Note: This paper will be published in the International Journal of Constitutional Law in early 2018. The ideas explored in the paper, however, form the basis for a broader project on legal territoriality. That project will develop the theory advanced in this paper. In particular, it will explore whether international law or theories of the state can provide a more convincing answer to the question of legal territoriality than that defended here. The theory will then be applied to issues of secession, territorial contestation and federalism. I very much welcome comments and criticisms on all aspects of the paper, as well as suggestions for future directions.

The Silent Constitution of Territory

Oran Doyle*

Introduction

Geographical specificity has long been a fundamental but under-explored element in our understanding of legal systems and states. Hart commented that 'in almost every part of the world that is thought of as a separate "country" there are legal systems ….'[1] Loughlin refers to the three fundamental elements of the state in the *Staatslehre* tradition: territory, ruling authority and people. In comparative constitutional law, considerable attention is paid to liminal instances of territory, such as secession [2] and territorial contestation. [3] However, there has been remarkably little conceptualisation of this most basic feature of legal systems and constitutional orders, namely that they are geographically limited. Constitutions almost universally present themselves as made by and for a particular people living in a particular place. This geographic referent underpins all analysis of a constitution's democratic credentials (and therefore the structure of government it

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[1] H.L.A. Hart, CONCEPT OF LAW 3 (2d ed. 1994).

[2] See, for instance, David Haljan, CONSTITUTIONALISING SECESSION (2014).

[3] See, for instance, the contributions to the special volume of the German Law Journal addressing events in Crimea. 16 GERMAN LAW JOURNAL (2015).

creates), the appropriate amendment method and the legitimacy of constitutional replacement. Furthermore, without properly understanding the territoriality of law in core, uncontested instances, we lack the analytical tools to address more contentious cases. In this article, therefore, I employ comparative constitutional analysis to develop and test a new theory of legal territoriality, before addressing how constitutional orders can both anticipate and respond to secession and territorial contestation.

A newly compiled dataset of national constitutions reveals a curious dichotomy. Although 87 per cent of national constitutions explicitly reference their national territory in some way, only 14 per cent attempt to delineate that territory with any specificity. This phenomenon of general but not absolute constitutional silence provides a new insight into the geographical specificity of laws. I argue that the silent conventions of a geographically located group determine the geographical scope of a constitution's application. Constitutional delineations of the national territory are therefore unnecessary. Nevertheless, textual delineations of territory can achieve three purposes: they can clarify the silent conventions, express territorial claims over contested territory, and contract the scope of the constitutional order. This analysis reframes the debate on whether constitutions should grant a right to secede, while also focusing attention on how constitutions can be sites of territorial contestation.

Territory: constitutional salience and constitutional silence

87% of state constitutions contain clauses that explicitly reference the national territory.[4] 31% of constitutions make assertions of territorial integrity, indivisibility or inalienability. For instance, Article 2.2 of the Bulgarian Constitution provides that the 'territorial integrity of Bulgaria shall be inviolable.' 41% of constitutions make specific provision for alteration of national territory: Finland requires a

[4] The dataset consists of the current 193 Member States of the United Nations, less Israel, New Zealand, San Marino and the United Kingdom, all of which lack a single master-text constitution that purports to be foundational of the constitutional order. This exclusion criterion is contestable, although little difference would be made to the statistics cited. Conversely, a reasonable case could be made for the inclusion of the Republic of China (Taiwan) and Kosovo. However, it is difficult to articulate a ground for their inclusion that does not involve answers to the theoretical questions that analysis of the dataset is meant to assist. For this reason, it is safer to exclude them from the dataset, notwithstanding their obvious relevance to the broader discussion. All currently in force constitutional provisions are cited from www.constituteproject.org. On master-text constitutions, see John Gardner, LAW AS A LEAP OF FAITH 90 (2011).

parliamentary vote;[5] Burundi requires a referendum;[6] France makes the national territory unamendable.[7] 27% of constitutions impose obligations on the Head of State to defend the national territory: for instance, the President of Senegal must take an oath to defend 'the integrity of the territory and the national independence.'[8] 12% of constitutions make a similar demand of all citizens: for instance, a Bhutanese citizen is constitutionally obliged to 'preserve, protect and defend the sovereignty, territorial integrity, security and unity of Bhutan.'[9] 7% of constitutions deem protection of territorial integrity a legitimate ground for the restriction of civil and political rights: for instance, in Croatia, exercise of the right to freedom of association is restricted by 'the prohibition of any violent threat … unity and territorial integrity of the Republic of Croatia.'[10] 29% of constitutions guarantee citizens freedom of movement within the territory: for instance, Article 24 of the Swiss Constitution guarantees Swiss citizens the right to establish their domicile anywhere in the country, as well as the right to leave or enter Switzerland. 11% of constitutions contain guarantees against extradition or exile: for instance, Article 9 of the Jordanian Constitution provides that no Jordanian citizen may be deported from the Kingdom.

Each of these clauses presupposes a constitutional understanding of the national territory. However, even without such clauses, national constitutions imply an understanding of the national territory. Although only 14% of constitutions contain statements about the geographical scope of their own application,[11] all national constitutions implicitly contain such statements. When 'the People of Malawi … adopt the following as the Constitution of Malawi,' it is surely implicit that the constitutional order is taken to apply to a discrete geographical area understood to be Malawi. Even without such a clause, in a post-colonial world the very self-presentation as 'the Constitution of X,' where X is a geographically limited area, implies a geographical limitation on the laws made by the constitutional organs of X. In short, 87% of national constitutions *explicitly presuppose* a constitutional understanding of national territory but all national constitutions *implicitly presuppose* such a constitutional understanding.

[5] Article 4 of the Finnish Constitution.
[6] Article 259 of the Burundian Constitution.
[7] Article 89 of the French Constitution.
[8] Article 37 of the Senegalese Constitution.
[9] Article 8.1 of the Bhutanese Constitution.
[10] Article 43 of the Croatian Constitution.
[11] Article 116.1 of the Albanian Constitution is an unusually clear example, listing the 'normative acts that are effective in the entire territory of the Republic of Albania.'

Only 48% of constitutions, however, attempt to delineate their national territory. Most of these are not self-sufficient delineations but require further inquiries to identify fully the national territory. For instance, 17% of constitutions refer to the territory being the same as it was on a particular date, usually immediately prior to the coming into force of the constitution.[12] For instance, Article 4.2 of the Nepali Constitution provides that the territory of Nepal comprises 'the territory existing at the commencement of this constitution' and 'such other territory as may be acquired after the commencement of this constitution.' 5% of constitutions make reference to international law in general, while 5% make reference to specific instruments of international law.[13] For instance, Article 84 of the El Salvador Constitution includes examples of both, stating that the territory includes the 'insular territory integrated by the islands, islets and cays enumerated by the Judgment of the Central American Court of Justice, pronounced on March 9, 1917, and also others which correspond to it according to other sources of International Law.' 13% of constitutions make reference to the sub-divisions of the state but this only identifies the national territory if we can first delineate the sub-national territory. For instance, Article 2 of the Constitution of the Democratic Republic of Congo provides that the Democratic Republic of the Congo is composed of the City of Kinshasa and of 25 Provinces endowed with juridical personality, before listing those 25 Provinces. 6% of constitutions refer in general terms to other laws that determine the national territory. For instance, Article 3.2 of the Constitution of Romania provides that the borders of Romania are established by organic law.

Only 14% of constitutions contain self-sufficient delineations of national territory. in the form of maps (1%),[14] coordinates (2%),[15] narrative descriptions (5%) and comprehensive identification of island territories (7%).[16] Narrative descriptions can be more or less detailed, the Ugandan constitution's 5,000-word description of the national boundary being by far the most impressive.

[12] This reflects a drafting device practiced by the Westminster Parliament for departing colonies, although its use is not limited to those situations.
[13] More than half of these international law references occur in Latin American constitutions.
[14] For instance, Article 2 of the Cambodian Constitution refers to the 1/100,000 scale map made between the years 1933-1953, and internationally recognized between the years 1963-1969.
[15] For instance, Article 2 of the Tuvalu Constitution refers to all islands, rocks and reefs within the area bounded by—a. the parallel 05°S; and b. the meridian 180°E; and c. the parallel 11°S; and d. the meridian 176°E.
[16] 16% of constitutions make some reference to islands as part of the territory, but only 7% identify all or nearly all the national territory through the identification of islands, two of which also use coordinates: Saint Vincent and the Grenadines, and Samoa. The figure of 14% avoids double-counting those state constitutions.

The puzzle of constitutional silence on territory

Why, given that constitutions explicitly and implicitly presuppose a clear understanding of national territory, do so few provide any self-sufficient and clear delineation of national territory? In this section, I canvas six possible explanations. Although none is successful, most shed some light on territory. First, perhaps territory is not a question of where laws *should apply* but rather simply a question of where laws *are applied*. The territory of a constitutional order is wherever its officials happen to be in *de facto* control. This account may suffice for those who need to navigate their way through constitutional orders. However, it fails to explain the perspective of the officials of the constitutional order who apply the law in a limited geographical area because they believe they are under an obligation to do so. If officials did not believe territory to be normatively relevant to their actions, there would be no unity to their actions and therefore no practice of control that non-officials could assess. Territory is not simply the geographical area in which laws happen to be applied but is an aspect of the laws themselves. Maier captures this dimension of territory when he observes that 'territoriality does not present itself apart from the qualities of politics or economics of social connections that are organized with respect to their spatial extent. We ascribe territorial qualities to social and political organizations to make them function.'[17] If laws are normative, legal territoriality is normative.

Perhaps territory is specified in constitutional laws that operate below the level of the master-text constitution. Although the Japanese Constitution does not delineate the national territory, in 2009, the Diet amended the Act on Special Measures for the promotion of the resolution of the Northern Territories issue (Act No. 85 of August 31, 1982) to provide that 'the Northern Islands are an inherent part of our country.'[18] However, such sub-constitutional laws could not be legally capable of expanding or contracting the scope of the constitutional order as silently envisaged by the constitutional master-text.

If the state—rather than the constitution—is the paradigmatic concept of public law, then perhaps constitutional silence follows because a constitution is merely the creature of a state, limited in geographical application to the territory of that state. The *Staatslehre* tradition identifies three fundamental elements in the

[17] Charles S Maier, ONCE WITHIN BORDERS: TERRITORIES OF POWER, WEALTH, AND BELONGING SINCE 1500 6-7 (2016).
[18] These islands are under the control of Russia. I am grateful to Prof Satoshi Yokodaido and Prof Heijime Yamamoto for insights into territorial issues within Japanese constitutional law.

concept of the state: territory, ruling authority and people.[19] However, the territory of a state is a function of the geographic scope of the rules of that state. Therefore, even if we shift our focus from constitutions to states, we still need an account of the territorial dimension of laws.

Perhaps constitutional silence on the identification of territory follows from the fact that national territories are determined by international law? Kelsen recognises that for a norm to be valid 'means always that it is valid for some specified space and time….'[20] At the apex of the chain of validity lies the historically first constitution, the validity of which cannot be traced to a pre-existing norm. Since a norm can only derive its validity from another norm, Kelsen presupposes a further norm (the 'basic norm') in order to give objective validity to the norms of the constitutional order.[21] International law and national law can only *both* be valid sets of legal norms if they are non-contradictory: they therefore must be validated by the same basic norm. This monistic construction of national and international law contains an international law norm to the effect that a government is the legitimate government if it exerts effective control over the population of a certain territory, independent of other governments.[22] Even if national law does not explicitly recognise this norm, as Kelsen requires,[23] it would necessarily be the limit to the territorial scope of national law. However, the attractiveness of this position is undermined by the narrowness of Kelsen's perspective. Kelsen's theory is neither a normative account of how legal officials should behave nor a factual account of how legal rules have come into existence. Instead, it is simply an epistemological account of how certain subjective facts can be described as objectively valid norms. Since Kelsen is not claiming that international law actually determines the scope of national territory, the theory does not of itself provide a convincing explanation for constitutional silence.[24]

Perhaps the many examples of states ceding or exchanging territory by international treaty provide different support for the claim that territory is a function of international law. The dependence of this argument on the actions of states recognised in international law, however, is problematic, since effective

[19] Martin Loughlin, FOUNDATIONS OF PUBLIC LAW chapter 9 (2010).
[20] Hans Kelsen, PURE THEORY OF LAW (Translation from the Second (Revised and Enlarged) German Edition by Max Knight) 12 (1967).
[21] Ibid 200.
[22] Ibid 214-5.
[23] Ibid 337-8.
[24] It is possible that the far higher prevalence of references to international law in Latin American constitutions reflects an internalisation of Kelsen's theory as a conceptual rather than epistemological account.

control of territory is the most important—if no longer the only—criterion in determining whether an entity is a state.[25] Since territory is prior to the notion of state, it must be possible to identify territory without reference to the actions of states.

Finally, perhaps there is no constitutional silence. A constitution identifies the geographical scope of the constitutional order simply by presenting itself as the constitution of an already known geographical entity. However, this raises the question of how we know where the boundaries of a country are. Apart from islands, [26] it seems unlikely that any common understanding of continental subdivisions could arise from wholly non-political understandings: the lines drawn on a map are not pre-political facts of the natural world. A textual geographic referent is not sufficient on its own to identify the territorial scope of a state or constitutional order; that textual referent itself depends on observed practices of law application or political control for its own meaning.

These strategies all fail to present a convincing concept of territory and therefore, absent some conceptual misunderstanding on the part of constitutional drafters, could not motivate any decision to maintain constitutional silence on territory. However, they point to parts of the answer. Kelsen is correct to note that norms are valid for a specified place. The *Staatslehre* tradition is correct to direct our attention away from constitutions. Official practice is critical to territory while the actions of states in international law are relevant to the precise shaping of boundaries. We must conceptualise territory as a normative concept dependent on practices of political control or law-application.

Territory and conventional rules

Territory is a normative, rather than factual, concept. In the same way that normative statements have three different senses, so too do territorial statements.[27] When we say that the territory of state A is geographic area Z, we could mean (i) that state A claims that its legal system applies in Z, (ii) that the legal system of state A justifiably applies in Z, or (iii) that the legal system of state

[25] James Crawford, THE CREATION OF STATES IN INTERNATIONAL LAW 56 (2006).
[26] This may explain why 16% of constitutions list their island territories: it is easy to do so.
[27] This follows Joseph Raz's account of norms and authority. See generally Joseph Raz, PRACTICAL REASON AND NORMS (2d ed 1990). Raz does not, however, accept that territory laws are normative, a point to which I shall return below.

A is generally accepted as the law within Z. These statements may be simultaneously true: state A may justifiably claim Z as its territory, that claim being generally accepted and therefore effective within Z. However, the statements need not simultaneously be true: a claim to territory might be unjustified or ineffective or both. There might also be conflicting territorial claims about the same geographical space; some people might accept one territorial claim, while other people might accept a rival territorial claim. Each claim is, on its own terms, exclusive. Although B may accept that the legal system of A currently applies in Z, B cannot *both* claim Z as its own territory *and* accept that A's claim to Z is justified. This analysis provides a better solution to the issue faced by Kelsen. If we conceive of legal rules as social norms or claimed norms rather than justified norms, then there is no need for all norms to cohere and no need for a hypothesised basic norm to reconcile all rules of national law and international law.[28] The analytical distinction between claimed territory and effective territory is central to a satisfactory understanding of the relationship between law and geographical space.

One way to explain the territorial specificity of law would be to treat each law as containing a clause (explicit or implicit) limiting its geographic scope. Jeremy Bentham took something akin to this approach, holding that every law contains within it a set of complete conditions about its applicability.[29] The difficulty is that this departs considerably from our general understanding of law, and is analytically unhelpful. [30] Rather than conceptualise every law as including a complete statement of all conditions relevant to its application, it is better to understand some laws as modifying the applicability of other laws. Applying this method of individuation to territory, Raz maintains that there is one law 'determining the territorial sphere of validity of most of a country's law.'[31] Most, if not all, legal systems have laws that confer some form of extra-territorial jurisdiction and establish some conflicts of law rules. Each of these laws can be understood as altering the default geographical scope of validity of another law. But each of these laws must itself have a geographical scope (as distinct from the geographical scope it confers on other laws). This is the same default geographical scope as all

[28] This develops very slightly Raz's argument in Joseph Raz, *Kelsen's Theory of the Basic Norm*, THE AMERICAN JOURNAL OF JURISPRUDENCE 94 (1974).
[29] *Introduction to the Principles of Morals and Legislation* in Jeremy Bentham, A FRAGMENT ON GOVERNMENT WITH AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 429.30 n.1 (1823).
[30] Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE LAW JOURNAL 823, 830, 832 (1972).
[31] ibid 835.

others laws of its own legal system. What determines that default geographical scope?

A posited constitutional law could claim a particular geographical scope for all laws, including itself. However, this would be regressive because such a constitutional claim could have no effect unless it were first accepted within that geographical area that the constitution had the authority to make such a claim. The law that establishes a legal system as a geographical (rather than abstract and disembodied) phenomenon depends on acceptance rather than having been posited. An adaptation of HLA Hart's account of ultimate rules of recognition explains how the territorial scope of constitutional orders depends on acceptance.

Wherever there is a legal system, there is also an ultimate rule or rules of recognition that are taken to impose duties on legal officials within that system to recognise certain normative propositions as valid laws of the legal system.[32] Those duties reflect criteria that are likewise reflected in rules of change that empower officials to make new laws. Thus Hart's canonical statement of an ultimate rule of recognition—whatever the Queen enacts in Parliament is law—in fact states a criterion that is reflected in a power-conferring rule of change (the Queen in Parliament may change the law) and a duty-imposing ultimate rule of recognition (legal officials are under an obligation to apply as law whatever the Queen in Parliament enacts). Hart does not explicitly consider territory in this context, but this ultimate rule of recognition must be geographically limited: legal officials *of this system* must apply whatever the Queen in Parliament enacts as law *in the geographical area of Great Britain and Northern Ireland*. This is consistent with Raz's view that every legal system has one territory law. Raz argues that this law is not a norm since it does not guide behaviour directly, but rather indirectly through its logical relations with other laws that are norms. It is better, however, not to hypothesise a non-normative territory law but rather to view a geographical referent as an essential component of the ultimate rule of recognition. An ultimate rule of recognition could not validate any embodied legal system without this geographical referent; territory is therefore normative because it is an essential aspect of the ultimate rule of recognition, which is itself normative.

[32] This is an account of Hart's theory of the ultimate rule of recognition, but it follows a number of others in ironing out some of the wrinkles in that theory. For a particularly useful account, see Scott Shapiro, *What is the Rule of Recognition (and Does it Exist)?*, in THE RULE OF RECOGNITION OF THE US CONSTITUTION (Matthew Adler and Kenneth Himma eds, 2009).

The canonical formulation of an ultimate rule of recognition can be misleading since, in Hart's own words, ultimate rules of recognition are seldom formulated but rather used. As social rules, they derive from the geographically located practice of legal officials recognising normative propositions as law with reference to certain criteria. The precise way in which official practice is relevant to ultimate rules of recognition is the subject of much debate. In his posthumously published postscript to *Concept of Law*, Hart accepted that social rules were instances of conventional (rather than merely concurrent) morality.[33] It is not simply that the legal officials share a common practice; the fact of the common practice is itself taken to provide a reason for the practice.[34] There is an ambiguity here as to whether 'reason' means motivating consideration or justified normative reason.[35] In respect of law-recognition, it seems likely that each official must at least be motivated by the practice of other officials to behave in the same way: a group of officials would not coincide on precisely the same location for borders if they did not have regard to what other officials were doing and had been doing. Some officials might be normatively motivated by the practice of other officials, perhaps for reasons of consistency or the perceived benefit of a convention that can solve coordination problems. Some officials might just play along to be part of the group. As an empirical matter, it may be impossible to discern whether particular officials view the shared practice as itself normatively significant. However, it seems unlikely that the shared practice of recognition would get off the ground without at least some officials believing the practice of officials to be normatively significant.

We can enhance our understanding of the geographical referent in the ultimate rule of recognition through attention to the different senses of territory as a normative concept considered above. The fact that legal systems and constitutional orders are geographically limited is not a happenstance but rather is explained by the acceptance of a territorial norm by legal officials. That territorial norm consists of the conventional practice of the officials themselves and reflects the geographical spread of the officials who share the same conventional practice. We can extrapolate from this practice a territorial claim: an asserted moral obligation on officials in a specific geographic area to apply the laws of a specific legal system within that area. (The moral justification of this practised and claimed territorial rule is a separate question.) An important implication of this is

[33] HLA Hart, *supra* note 1, 256.
[34] Ronald Dworkin, TAKING RIGHTS SERIOUSLY 53-4 (1977).
[35] See, for instance, George Letsas, *The DNA of Conventions*, 32 LAW AND PHILOSOPHY 1 (2013).

that a legal system cannot, through its ultimate rule of recognition, claim a territory greater than the geographic area in which the ultimate rule of recognition is accepted. No ultimate rule of recognition extends beyond the geographical range of the officials whose practice constitutes the rule. It follows from this that the only way a legal system can claim territory that it does not control is through a posited law.[36] Different constitutional orders can—through their posited laws—make competing territorial claims to the same geographic area. Those territorial claims might in turn compete with claims that are made through international law.

Constitutional non-silence on territory

It may be helpful to recap the steps of the argument using the language of constitutionalism. Constitutional orders are not disembodied phenomena but instead apply to or exist within discrete geographic areas: they are territorial. Territory is a normative concept and can be understood in three different, though related, senses: claimed territory norms, effective territory norms, and morally justified territory norms. Effective territory norms arise through conventional ultimate rules of recognition that necessarily contain a geographic referent. Because these rules are constitutive of the legal system, they can be characterised as silent constitutional laws. Through their existence, they are effective territory norms; through their structure as rules, they are claimed territory norms. Where a constitutional order has a master-text constitution, there is a practice of officials that instantiates and accepts a silent constitutional rule (ultimate rule of recognition) in the following form: 'legal officials of area X must apply [the constitution of X / whatever constitution is enacted by the people of X] as law in the geographical area of X.' This explains why most master-text constitutions explicitly do not textually delineate the national territory. Posited constitutional rules can only have force in the context of a silent constitutional rule that founds the legal system in a geographically limited area: a posited territory rule is therefore *both* unnecessary *and* ineffective to determine the scope of national territory.

Although this explains why most constitutions do not attempt to delineate their territory, it fails to explain why 48% of constitutions do attempt some, although

[36] Of course, officials within a legal system could choose to articulate territory claims through public speeches, etc, without deciding to make those claims through the legal system.

often referential, delineation. The analysis thus far would suggest that such claims are either otiose or ineffective. However, if we consider these written territory laws not as attempts directly to determine territory but rather as indirect engagements with the geographical referent in the ultimate rule of recognition, they begin to make sense. Viewed through this lens, there are three purposes that written territory laws can achieve.

First, they can clarify and stabilise the scope of that geographic referent. Social rules lack precision, both as to their content and their scope. Posited territory-laws can play an important clarificatory role; they do not take the place of conventions but rather fix and stabilise the meanings of those conventions. In this regard, they perform a role similar to the judicial recognition of constitutional conventions in jurisdictions such as Canada. Vermeule speaks of judicial recognition of conventions as providing a focal point for cooperation by political actors. In order for a convention to come into existence, A must know how B will act and B must know how A will act. Furthermore, B must know that A knows how B will act, and so on. Otherwise, behaviour will not converge. Judicial recognition is one way of ensuring this mutual knowledge and alignment of expectations.[37] Posited territory-laws similarly provide clarity as to what the conventional territory-law is. Even rather vague delineations can perform this clarificatory function. The references to national territory on an earlier fixed date, to general rules of international law, to subordinate laws and to subdivisions, while not sufficient to delineate the territory, all fix the meaning of the convention in a way that is immune from the normal incremental development of conventions. Crucially, however, the posited territory law cannot change the convention and only has purchase because it is consistent with the slightly vague convention.

Second, posited territory laws can contract the scope of national territory. Where an ultimate rule of recognition is accepted in a given area, the officials will accept the authority of validly posited laws. Therefore, a posited law reducing the scope of the national territory would be valid at the moment of enactment throughout the territory and would continue to be valid in the remainder of the territory. The Portuguese Constitution may provide an example of this. Whereas the Constitution of 1933 listed Portugal's territory as including specified areas in Africa, Asia and Oceania, Article 5.1 of the Portuguese Constitution of 1976 provides that 'Portugal shall comprise that territory on the European mainland which is historically defined

[37] Adrian Vermeule, *Conventions in Court*, 38 DUBLIN UNIVERSITY LAW JOURNAL 283 (2015).

as Portuguese, and the Azores and Madeira archipelagos.' This constitutional change may, however, have reflected rather than prompted a contraction in national territory.

The third purpose of posited territory laws derives from the expressive function of constitutional laws. One of the possible functions of written constitutional laws is to express values rather than directly alter people's behaviour.[38] In circumstances where part of the national territory is contested, it becomes even more important to express the claim that the contested area forms part of the national territory. Indeed, where the contested area does not *de facto* form part of the national territory, such a legal claim can *only* be made through a posited law. Consistent with this analysis, we tend to see explicit delineations of significant territory where it is contested. For instance, Article 1 of the Transitional Provisions to the Argentinian Constitution provides that the Argentine Nation 'ratifies its legitimate and everlasting sovereignty over the Malvinas [Falkland], South Georgia and Sandwich Islands … because they are an integral part of the National territory.' The Preamble of the Constitution of China (1982) records that Taiwan is part of the sacred territory of the People's Republic of China. Article 3 of South Korea's Constitution (1982) states that the territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands. The constitution of North Korea is less explicit in claiming authority over the whole of the Korean peninsula. Article 1 provides that North Korea is an independent socialist state representing the interests 'of all the Korean people.' This asserts a right to speak on behalf of all Koreans, which may equate to a territorial claim over South Korea. However, the constitution mirrors that of South Korea in referencing the need, in both its Preamble and Article 9, for reunification. Article 2 of the Constitution of Ireland, prior to the Northern Ireland peace settlement in 1998, provided that 'The national territory consists of the whole island of Ireland, its islands and the territorial seas.'

Even where the state controls the national territory, it can be attractive formally to express the claim to the contested area. The Preamble of the Serbian Constitution (adopted in 2006) records that the Province of Kosovo and Metohija is an integral part of the territory of Serbia. Article 1 and the First Schedule of the Indian Constitution list all of the states and territories of India, including the territory which immediately before the commencement of this Constitution was

[38] See Cass Sunstein, *On the Expressive Function of Law*, 144 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 2021 (1996).

comprised in the Indian State of Jammu and Kashmir.[39] Article 122 of the Estonian Constitution provides that the land boundary of Estonia is determined by the Tartu Peace Treaty of 2 February 1920 and by other international boundary agreements. In this way, Estonia makes a claim in a way that appeals to the obligations of states under international law.

If we understand the territory of a legal system as flowing from the geographical referent in a conventional ultimate rule of recognition, we can explain both the general constitutional silence on territory and those instances in which territory is specifically delineated. Constitutional master-texts cannot determine their own territorial scope and only have force in the context of an ultimate rule of recognition with a geographical referent. It therefore makes perfect sense for a constitution to be proclaimed as the 'the constitution of X' without making any effort to delineate the geographical scope of X. Nevertheless, mastertext constitutions can play a role in clarifying the territory convention, contracting the scope of the territory and expressing a claim to contested territory. The constitutional delineations of territory in extant constitutions can all be understood as serving one or more of these purposes.

Constitutional rights to secede

This analysis of territory sheds light on the current debate within the academic literature as to whether constitutions should contain a right to secede.[40] Sunstein has argued that the inclusion of any such right is unwise as it is more likely to fuel than quell secessionist sentiment.[41] Although sub-units might have a moral right to secede, polities should not encourage secessionist sentiment as it disrupts normal politics. More recently, drawing an analogy with marriage and divorce, Elkins has challenged the intuition that a right to secede is a centrifugal force. He argues that such a right can 'induce wary actors to experiment with unions with partners with whom they are involved but about whom they harbour some scepticism' and may 'lead to a stronger sense of loyalty that comes from an active, voluntary

[39] Article 17 of the Pakistani Constitution does not explicitly claim Jammu and Kashmir but rather anticipates a decision of the people of the State of Jammu and Kashmir to accede to Pakistan.
[40] The legitimacy of secession and how it relates to values of constitutionalism goes far beyond the scope of this article. For a sophisticated account of these relationships, see David Haljan, CONSTITUTIONALISING SECESSION (2014).
[41] Cass Sunstein, *Should Constitutions Protect the Right to Secede: A Reply to Weinstock*, 9 THE JOURNAL OF POLITICAL PHILOSOPHY 350 (2001).

commitment—a forced renewal of vows of sorts that reinforces commitment.'[42] Jackson has argued for a middle path of constitutional silence, through which constitutions neither explicitly permit nor prohibit secession.[43] This allows constitutional actors, whether courts (such as the Canadian Supreme Court in the *Secession Reference*[44]) or political actors (such as the Westminster and Scottish Governments in advance of the Scottish Independence Referendum), to fashion responses to secessionist movements if and when they emerge. This avoids the risks both of encouraging secession and of designing procedures for secession in the absence of relevant information. In this section, I take up Jackson's challenge to explain the silence around secession as a prelude to clarifying the normative arguments over constitutional recognition of a right to secede.

The lesson of this article is that constitutional silence on issues of territory may not simply be an open question of drafting preferences but rather stems from some of the deepest features of constitutional orders. Our initial focus should be on these silent conventions rather than the master-text constitution. It follows that analogies with marriage and divorce are inapt: the territorial scope of constitutional orders depends not on an agreement between parties but rather on a prior and continuing acceptance of who and where the relevant parties are. For the same reason, secession may result from a gentle slide or sudden rupture in the conventions that underpin the geographical scope of the constitutional order, irrespective of what the master-text constitution says.

All that said, since a posited constitutional law can contract the geographical scope of the constitutional territory, the question of whether a master-text constitution should contain a right to secede is not moot. However, it is better placed in a more general discussion of how master-text constitutions treat territorial change. First, a constitution might outright prohibit any alteration of the national territory, either through a statement that the national territory is indivisible or through a statement that the territory is unamendable. 36% of national constitutions take these approaches.

Second, a constitution might explicitly or implicitly allow for alterations to its territory. 10% of national constitutions allow for territory to be amended either by

[42] Zachary Elkins, *The Logic and Design of a Low-Commitment Constitution (Or, How to Stop Worrying about the Right to Secede)* in NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT (Sanford Levinson ed, 2016).
[43] Vicki Jackson, *Secession, Transnational Precedents, and Constitutional Silences* in NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT (Sanford Levinson ed, 2016).
[44] [1998] 2 R.C.S. 217.

legislation or parliamentary approval of a treaty. 6% of national constitutions allow territory to be amended by a supermajority in parliament, while 9% allow territory to be amended following a referendum. Constitutional silence on territorial amendment probably implies that alteration is permissible either as a legislative competence or by constitutional amendment. None of these approaches amounts to a right to secede, however, since in all cases the power of territorial amendment remains vested with the territory-wide constitutional actors of the existing constitutional order.

Third, a constitution might specifically grant a sub-unit a right to secede. Examples of this are few and far between. Article 4.2 of the Liechtenstein Constitution grants a right to individual communes to secede. Article 74 of the Uzbekistan Constitution grants a right to the Republic of Karakalpakstan to secede based on 'a nation-wide referendum held by the people of Karakalpakstan.' Article 113 of the Constitution of St Kitts and Nevis allows the Legislature of Nevis Island to provide that the Island of Nevis should cease to be federated with the Island of Saint Christopher and accordingly that the Constitution should no longer have effect in the island of Nevis. Article 222 of the Sudanese Constitution required an internationally monitored referendum in which 'the people of Southern Sudan' could vote for secession, which they duly did. Article 39 of the Ethiopian Constitution grants every nation, people and nationality in Ethiopia an unconstitutional right to secede. A two thirds majority in the relevant Legislative Council must vote to secede; the Federal Government then organises a referendum in the relevant area after a three-year cooling off period.[45] Historically, the Constitutions of the USSR and Yugoslavia apparently recognised a right to secede of members and peoples respectively.[46]

These constitutions do not recognise a general right to secede but instead provide rights to secede to specified entities, whether some or all of the existing sub-units of the state. A general right to secede would be inconsistent with the constitutional order's very character as a constitutional order, since it would make the order's authority claims subject to the disapproval of any self-constituting group, no matter how small or temporary. Even a specific right to secede is a significant compromise of the constitutional order's claims to authority. Such a concession casts doubt on the existence of a unitary ultimate rule of recognition of

[45] I am grateful to Assefa Fiseha for assisting with an understanding of the Ethiopian procedure.
[46] Elkins 301-2.

the state, since the officials in a sub-unit are granted an entitlement not to follow that ultimate rule of recognition. Although it is possible that such an entitlement might be conceded as a drafting choice, it is likely that such a compromise would only be made where there is no unitary ultimate rule of recognition in the first place. Instead, two or more sets of officials practise two or more ultimate rules of recognition in different geographic areas that contingently overlap in validating the same constitutional order *for the present*. The relevance of this is that inclusion of a constitutional right to secede may well not be a *choice* on the part of constitution-drafters but instead a necessity based on the underlying ultimate rules of recognition.

Constitutional drafters do face a meaningful choice, however, whether to prohibit secession explicitly. As noted above, 36% of national constitutions either contain a territorial inviolability clause or make the territory unamendable. Absent such clauses, it is probably permissible for constitutional actors subsequently to create a constitutional pathway to secession. The *Quebec Secession Reference* provides the most prominent example of a judicial intervention to this effect.[47] In an advisory opinion, the Canadian Supreme Court held that the Constitution precluded unilateral secession by the National Assembly, legislature or government of Quebec. However, the constitutional principles of democracy, federalism, constitutionalism and the rule of law also required the other participants in the Confederation to recognise the democratic legitimacy of any secession initiative if there were 'a clear majority vote in Quebec on a clear question in favour secession.' In such circumstances, the Constitution would require a negotiation between two legitimate majorities to reconcile the various rights and obligations.

Hirschl comments that the Court's answers were congenial for both federalists and separatists.[48] We cannot assess whether the constitutional process created by the Court would successfully channel a secessionist campaign by Quebec. Nevertheless, the approach can be justified on the basis that a constitutional process is likely to lessen the human suffering often associated with state disintegration.[49] By extension, a mastertext constitution should not preclude the possibility of a constitutional secession process being introduced at a later date. This validates the second half of Jackson's conclusion: a constitution should not be drafted so as to

[47] [1998] 2 R.C.S. 217. The Government also asked questions in relation to the effect of international law. These do not directly concern us here.
[48] Ran Hirschl, *Nullification: Three Comparative Notes*, in Levinson ed. 259.
[49] Zoran Oklopcic, *The Idea of Early-Conflict Constitution-Making: The Conflict in Ukraine beyond Territorial Rights and Constitutional Paradoxes*, 16 GERMAN LAW JOURNAL 658, at 678-9.

prohibit secession as this precludes constitutional actors from developing new constitutional processes should secessionist pressures emerge. A case in point is section 2 of the Spanish Constitution, which refers to the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards. Given this constitutional text, it is unsurprising that the Spanish Constitutional Court has become a principal instrument for the resistance of Catalan independence.[50] Nevertheless, constitutional secession processes are not a panacea: they may prove ineffective simply because they purport to regulate situations in which the very question is their own authority to regulate those situations.

Territorial contestation

Posited constitutional laws play an important role in expressing claims to territory, especially where the territory is not under the *de facto* control of the constitutional order. This expressive role, however, means that constitutions are sites for the escalation of territorial contestation. We saw above how the Japanese Diet enacted legislation that claims the Kuril Islands / Northern Territories as part of Japan, notwithstanding that they are controlled by Russia. In the highly unlikely event that Japan were to amend its Constitution to make such a claim, this would be a significant escalation of the territorial contestation.

Constitutions, however, can also be sites for de-escalation. As noted above, Article 2 of the Irish Constitution used to provide that the national territory consisted of 'the whole island of Ireland, its islands and the territorial seas.' As part of the Northern Ireland peace settlement, a referendum reframed reunification in the following terms: 'the firm will of the Irish Nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island.' The Westminster Parliament enacted the Northern Ireland Act 1998, section 1 of which provides that Northern Ireland will cease to be part of the United Kingdom if a majority of people in Northern Ireland vote to be part of a united Ireland.

[50] Urías, Joaquín: *The Spanish Constitutional Court on the Path of Self-Destruction, VerfBlog*, 2017/4/24, http://verfassungsblog.de/the-spanish-constitutional-court-on-the-path-of-self-destruction/, DOI: https://dx.doi.org/10.17176/20170424-104310.

The constitutional amendments significantly de-escalated territorial contestation. From the Irish perspective, it was the contraction of an expressive claim about constitutional territory. This did not change the geographical referent in Ireland's ultimate rule of recognition: since before the enactment of the 1937 Constitution, it had been accepted that the people in the 26 counties of southern Ireland could adopt a constitution with actual effect in that part of Ireland. Although the people of Northern Ireland have been given a measure of territorial control, they have only two choices: continuation in the United Kingdom or reunification with Ireland. Northern Ireland has not been granted a right to secede, as such. In political terms, the peace settlement can only be welcomed for its focus on the interests of those who inhabit the contested territory, rather than the claims of those who live elsewhere. However, this focus concedes the territorial legitimacy of Northern Ireland, a concession that Dublin could not have made when Northern Ireland was carved out in 1922, or even when the constitution was drafted in 1937. As with much else about territory, nothing succeeds like longevity.

Conclusion

In this paper, I have used the concept of constitutional silence to argue that the territorial scope of legal systems is a matter of constitutional law but cannot be directly determined by constitutional text. Instead, legal systems depend on an ultimate rule of recognition that necessarily contains a geographic referent, reflecting the geographic range of the officials whose actions constitute the ultimate rule. The necessary inclusion of that geographic referent means that the ultimate rule of recognition, once conceived as a normative proposition, determines the territorial scope of its legal system. This conclusion makes sense of the fact that most national constitutions explicitly presuppose a clear understanding of their national territory without making any attempt to define what that territory is. This theory also explains textual delineations of national territory as attempts to clarify the geographic referent of the ultimate rule of recognition, contract the scope of national territory, or express a territorial claim. This analysis illuminates the ways in which written and silent constitutional law can interact, providing a framework for the analysis of deeply contested issues in public law, such as secession and territorial disputes.

This analysis of constitutional territory provisions has implications for our understanding constitutional silence more generally. Some constitutional silence is inevitable in constitutional orders. Constitutional texts are not self-executing but instead depend on foundational decisions reflected in unwritten conventional rules.[51] Given the role that these rules play in constituting the constitutional order, it is not unreasonable to characterise them as *constitutional rules*. However, the silence of conventional constitutional rules differs significantly from other instances of constitutional silence. Where constitutional silence consists of implicit constitutional norms, this empowers those vested with the interpretative authority to render those norms explicit. Where constitutional silence consists of an absence of constitutional norms, this empowers those political actors most likely to be constrained by constitutional norms. However, where constitutional silence is a case of conventional rules, different considerations arise. Because they cannot be deliberately changed, conventional constitutional rules constrain the constitutional actors—both judicial and political—whose continuing actions preserve the constitutional rule. In other words, the constitutional silence of conventional rules is not the same as constitutional absence. An understanding of this interaction between silent and posited rules enables new ways of grappling with some of the most fundamental challenges that confront constitutional orders.

[51] This article has focused on territory but similar points could be made about the identity of the people assumed by most constitutions to hold the authority to make constitutions.