauge, especially in the

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<sup>3</sup> See John McGarry and Brendan O'Leary, "Federation as a Method of Ethnic Conflict Regulation," in Sid Noel, ed., *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies* (Montréal and Kingston: McGill-Queen's University Press, 2005), pp. 289–90.

<sup>4</sup> Brendan O'Leary, Khaled Salih, and John McGarry, "Preface" in O'Leary, Salih and McGarry, eds., *Future of Kurdistan in Iraq*, p. xi; see also Patrick Thornberry, "The Convention on Genocide and the Protection of Minorities" in Patrick Thornberry, ed., *International Law and the Rights of Minorities* (Oxford: Oxford University Press, 1991), 59–85.

<sup>5</sup> Tony Blair quoted in O'Leary, Salih and McGarry, "Preface," p. xii.

<sup>6</sup> Human Rights Watch, *Genocide in Iraq: The Anfal Campaign against the Kurds* (New York: Human Rights Watch, 1993); "Iraqi Kurds' Story of Expulsion," *BBC News*, November 3, 2001, available at [news.bbc.co.uk](http://news.bbc.co.uk); U.S. Agency for International Development, "Iraq's Legacy of Terror: Mass Graves" (Washington, D.C.; USAID, 2004), available at [www.usaid.gov/iraq/pdf/iraq\\_mass\\_graves/pdf](http://www.usaid.gov/iraq/pdf/iraq_mass_graves/pdf).

context of a repressive and undemocratic regime, but there is strong evidence that the population identifies itself along national and clan lines, and not as Iraqi (civic) nationalists. Although neither of the two major political parties—Jalal Talabani’s Patriotic Union of Kurdistan or Massoud Barzani’s Kurdistan Democratic Party—calls for independence, most analysts argue that this preference is strategic: the parties recognize that the United States would not support Kurdish independence (at least not in the current context) and that the Kurds need American/Alliance support.<sup>7</sup> Indeed, most Kurdish political leaders and outside observers contend that the major political parties act as a restraint on the population, which is strongly mobilized behind independence. This claim is often expressed in strong language: according to Peter Galbraith, a former U.S. ambassador, “The people of Kurdistan equate Iraq with repression and genocide. Almost no one in Kurdistan would choose to be part of Iraq if there were an alternative.”<sup>8</sup>

Further support of this assessment is provided by events surrounding the January 2005 elections in the Kurdish region of Iraq, when hundreds of Kurds sympathetic to Kurdish independence held an informal referendum on independence. With no advance warning, members of the Kurdish Referendum Movement erected tents outside official polling stations and asked those emerging from the ballot booths to vote in a referendum on independence. According to a spokesperson for this movement, 1,998,061 people participated in the referendum, and only 20,251 voted for remaining in Iraq. It was also claimed that there was overwhelming support for independence throughout the country, with Hewler (Erbil) and Duhok in the Sulaymani province slightly less supportive than the others.<sup>9</sup> This 99 percent vote for independence can be regarded with some skepticism, especially considering the nonbinding character of the referendum, and the fact that those opposed may have declined to participate in an obviously partisan poll. Nevertheless, it would be unwise to conclude that the opposite is true. According to an independent eyewitness writing for the *New York Times*, “Almost everyone stopped to vote in the referendum, and the tally was running around 11 to 1 in favor of independence.”<sup>10</sup>

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<sup>7</sup> The American support for the federal principle is clear. See John McGarry, “Canadian Lessons for Iraq,” in O’Leary, McGarry and Salih, eds., *Future of Kurdistan in Iraq*, p. 92.

<sup>8</sup> Peter Galbraith, “Kurdistan in a Federal Iraq,” in O’Leary, McGarry and Salih, eds., *Future of Kurdistan in Iraq*, p. 281.

<sup>9</sup> Kamal Mirawdeli, “Voting for Independence: People of Kurdistan Make Their Choice!” *KurdishMedia.com*, February 9, 2005; available at [www.kurdmedia.com/articles.asp?id=9997](http://www.kurdmedia.com/articles.asp?id=9997).

<sup>10</sup> Peter Galbraith, “As Iraqis Celebrate, The Kurds Hesitate,” *New York Times*, February 1, 2005, p. A19.

This support for independence, or lack of support for continued inclusion in Iraq, is hardly surprising, since the previous Baathist regime was ideologically associated with pan-Arabism, which was used to justify oppressive and genocidal policies against the Kurdish population.<sup>11</sup> We can thus see in this case how the history of unjust treatment may sometimes be very strongly correlated with sentiments of minority nationalist mobilization. As Walker Connor has noted, discriminatory and oppressive policies by the state are often counterproductive: they rarely lead to the disappearance of a particular group; on the contrary, they lead the members of the victimized group to become more strongly mobilized.<sup>12</sup>

## NATIONAL SELF-DETERMINATION ARGUMENTS

There are, broadly, three distinct theories of the right to secede, each of which specifies the ground for the right and the conditions under which there is a right to secede. There are individual autonomy (or plebiscitary right) theories, national self-determination (or collective autonomy) theories, and just-cause theories.

This paper does not discuss in any detail individual autonomy arguments, such as those advanced by Christopher Wellman, Harry Beran, and Daniel Philpott. These theories typically require that a territorially concentrated majority express a desire to secede in a referendum or plebiscite for the secession to be legitimate, and they do not require that the seceding group demonstrate that they are the victims of injustice at the hands of the state or the majority (remainder) group on the territory.<sup>13</sup> Typically, those who adopt this line of argument view the right to self-determination, including a right to secession, as based on an argument about the right of political association. The right of political association is then grounded in a deeper argument about the value of individual autonomy. This type of theory typically deploys fairly stringent practical requirements on the redrawing of boundaries, requiring (in the case of Wellman) that both the seceding unit and the remainder units be capable of performing the function of states; that the areas be territorially

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<sup>11</sup> The three stars in the Iraqi flag do not represent the three dominant groups in Iraq—the Shi'a, Sunni, and Kurds—but are reflective of pan-Arabism. One star represents Iraq; the other two represent Egypt and Syria.

<sup>12</sup> Walker Connor, *Ethnonationalism: The Quest for Understanding* (Princeton: Princeton University Press, 1984), pp. 38–39.

<sup>13</sup> Daniel Philpott, "In Defense of Self-Determination," *Ethics* 105, no. 2 (1995), pp. 352–85; Christopher H. Wellman, "A Defense of Secession and Political Self-Determination," *Philosophy & Public Affairs* 24, no. 2 (1995), pp. 142–71; and Harry Beran, "A Liberal Theory of Secession," *Political Studies* 32 (1984), pp. 21–31.

contiguous and viable (Beran); and that the groups be territorially concentrated and as likely to be protective of human rights as the state that they are leaving (Philpott).

Although individual autonomy theories represent a philosophically rich argument based on liberal conceptions of consent and political legitimacy, their application to Iraq is not very interesting. It is clear, on the one hand, that individual autonomy arguments would justify a referendum in areas of Iraq that seek secession; and it is probable, based on the empirical evidence marshaled above, that the northern area of Iraq, in which the Kurdish population is settled, would support, by majority vote, self-determination, possibly including secession from Iraq. On the other hand, however, they do not address important questions about disputed areas and past injustice. For example, Kurds have put forward claims that Kirkuk (the city, as well as the region) was historically Kurdish, and that some Arab members of the existing population, who are entitled to vote in a referendum, have moved into an area as a result of state-directed population movements.<sup>14</sup> In that case, there may be restitutive justice arguments for including Kirkuk as part of the Kurdish region.<sup>15</sup>

This brings us to the collective autonomy, or national self-determination, argument, which, like the individual autonomy arguments of Wellman, Beran, and Philpott, would support a democratic vote in the self-determining area, although not a statewide vote throughout the over-holding region. This requirement is justified in terms of the collective autonomy of the nation or people, the claim being that groups should be able to decide on their own with whom to associate, and that a statewide vote would violate that capacity to make a decision. Indeed, most accounts of national identity that have a strong subjectivist element will mirror the same results as the individual autonomy argument—namely, that part of the prerequisite for being classified as a nation is that there are a sufficient number of individuals who have a shared sense of identity and who also aspire to be

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<sup>14</sup> The basic facts are disputed. It seems that Kurds form a majority in the Kirkuk region, but have not always formed a majority in the city. There is some (albeit disputed) evidence that Kurds were only 25 percent of the population of the city in 1949. See Ofra Bengio, "Autonomy in Kurdistan in Historical Perspective," in O'Leary, McGarry, and Salih, eds., *Future of Kurdistan in Iraq*, p. 181. For this particular (low) estimate, Bengio cites Cecil Edmonds, *Kurds, Turks and Arabs* (Oxford: Oxford University Press, 1957), p. 435. Subsequently, the Kurds formed a much larger percentage of the population—Kurds claim that they were and are a majority—but Kirkuk was excluded from the Kurdistan region and the Baathist regime subjected the city to a rigorous Arabization campaign, involving the expulsion of some Kurds and the settlement of Arabs. *Ibid.*, p. 181. Turkomen are also, it is claimed (by Turkey), a significant population element in the city, but that is seriously contested.

<sup>15</sup> Kurds claim that, notwithstanding this Arabization campaign, the majority population is ethnic Kurdish.

self-governing.<sup>16</sup> A democratic vote is not always required on this argument. Many proponents of national self-determination rely on “tests” of shared national identity or political community such as markers of national mobilization: for example, electing national parties, lobbying or organizing along national lines, and possibly a majority vote in a referendum on secession, especially if there are indications of a persistent desire for a self-determining political community.

One interesting issue that this argument raises is the status of the Shi’a population with respect to the national criteria. The Kurds easily meet most standard definitions of nationhood in the normative literature: they are culturally, ethnically, and linguistically distinct from the Arab population with whom they live, and there is strong evidence of a persistent aspiration for collective self-determination among them, even throughout the 1992–99 period, when the Kurds were torn by civil war.<sup>17</sup> The Shi’a population, however, are religiously distinct but ethnically and linguistically Arab: indeed, the August 28, 2005, Draft Constitution, largely written by Shi’a and Kurdish elites, declared, “The Arab people are part of the Arab nation.”<sup>18</sup> This was thought to be a concession to the Kurds, but it seems also to reflect the view that the Shi’a and Sunni share the same national identity.

On any reasonably dynamic account of the construction of national identity, however, where identities are responsive to institutional differentiation and group-based discrimination and oppression, it is possible for a *national* identity to emerge where formerly there was only an ethnic or religious or linguistic identity. In Linda Colley’s careful historical examination of the development of British identity, she asks why the Welsh, the English, and the Scots could feel that being Welsh, English, and Scottish was consistent with *also* being British, and the Irish could not. Her answer is that the Irish were effectively excluded from developing a British national identity because Protestantism was absolutely central to Britishness, particularly in the eighteenth and nineteenth centuries.<sup>19</sup> This suggests that historical events are important to the development of identities and to the mobilization of certain

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<sup>16</sup> For more on this subjectivist component, see Ernest Renan, “What is a Nation?” in Alfred Zimmern, ed., *Modern Political Doctrines* (London: Oxford University Press, 1939), pp. 186–205; Yael Tamir, “The Enigma of Nationalism,” *World Politics* 47 (April 1995), pp. 418–49; David Miller, *On Nationality* (Oxford: Oxford University Press, 1995); and Margaret Moore, *The Ethics of Nationalism* (Oxford: Oxford University Press, 2001).

<sup>17</sup> The war took the form of a classic power struggle. See David McDowell, *The Kurds: A Nation Denied* (London: Minority Rights Groups, 1992). Nonetheless, even McDowell does not doubt that there existed an overarching national sentiment.

<sup>18</sup> Article 3 reads: “Iraq is a multiethnic, multireligious and multi-sect country. It is part of the Islamic world and its Arab people are part of the Arab nation,” Draft Constitution of Iraq, chap. 1, art. 3; available at [news.bbc.co.uk/1/shared/bsp/hi/pdfs/24\\_08\\_05\\_constit.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/24_08_05_constit.pdf).

<sup>19</sup> Linda Colley, *Britons: Forging the Nation 1707–1837* (London: Pimlico, 1992), pp. 11–54, 322–24.

groups. Similarly, in Iraq, it might be the case that the ethno-sectarian nature of the Saddam Hussein regime has deepened divisions, and that now there is a strengthened aspiration for collective self-government by the Shi'a community. This may have occurred because both Kurds and Shi'a were engaged in a revolt against the regime (in the Kurdish case, after 1961, and especially during the Iran-Iraq war of 1980–88; and in the Shi'a case, throughout the period, in the form of political Islam). This led to group-based repression, and further entrenchment of the regime in Sunni areas. For this reason, it is impossible to exclude the possibility that Iraq is at a crucial juncture: one where religious markers may also be national markers, just as in Yugoslavia religious markers (Catholic and Orthodox) have become transformed into markers for national identity (Croat, Serb), and in Northern Ireland religious markers (Catholic, Protestant) reflect a national conflict (Irish, British).

In many cases, of course, the national self-determination argument has clear application. Most normative accounts agree on which groups constitute national communities: the Kurds, Basques, Scots, Chechens, and Quebecois are typical examples of minority nations. But in Iraq, the nature of the group identity is contested—not only within the Shi'a community, but also by members of the Sunni community, many of whom view Shi'a proposals for autonomy as sectarian rather than nationalistic. An International Crisis Group report on Iraq indicates that one of the disputes about federalism concerns precisely the allegedly nonnational character of the Shi'a identity. It cites a senior Sunni official who was prepared to give concessions in the form of political autonomy arrangements to Kurds, but not to Shi'as.<sup>20</sup> The argument for this differential treatment is that political autonomy for Kurds reflects their national character, and so has a legitimate basis; whereas, for Shi'a, there is no national differentiation, so political autonomy reflects simple sectarianism, and the desire for political control.

While this essay does not attempt to ascertain empirically the extent to which Shi'a identity can be viewed as simply religious and the extent to which Shi'as constitute a national community aspiring to collective self-determination, in cases where religious markers become coextensive with national markers—as in Northern

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<sup>20</sup> In an International Crisis Group interview, Mjibel Shiekh Issa, a Sunni Arab member of the constitution committee, is quoted as saying: "We accept federalism for the Kurds, but only for the Kurds, as an exception." A similar sentiment is echoed by Adnan Dulaimi, another prominent Sunni Arab leader: "We reject federalism in the central and southern area of Iraq, because it has no foundation other than sectarianism. Any honourable Iraqi should stand up against those who seek to deepen sectarianism in Iraq." Both are quoted in International Crisis Group, "Unmaking Iraq: A Constitutional Process Gone Awry," Report No. 19 (Amman and Brussels, September 26, 2005), p. 4; available at [www.crisisgroup.org/home/index.cfm?id=3703&l=1](http://www.crisisgroup.org/home/index.cfm?id=3703&l=1).



Ireland and the former Yugoslavia—there are guidelines for making such a judgment. In the cases of Northern Ireland and Yugoslavia, the dispute between the two communities was no longer religious in character in the sense that it was not a dispute about some finer theological point, nor were religious clerics (priests and ministers) targeted in any way. These facts suggest that the conflict was not about religion, but rather about different national identities. In Iraq, however, the evidence is unclear, both because the role of religion in the laws and structure of the state is one of the central debates concerning Iraq's future, and also because religious leaders are important agents for political mobilization. On the other hand, there is strong evidence, in particular from the conduct of the negotiations for the draft treaty, that the Shi'a community meets a crucial, possibly even the only, "test" of shared nationality: the aspiration to or acceptance of a common mode of conducting their collective political affairs.

On the national self-determination argument, secession of national groups is justified in terms of the moral value that is realized in giving institutional recognition to national identity. Because of the structure of this argument, the question of who is a legitimate right-holder (who is a nation) is an important one: the focus tends to be on the group that is claiming the right. I will argue below that this focus is too limiting; thus far, I have only suggested that the argument has clear application to the Kurds, and that it is unclear whether the Shi'a can plausibly qualify as a national group.

There are a number of different justificatory arguments for national self-determination, but most suggest that nations are moral communities and that the bonds of membership and shared identity that co-nationals feel have ethical value.<sup>21</sup> Institutional recognition is important to members' sense of identity and gives expression to their political aspirations. On some versions of the argument, emphasis is put on the instrumental value that these bonds have in undergirding a democratic community and its redistributive practices.<sup>22</sup>

The different versions of this argument emphasize different goods that collective autonomy (or collective self-determination) realizes—goods that suggest a *prima facie* case for valuing collective autonomy. The value that resides in national communities, or is promoted by a shared national identity, is itself based on the value

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<sup>21</sup> See Miller, *On Nationality*; Moore, *Ethics of Nationalism*; Avishai Margalit and Joseph Raz, "National Self-Determination," *Journal of Philosophy* 87 (1990), pp. 439–61; and Tom Hurka, "The Justification of National Partiality," in Robert McKim and Jeff McMahan, eds., *The Morality of Nationalism* (New York: Oxford University Press, 1997).

<sup>22</sup> Miller, *On Nationality*; Moore, *Ethics of Nationalism*, ch. 4.

that these communities have for individuals. National communities are not the only repositories of value, however, as there are many components of human flourishing. Therefore, almost all arguments that take this form tend to argue in favor of balancing the good being realized (collective autonomy) with other competing goods—such as the likelihood that the resulting state will realize justice, support democratic governance, and secure peace. Of course, as noted above, much depends on whether, first, one agrees that the groups in question represent national political communities and, second, the likelihood that they will promote said moral values.

Even if we can feel confident that both of these criteria will be satisfied, a contextual assessment of the balance of goods realized against the losses to other values engendered is crucial to the moral judgment about secession. This is so because the moral good involved in secession is collective autonomy (or collective self-determination), and this can take different institutional forms, including nonsecessionist ones. And if collective self-determination is a value, and it can be realized in a number of institutional forms, then why (or when) is secession the appropriate one? This seems especially relevant since secession may be more disruptive to the international community than other constitutional arrangements, and it may involve more rigorous duties (or holding more people under duties) than other forms of self-determination.

Unfortunately, none of the proponents of this argument attempt to specify more precisely how this moral assessment should be made. There are a number of elements, many of which are in tension with one another, that are relevant to moral judgments about particular secessionist movements. On the one hand, it is useful to be able to specify, without reference to consequences, whether the group in question (e.g., the Kurds) has a right to self-determination. It seems wrong—indeed, it flies in the face of rights-based argument—to deny a group a right on *purely* consequentialist grounds, where among the consequences is the mere fact that some other group—the dominant majority, say—does not accept their right. This fact might be relevant to overall good consequences, but it shouldn't enter in at the ground floor. That is, the claim that Kurds' rights are violated by being forced to remain in an Arab-dominated Iraqi state should not be discounted simply because of what other groups in Iraq or what the neighbors of Iraq might do if the Kurds exercised their rights.

On the other hand, it is relevant to an assessment of a group's claims to secession to consider what alternative constitutional arrangements might be on offer. Either the adoption of a new constitution or the secession of part of the state is a profound

constitutional moment, not simply part of the regular “game of politics,” and each constitutes an alternative way of realizing the goods in question—whether the good is conceived of as collective self-determination of the community or protecting the community against further unjust treatment.<sup>23</sup> Thus, secession might *not* be justified if the group in question is offered a constitutional settlement within the state context that permits it to be collectively self-determining and that gives it reasonable guarantees that it will not be discriminated against or oppressed or consistently outvoted. If such arrangements are not on offer, then the group is justified in opting for other ways to realize justice or secure collective autonomy—even acts with momentous, and possibly negative, international consequences.

The view elaborated above is continuous with a plausible account of the assignment of moral responsibilities. It suggests that national groups have claims of justice to forms of collective self-determination. There is a general obligation on others (the remainder state, dissenters in the state, others in the international community) to facilitate self-determination (e.g., by negotiating in good faith these forms of collective life, refraining from insurrection). But there is no claim of justice to secession *per se*, and no moral obligation to facilitate this in cases where fair constitutional arrangements are on offer that permit the group in question to enjoy significant forms of collective self-determination short of outright secession.

While collective autonomy or national self-determination theories view the aspiration to collective self-determination as a legitimate one, they do not offer a full treatment of how this aspiration should be balanced against the realization of other goods in competition with it. Indeed, a fuller account might not give a “green light” to a group who otherwise might be justified (in autonomy or justice terms) in pursuing secession. This is because there are sometimes serious negative consequences attached to realizing the maximalist version of this desire, which have to be considered. In the case of the Kurds, this involves not only the opposition of Iraqi nationalists, who find their own (preferred) state “dismembered,” but also the destabilization of neighboring states with large Kurdish populations and possibly regional conflagration and instability. These considerations must be factored into an overall assessment, particularly when there is a possibility of constitutionally protected forms of self-determination that might avoid these negative results. In particular, it seems that the issue isn’t simply whether there is a right to secession,

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<sup>23</sup> See Jamal Benomar, “Constitution-Making after Conflict: Lessons from Iraq,” *Journal of Democracy* 15, no. 2 (2004), pp. 81–95; and Rainer Baubock, “Paradoxes of Self-Determination and the Right to Self-Government,” IWE Working Paper Series no. 42 (Vienna: Institute for European Integration Research, January 2004).

considered in abstraction from the consequences and context, but whether there are other, just constitutional alternatives and what the costs and benefits of these might be.

Moreover, as I will argue below, the comparative framework of this argument is inadequate: it compares self-determination that takes a secessionist form with self-determination within a state context. Both are justified by this argument, and it seems that other considerations, including realpolitik ones, come into play to determine which is most appropriate. The focus is on the seceding group and the comparison is only with what institutional arrangements are justified by the group's right. This focus has to be widened and sharpened, because, as I argue below, the appropriate normative question is whether there are fair multinational arrangements on offer, and what burdens are involved for others by the group's self-determination or secession.

## JUST-CAUSE THEORIES

Just-cause theories, among which Allen Buchanan's is the best known, typically argue in favor of a general right to secede for groups that have suffered certain kinds of injustices at the hands of the state.<sup>24</sup> Different just-cause theories focus on different kinds of injustices: some on prior occupation and seizure of territory; some on serious violations of human rights, including genocide; others on discriminatory injustice.<sup>25</sup> One advantage of this type of theory is that it suggests a strong internal connection between the right to resist tyranny—exploitation, genocide, oppression, wrongful seizure of territory—and the collective right to self-determination, or secession. By suggesting a strong link between secession and human rights, this kind of argument grounds the ethics of secession within the generally accepted framework of human rights and a generally accepted theory of state legitimacy.

It may at first appear that this theory not only has the advantage of being continuous with credible and generally accepted understandings of justice, human rights, and state legitimacy, but that it is relatively easy to apply. It requires only a backward-looking assessment of the policies and practices of the state in order to judge the

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<sup>24</sup> Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, Colo.: Westview Press, 1991).

<sup>25</sup> In Wayne Norman's elaboration (and defense) of just-cause theory, he cites five kinds of injuries to a group that are considered to give just cause. See Wayne Norman, "Ethics of Secession as the Regulation of Secessionist Politics," in Margaret Moore, ed., *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998), pp. 34–61.

veracity of claims made by the would-be secessionist group concerning violations of human rights, torture, and unjust killing.

There are, of course, contentious cases. The facts may be unclear or contested, and there may be no reliable, independent witness to ascertain which narrative of events is true. This is not a philosophical objection to just-cause theory, however; the same is true of criminal trials in which wrongdoing is alleged.

More seriously, there may be disagreements about what justice requires, especially in the realm of fairly fine-grained theories of distributive justice. Buchanan argues that unfair distributive arrangements should be counted as giving just cause to a group to secede. However, this immediately runs up against the problem that there is no agreement on which particular theory of distributive justice we should accept (e.g., Dworkinian equality of resources vs. Rawlsian original position theories vs. Nozickian proceduralism). In order to address this more difficult problem, we could agree not to “count” as violations of justice those that are based on particular, contested, fine-grained theories of distributive justice. We could focus instead only on those egregious violations of human rights that are generally accepted as deeply problematic both in the philosophical literature and the international legal order.<sup>26</sup> By these, I mean those human rights commonly thought to protect fundamental human interests, such as the right not to be tortured or the right not to be unjustly killed.

On this understanding of just-cause theory, the clear evidence of historical injustice perpetrated by the Baathist regime in Iraq canvassed above is relevant to the legitimacy of the secession. Just-cause theory would give the green light to secession by secessionist groups in Iraq. There is no doubt of the murderous and genocidal character of the previous regime, as the mass graves that have since been found and are slowly being exhumed attest.<sup>27</sup>

If we accept this retrospective understanding of just-cause theory, we are able to distinguish clearly, at least at the theoretical level, between the justice theory and applications of the theory. No doubt, of course, there remain difficulties in *applying* the theory. One problem is connected to the fact that the people who have suffered most at the hands of a dictator, and so have a moral right to secede, often have no

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<sup>26</sup> This decision doesn't need to be regarded as a purely pragmatic one. It might be thought that the gravity of the situation, or the remedy sought, might necessitate a greater degree of determinacy both about the justice violation and the consequences attached to rectifying it. See Allen Buchanan, “Are Human Rights Parochial?” paper presented to the Political Philosophy Group, Queen's University, Kingston, Ontario, October 2005.

<sup>27</sup> For an informative account of the mass graves found in Iraq by the Provisional Authority, see USAID, “Iraq's Legacy of Terror,” [www.usaid.gov/iraq/pdf.iraq\\_mass\\_graves/pdf](http://www.usaid.gov/iraq/pdf.iraq_mass_graves/pdf).

mechanism to enforce that right. The repressive state disallows it, and indeed uses the “threat” of secession as a ground for further repression. In the likely event that there is no constitutional procedure to bring secession under the rule of law, a further problem is that the mere act of insurrection or insurgence on the part of secessionists will lead to measures designed to dampen it on the part of the remainder state. Insurgents are well aware of this, and will often engage in actions designed to lead to state repression of their community, to which they can then refer to help mobilize their own group and the international community behind the secession. But these are not serious philosophical problems: they only suggest that it is not always easy to constitutionalize rights or to get people to agree to particular rights.

It is important to note that this theory is much more restrictive than it first appears. It is restrictive in the obvious sense that it restricts secession to groups that have been victimized or discriminated against; but it sets the bar even higher by requiring that the injustice be the result of deep state structures, rather than simply the actions of an illegitimate government. To see this, one must take into consideration how the justice-based argument connects with the theory of state legitimacy. In *Secession*, Buchanan argues that the desires and claims of the secessionists have to be weighed against the claims of the state, which, if it is a just state, is the “trustee for the people, conceived as an intergenerational community.”<sup>28</sup> The just state, therefore, has an obligation to protect all existing and future citizens’ legitimate interests in this political and territorial community. On Buchanan’s view, secession is permissible *only when the state forfeits its claim to being a legitimate trustee by failing to fulfill its justice-based obligations*.

Interestingly, this argument does not require that the would-be secessionist group itself be the victim; rather, it requires only that the state that is being dismembered be the perpetrator of injustice. Kurds in Iraq who were the victims of a nerve-gas attack have, on this theory, a strong right to secession; but this is primarily because the Iraqi government/state, through its action, lost political legitimacy and failed to fulfill its trusteeship role. Its claim to a right to territorial integrity therefore does not need to be weighed against the desires of the secessionists, and this is so even if the would-be secessionists were some group in the state other than the Kurds.

A crucial question raised by this argument is: at what point do we regard *the state* as an unjust one? And, at what point do we regard *the regime* (as distinct from the state) as an unjust one? This theory of secession, rooted in a theory of state legitimacy,

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<sup>28</sup> Buchanan, *Secession*, p. 109.

does not turn crucially on whether the seceding group is a victim of injustice; in fact, it does not really require that at all. The crucial question is whether the state has perpetrated, or is perpetrating, acts of injustice. And this raises the question of the distinction between a state and a particular governing regime.

This certainly complicates the theory's application to post-Saddam Hussein, postinvasion Iraq, for the crucial question would seem to be whether the legitimacy of the state has been restored by regime change. If so, it would mean that the egregious violations of human rights, torture and murder rendered illegitimate the Baathist regime run by Saddam Hussein, but not the *Iraqi state* itself.

In his more recent book, Buchanan elaborates on the implicit distinction operating here between *state* acts of injustice and particular *government's* acts of injustice.<sup>29</sup> He defines a "state" as an enduring structure of basic institutions for wielding political power, which includes roles to be filled by members of the government.<sup>30</sup> The "government" can be thought of as the human agency by which the institutional resources of the state are employed. If the state is illegitimate, its government is illegitimate. But if the government is illegitimate, it does not follow that the state is illegitimate.

If a particular government commits unjust acts, then the logic of the analysis is that they can be rectified by a change in government. We are then in the realm of overthrowing the government, as John Locke argued in 1681. Locke considered the possibility that "either the executive or the legislative, when they have got the power in their hands, design to go about to enslave or destroy them [the people]. The people have no other remedy in this . . . but to appeal to heaven."<sup>31</sup> Locke was clear that this constitutes a right to overthrow the government, although he was careful to argue that it should be exercised judiciously. "Such revolutions happen not upon every little mismanagement in public affairs. Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty will be borne by the people without mutiny or murmur."<sup>32</sup>

Buchanan argues that remedying the flaws of an illegitimate state involves more than a change of character in the government: it requires profound constitutional changes that transform the state itself. An example of such a profound constitutional

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<sup>29</sup> Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), pp. 281–288. Here, Buchanan is principally concerned with the issue of legitimacy as it applies to state recognition policy, but this question of who should be the object of recognition (with all the rights and obligations that that entails) is another way of posing the question of the legitimacy of secession.

<sup>30</sup> *Ibid.*, pp. 281–83.

<sup>31</sup> John Locke, "Second Treatise of Government," in *Political Writings of John Locke*, ed. David Wootten (New York: Penguin, 1993), p. 348.

<sup>32</sup> *Ibid.*, p. 376.

change is secession. And of course secession is justified if the state is illegitimate, because by definition the state does not deserve the rights (to territorial integrity) that it has had conferred on it by the international community. The problem is that the conditions that have to be met to qualify as an “unjust state” are quite stringent, and this makes the theory of secession very restrictive. Indeed, Buchanan cites only two examples of unjust states: apartheid-era South Africa and the antebellum South of the United States.<sup>33</sup>

On Buchanan’s account of the distinction between “state” and “government,” there are potentially two distinct categories of unjust (or just) entities. The category “unjust government” is overpopulated, encompassing all governments who have engaged in unjust conduct. The category “unjust state” is seriously underpopulated. Buchanan cites only two examples, and one of these is contestable. By the same logic, the category of “just government” is seriously underpopulated, whereas almost all states fall into the category “just state.” Secession is legitimate only if the entity in question falls into the category of “unjust state,” which is highly unlikely, since repression, torture, and killing at the behest of the government may not be sufficient, in Buchanan’s view, to render a state as “unjust.” Indeed, it seems that this line of argument does not really constitute a theory of legitimate secession, since there are practically no instances of secession that would be justified. It is really a theory of political legitimacy.

Second, and related to the underpopulated nature of the category “unjust state,” this theory fails to track the likely mobilization for secession. This means that there is the potential for serious tension between the identity and aspirations of the people and the requirements of Buchanan’s theory of political legitimacy. There are two main reasons for this. First, there is strong evidence that oppression and injustice strengthen minority mobilization. Groups that have been the victims of unjust treatment at the hands of a majority group in the state, or at the hands of a governing (majority) regime, typically identify very strongly with their own (victimized) group. It is psychologically difficult to adopt the identity of the very people who killed or tortured members either of your family or of the ethnic, linguistic, religious, or national group to which you belong. There is strong empirical evidence from a variety of social science traditions of the fact that the formation and consolidation of national identities occur through reaction to the various policies of inclusion and

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<sup>33</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, pp. 282–83.



exclusion, to which the example of the Kurds itself attests (and possibly that of the Shi'as).<sup>34</sup>

The second, closely related, reason is that members of majority groups often view unjust acts as carried out by individuals or by particular corporations or businesses or even by particular governments, but always as specific acts by unjust people or groups. By contrast, members of minority groups, who are targeted precisely because they are from a particular religious, ethnic, linguistic or national minority, tend to view such acts as perpetrated by representatives of the majority community, which also controls the state. Thus, while the just-cause theory of secession operates with a clear distinction between an unjust governing regime and an unjust state, this distinction is rarely accepted by members of minority groups who seek secession. Their mobilization as nationalists or secessionists often occurs precisely because they have been targeted as members of particular groups. The injustice that they have experienced makes it unlikely that nested forms of identity will be open to them, by which I mean identities where people feel equally French and European, or equally Scottish and British, equally Kurdish and Iraqi, and so on. This is a problem in practice, since the old adage equating peace with justice will not be achieved.<sup>35</sup> The just-cause theory of secession is unlikely to placate those members of minority national communities who have been victims of injustice, and who seek their own political community, not reform of a political community with which they do not identify, and in which they will be permanently vulnerable members.

In contrast to Buchanan's just-cause argument, in which the standard remedy for injustice is a change of government, the burden of proof should be on the state to demonstrate that it is now a just state that gives ample protection to minorities. This is not easy, since the very fact that group-based oppression or injustice occurred is prima facie evidence of a propensity to group-based discrimination or oppression. After all, most governing regimes get some support from the population, or, even where they do not, there are members of the military or police or other people working in various capacities in the state who must have been implicated in the oppression. This means that there has to be strong evidence that the state is constructed so that this kind of thing is not likely to happen again: minorities are

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<sup>34</sup> See David Laitin, *Identity in Formation: The Russian-Speaking Populations in the Near Abroad* (Ithaca, N.Y.: Cornell University Press, 1998), pp. 13, 275–99.

<sup>35</sup> For an interesting view of the relationship between justice and peace, see Melissa S. Williams, "Tolerable Liberalism," in Avigail Eisenberg and Jeff Spinner-Halev, eds., *Minorities within Minorities: Equality, Rights, and Diversity* (Cambridge: Cambridge University Press, 2005), pp. 19–40.

entitled to strong guarantees of their security and constitutional protection over their collective existence.

These concerns immediately raise the question of a new baseline: does the new, post-Saddam Hussein, postinvasion Iraq constitute a state in which the previously victimized groups can be secure in their collective existence? For that to be true, it seems that at least the following three conditions should be met. First, the principal national minority (e.g., the Kurds, probably also the Shi'a community<sup>36</sup>) should have constitutionally guaranteed self-government, which means that Iraq should be either constituted as a federation, or that the Kurdish area should have a constitutionally protected autonomy arrangement.<sup>37</sup> Second, the institutions at the center should be inclusive of diversity, which involves executive power-sharing, either specified constitutionally, or as a result of proportional principles operating in the electoral system (e.g., a proportional representation electoral system). This proportionality should also be reflected in other institutions—such as the second chamber and the federal supreme court.<sup>38</sup> Finally, there should be the standard liberal protections against abuse of state power, such as due process of law, protections for the accused, freedom of speech, freedom of religion, and so on. These sorts of things are necessary if the victimized groups—in Iraq's case, both the Kurdish minority and the Shi'a majority—are to view the Iraqi state as a state that is fully inclusive of their culture and identity. These sorts of protections are also continuous with a liberal-democratic tradition of constitutionalism, in which the point of many institutional arrangements is to protect against injustices; and this has to take the form of group-based constitutional protections in a society that has suffered years of state-sponsored oppression along group lines.<sup>39</sup>

The case of Iraq, however, reveals the limits of focusing solely on the previously oppressed group, or the national minority, that has a right to self-determination.

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<sup>36</sup> I leave this open to question for the reasons sketched earlier regarding the Shi'a commitment to collective self-determination. It is unclear, given the undemocratic nature of Iraq under Saddam, and the various constraints on the elections in the postinvasion period, whether there could be more of a community of interest between Shi'a and Sunni Arabs in Iraq.

<sup>37</sup> For an excellent discussion of federations and autonomy arrangements, see McGarry and O'Leary, "Federation as a Method of Ethnic Conflict Regulation," in Noel, ed., *From Power Sharing to Democracy*, pp. 263–96.

<sup>38</sup> A typical strategy is to have a second chamber that reflects regional interests. See Ronald L. Watts, *Comparing Federal Systems*, 2nd ed. (Kingston, Ont.: Institute of Intergovernmental Relations, Queen's University, 1999), pp. 83–96.

<sup>39</sup> For a more extensive treatment of liberal constitutionalism within the national and multicultural literature, see Jacob T. Levy, "National Minorities without Nationalism," in Alain Dieckhoff, ed., *The Politics of Belonging: Nationalism, Liberalism, and Pluralism* (Lexington, Mass.: Lexington Books, 2004).

The comparative baseline should not simply be whether the new state is one that adequately protects these groups, although that is an important, indeed necessary, condition for classifying the state as a just one. The state has to be one in which fair multinational constitutional arrangements are on offer, and the “fairness” criterion presupposes that it includes, not just the previously victimized groups, but all groups in society.

## THE POSTINVASION CONTEXT

In the sections above, I argued that the legitimacy of secession is closely bound up with the particular constitutional protections and autonomy arrangements on offer in a particular state. This section examines the current constitutional regime, as outlined in the Iraqi Draft Constitution, which forms the basis of elections (held on December 15, 2005) to form a new government and leadership for a four-year term.

Most normative theories of secession consider the issue of secession as it relates to the group that is likely to secede. They place the burden of justification on the seceding group, and also tend to focus on the interests and identity of the seceding group when comparing the institutional arrangements on offer in the existing or reformed state with those that would be available in the context of secession. From this perspective, the draft constitution, freely negotiated by the elected leaders of these two communities that were formerly discriminated against, reflects these communities’ interests and identities, and secession from such an arrangement would not be justified. It protects their interests by entrenching official bilingualism (Arabic and Kurdish),<sup>40</sup> freedom of religion, significant political autonomy (which will give extensive forms of self-government for the previously victimized Kurdish and Shi’a groups), and political inclusion at the center. The flag and symbols of the state, which are likely to be controversial, are not addressed in this document, but are deferred to a future elected national assembly. The precise shape of the federal units is not agreed: the draft constitution entrenches significant autonomy at the regional level, but the process by which regions are formed is left unspecified. Article 114 states, “The Council of Representatives shall enact, in a period not to exceed six months from the date of its first session, a law that defines the executive procedures

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<sup>40</sup> Article 4(1) of the draft constitution reads: “Arabic and Kurdish are the two official languages for Iraq.” It goes on to describe official language status as involving “speaking, addressing, and expressing in official domains, like the parliament, Cabinet, courts, and official conferences,” rights to education of children in their mother tongue, and protection of smaller language groups, like Turkomen and Assyrian language, where they are located.

to form regions, by a simple majority.” Moreover, only Baghdad is barred from joining another region, which means that Kirkuk could be incorporated into a Kurdish region if this is the decision of a simple majority in a referendum; and that the Shi’a regions can join together to form a single Shi’a super-region.

Of course, the draft constitution is not without its critics, even within these two communities<sup>41</sup>: it is somewhat weaker on human rights than some would like, although much depends on how the conflicting clauses will be interpreted by the judges in key decisions.<sup>42</sup> And it is insufficiently religious for some leaders: one of the constitution’s main opponents in the Shi’a community is concerned that Islam is described as one source of law, rather than the only source of law.<sup>43</sup>

The main problem with the draft constitution, however—and this is insufficiently considered by the various theorists of secession—is that it fails to be fair to, and fully inclusive of, all the groups in Iraq. More specifically, while the draft constitution adequately protects both Shi’a and Kurdish groups in their aspirations to be collectively self-governing and their legitimate concerns about the possibility of suffering further injustice in an Iraqi state, the Sunni Arab population, which is between 20–25 percent of the total Iraqi population, has been largely excluded from its drafting and their interests have not been adequately reflected.

One problem stems from the electoral system (which has since been changed) that was used to elect the people to draft the constitution. This system was proportional representation across the whole of Iraq, considering Iraq as a single constituency. This meant that groups with high turnouts—the Shi’a and the Kurds—were over-represented, while the Sunnis, which had a very low turnout (whether because they boycotted or because they feared for their safety in an insurgency situation), were barely

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<sup>41</sup> It might be objected that this section reifies the group identifications by referring to people on the basis of their group memberships. I do this because these group identifications are politically salient: the voting occurred on the basis of group lists and most people did not cross group affiliation lines. It does not imply homogeneity within the group, nor does it suggest that in some other institutional structure, or at some other time, different group affiliations will be more important/politically salient.

<sup>42</sup> Article 2(2) states: “1<sup>st</sup>—Islam is the official religion of the state and is a basic source of legislation; (a) No law can be passed that contradicts the undisputed rules of Islam. (b) No law can be passed that contradicts the principles of democracy. (c) No law can be passed that contradicts the rights and basic freedoms outlined in this constitution.” The basic rights and freedoms include standard civil and political rights of equality under the law without discrimination because of sex, ethnicity, nationality, origin, color, religion, and so on, as well as equality of opportunity; rights to life, security, and freedom; equal political rights, to vote and run for office and so on. It is clear that in certain cases, these rules will conflict and the judges will be left to decide what is an *undisputed* rule of Islam and how the principles of freedom and equality are to be interpreted consistent with this. There is a genuine source of concern, given the possibility of a very conservative Shi’a majority in future elections to the legislative assembly (Parliament).

<sup>43</sup> See Alisha Ryu, “Factional Rift Threatening Shi’ite Unity on Iraqi Constitution,” *VOA News*, September 25, 2005; available at [www.voanews.com/english/archive/2005-09/2005-09-25-voa32.cfm](http://www.voanews.com/english/archive/2005-09/2005-09-25-voa32.cfm).

represented at all. Proportional representation *within regions* would have produced proportionate Sunni Arab representation, even if the representatives were voted in on very low turnouts. Not unexpectedly, without adequate representation in the drafting of the constitution, Sunni Arab interests were not reflected in the final draft.<sup>44</sup>

From the Sunni Arab perspective, there are three fundamental problems with the text of the draft constitution. First, and probably most fundamentally, there is the issue of federalism, which many Sunni Arabs view as a harbinger of the “breakup of the state.” Federalism itself is not a position on which compromise is possible: a nonfederal Iraq would have been unacceptable to Kurds. But the exact form that the federal Iraq takes in this constitution is particularly problematic because it makes possible the creation of a Shi’a super-region, which would be particularly unstable, and which flies in the face of most federal arrangements. It is very doubtful that a federation can be stable—and be fully fair to its smaller groups—if one of the regions of the federation is so dominant.

Secondly, and related to the first point about potential dominance, natural resources such as oil that are not yet discovered are within the jurisdictional authority of the regional governments. As these are largely in the south and north of the country—in Shi’a and Kurdish areas (especially if Kirkuk becomes part of the Kurdish region)—there is a legitimate fear among Sunni Arabs, who predominate in the centre of the country, that the oil riches of the country will not be equitably shared.<sup>45</sup> Control over oil by regions is not unprecedented in a federal country—indeed, the Canadian provinces have jurisdiction over natural resources—but there should be a clearly spelled out formula for the distribution of oil reserves between the area from which it is drawn and the needs of the country as a whole. This is lacking in the draft constitution.

Finally, the draft outlaws the Baathist party and legitimates the de-Baathification committee, established in May 2003, which judged Iraqis not by their past conduct

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<sup>44</sup> One Sabeen and fifteen Sunni Arab members were added to the fifty-five-member Constitutional Committee as full voting members on July 5, 2005, although one of them was assassinated on July 19. There are different versions of the process, some of which claim that the Sunni Arab representatives were not constructive. For a roundup, see International Crisis Group, “Unmaking Iraq,” p. 3, note 10.

<sup>45</sup> The exact wording of the articles in the draft constitution is not clear. Article 109 states: “Oil and gas [are] the property of all the Iraqi people in all the regions and provinces.” But Article 110 specifies, “The federal government will administer oil and gas extracted from current fields in cooperation with the governments of the producing regions and provinces on condition that the revenues will be distributed fairly in a manner compatible with the demographic distribution all over the country.” Article 111 states, “All that is not written in the exclusive powers of the federal authorities is in the authority of the regions.” This means that any future discoveries will be under the control of the regions, and seems to suggest that the revenues are under their jurisdiction, too.

but by membership in the party.<sup>46</sup> It is not unusual to ban particular parties, especially those that have committed crimes such as Saddam Hussein's regime perpetrated, nor is it problematic to ban those who committed such crimes from holding political office, and indeed to prosecute them for their activities. But, clearly, this aspect of the draft constitution has fuelled worries that de-Baathification will amount to "de-Sunnification," by which it is meant that it is simply a mechanism to further exclude the Sunni population from participating freely and fully in the new Iraq.<sup>47</sup>

All this suggests that constitutional settlements, or baselines, should not be judged only from the point of view of the previously repressed group. One—but only one—relevant comparison is self-determination that takes a secessionist form and self-determination within the context of the state. But internal forms of self-determination must be viewed in terms of a general principle of fairness and inclusion. The relevant question is whether the constitutional arrangement represents a fair settlement *for all groups*.

Of course, it might not be possible in a divided society that has suffered serious group-based antagonism to reach a fair, *negotiated* settlement, since sometimes groups will simply refuse to compromise.<sup>48</sup> This certainly seems to be the case with the federal structure of Iraq: the Kurds are prepared to join a democratic, federal, pluralist Iraq in which they are likely to be at least proportionately included in the institutions of the center, but they would not have freely negotiated a unitary state. There may, however, have been more possibilities for compromise on the particular form that federalism takes; and this particular draft constitution seems to contain unnecessarily divisive sections, some of which seem clearly to be operating against the interests of Sunni Arabs. In any case, the issue of fairness is separate from the issue of what groups will agree on, although under certain conditions, negotiated agreements are likely to be fair.

Moreover, a comparative examination of the likelihood of successful secession suggests that it is most likely to occur when there is a breakdown at the center. In the period between 1900 and 1945, there were only two examples of secession: in 1905,

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<sup>46</sup> It is not clear that this suspicion is justified, and as I write there are news reports that a meeting of the various groups, at American insistence, is working to alter the wording of the draft constitution on this very point, and so dispel this worry (and possibly gain some Sunni Arab support).

<sup>47</sup> See International Crisis Group, "Unmaking Iraq," pp. 8–9.

<sup>48</sup> Although I do not argue the point here, I think that government by a majority is preferable to government by a minority, which was, after all, the system in place under Saddam Hussein. It is also typical for previously dominant groups to resent their removal from dominant status, and to be obstructionist until they come to terms with their new status. For this reason, it is not at all unlikely for groups to oppose fair agreements: what they seek is an unfair settlement.

with the secession of Norway from Sweden, and in 1921, with the secession of Ireland from the United Kingdom. In the period between 1945 and 1990, there was only one case of successful secession: Bangladesh. But since 1990, there have been many examples of secession,<sup>49</sup> and in not a single case was the secession opposed by the central government. The Soviet Union and Yugoslavia shattered into many pieces, and it is possible to say that in both cases there was no central government, or core state, to resist the secession.<sup>50</sup> The danger in Iraq is that there is no central authority capable of resisting its breakup, for the two groups that have been complicit in drafting the constitution and in strengthening the regions at the expense of the center, may well have no interest in holding the state together.

This empirical point has a normative dimension, as well: if secession is more fraught with greater negative international consequences than the reorganization of a state, and if civil war is a possibility because of the exclusion of one of the three main communities in Iraq, then the draft constitution is morally problematic. It is morally problematic not only in terms of its failure to include fully and adequately Sunni Arab interests, but in terms of the long-term consequences of implementing it. In short, to prevent secession it is not sufficient to satisfy a secessionist group, but rather there has to be a carefully crafted, balanced, and fair institutional arrangement that is inclusive of all group-based identities.

## CONCLUSION

In this essay I have analyzed the dominant theories in the ethics of secession and demonstrated how these theories apply to the situation in Iraq, concentrating primarily on the Kurdish minority there, who are most likely to seek secession. In each case, on a straightforward understanding of the theory, it seems that the Kurds have a moral right to secession on both individual and collective autonomy grounds if they can demonstrate a strong majority in favor of secession, or a clear indication of their aspirations to constitute a separate political community. The evidence canvassed in the first part of this paper suggests that they could probably meet this

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<sup>49</sup> The examples are: Croatia, Slovenia, Bosnia, Macedonia, Slovakia, Czech Republic, Russia, Ukraine, Turkmenistan, Kazakhstan, Uzbekistan, Kyrgyzstan, Belarus, Latvia, Estonia, Lithuania, Armenia, Georgia, Moldova, Azerbaijan, Uzbekistan, Eritrea, and East Timor.

<sup>50</sup> In the case of the former Yugoslavia, the Serbs, not the central government, resisted the secession, and this led to civil war—in Croatia and in Bosnia-Herzegovina. In the case of East Timor, the Indonesians (reluctantly) agreed under international pressure—but they did agree. For this point, I am grateful to conversations with John McGarry about this issue.

requirement. The just-cause theory also seems to give the Kurds, and indeed any group seeking secession from Iraq, the right to secede, because of the past history of oppression and injustice.

A more nuanced understanding of the structure of both the (collective) autonomy and just-cause arguments requires, however, an assessment of the constitutional protections and autonomy arrangements in place in the current state. My argument suggests that one condition that has to be met in order for there to be a clear right to secede is the absence of a fair multinational state. This condition highlights the importance of creating a fair, inclusive, multinational Iraq in which its various peoples can feel secure in their collective existence. I also suggest that current normative theorizing about secession is too exclusively preoccupied with comparing constitutional arrangements from the point of view of the seceding group, rather than defending a *fair* constitutional settlement for all groups. Here, unfortunately, the Iraqi Draft Constitution seems to fall short, and this poses serious risks to the long-term peace, justice, and security of the various groups in Iraq.