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The Legitimacy of Informal Constitutional Amendment and the “Reinterpretation” of Japan’s War Powers

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Abstract

The government of Japan has purported to reinterpret the famous war-renouncing provision of the Constitution in a controversial process that deliberately circumvented the formal amendment procedure. This article argues that these developments should be of great interest to constitutional law scholars in America because they bring into sharp focus issues that remain underdeveloped and unresolved in the debate over informal amendment. Theories on informal amendment suggest that there are some constitutional changes that exceed the reasonable range of normal interpretive development, but which are not implemented through formal amendment procedures. The existence, scope, and legitimacy of such informal amendments remains hotly contested.

This article focuses on the key issue of legitimacy. It uses the Japanese reinterpretation as the context in which to explore the relationship among three suggested factors affecting the legitimacy of informal amendment, namely: the public ratification of the change; the intent of the agents of the change; and the passage of time. It also suggests a new way of conceptualizing the relationship among authority, legitimacy, and time in thinking about informal amendments, in that the level of constitutional authority and degree of legitimacy that may be enjoyed by contested changes will begin to diverge with the passage of time.

The article argues that deliberate attempts to effect significant constitutional change in a manner calculated to circumvent the formal amendment process—such as the Abe government’s reinterpretation effort in Japan—are *prima facie* unauthorized and illegitimate at the time they occur. Moreover, only the most explicit and deliberate expressions of popular sovereignty can serve to legitimate such changes. But while such deliberate informal change will always remain unauthorized, it may be legitimated with the passage of time. I argue that this legitimation may, and should, take longer than for less contested forms of change.

KEYWORDS: Informal Amendment, Japanese Constitutional Reinterpretation

ARTICLE

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*Craig Martin**

ABSTRACT

The government of Japan has purported to reinterpret the famous war-renouncing provision of the Constitution in a controversial process that deliberately circumvented the formal amendment procedure. This article argues that these developments should be of great interest to constitutional law scholars in America because they bring into sharp focus issues that remain underdeveloped and unresolved in the debate over informal amendment. Theories on informal amendment suggest that there are some constitutional changes that exceed the reasonable range of

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INTRODUCTION

There is a vibrant debate in American constitutional law scholarship regarding the existence, nature, and legitimacy of so-called informal amendments.¹ The definition of the concept of “informal amendment” is itself an important subject in the debate, but we may start with the idea that the term refers to a form of significant change to the understanding and operation of a constitutional provision that is neither a formal amendment nor a normal

1. See, e.g., BRUCE ACKERMAN, WE THE PEOPLE, VOL. 2: TRANSFORMATIONS (1998); Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) > 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change* [hereinafter Levinson, *How Many Times Has the United States Constitutions Been Amended?*], in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 13 (Sanford Levinson ed., 1995) [hereinafter RESPONDING TO IMPERFECTION]; Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, in RESPONDING TO IMPERFECTION 89; Stephen Griffin, *Constitutionalism in the United States: From Theory to Politics*, in RESPONDING TO IMPERFECTION 37; Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in RESPONDING TO IMPERFECTION 237 [hereinafter Lutz, *Toward a Theory - Responding to Imperfection*]; David R. Dow, *The Plain Meaning of Article V*, in RESPONDING TO IMPERFECTION 117; Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in RESPONDING TO IMPERFECTION 275; Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009); Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165 (2014); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L. J. 408 (2007); Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155 (1997); Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to Strauss*, 77 Tul. L. Rev. 247 (2002); Rosalind Dixon, *Updating Constitutional Rules*, 8 SUP. CT. REV. 319 (2009); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001); WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010); Randy E. Barnett, *We the People: Each and Every One*, 123 YALE L. J. 2576 (2014); Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1062 (2014); Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Democratic Constitution*, 55 DRAKE L. REV. 925 (2007).

interpretive development. Formal amendments are, of course, those changes to the constitution initiated and approved in accordance with the established constitutional amendment procedure. Interpretive developments are the incremental changes in meaning that are typically the result of judicial decision-making. Informal amendment refers to changes in meaning or understanding that are arguably so dramatic and relatively sudden that they are impossible to reconcile with the text, purpose, and historical operation of the provision in question (according to most accepted theories of constitutional interpretation), and therefore will not be accepted by most jurists as a “normal” interpretive move.² Thus, the argument goes, such a change is better characterized as being a form of amendment to the constitutional system rather than an interpretive development, even though it is not a formal amendment and it creates no change to the underlying constitutional text.³

This standard formulation of informal amendment obviously implicates much broader debates in constitutional law. These include, particularly, the competing theories of valid constitutional interpretation and related arguments over the question of whether, how, or to what extent the constitution can be said to legitimately change through interpretation by the judiciary or by other branches of government.⁴ There are thus differences among the theories of informal amendment which mirror differences among theories of constitutional interpretation. But the theories on informal amendment largely arise in response to the felt need to explain, and for some theorists to legitimate, the relatively dramatic changes to the American constitutional system that were not promulgated by way of a formal amendment in accordance with the Article V process, and which cannot be reconciled with most scholars’ notions of legitimate interpretive change.⁵ While the different theories of informal amendment share this common purpose, supporters of each differ in their explanations for the modalities and process of change. They differ both descriptively in terms of what changes qualify as an

2. Levinson, *How Many Times Has the United States Constitution Been Amended?*, *supra* note 1, at 14-15.

3. *Id.*

4. *See infra* Section I.A.

5. Sanford Levinson, *Imperfection and Amendability*, in *RESPONDING TO IMPERFECTION*, *supra* note 1, at 7.

informal amendment and how they are said to come about, and normatively in terms of whether or how such change might be considered beneficial or legitimate.⁶ And of course, there are critics who reject the very notion of informal amendments on both descriptive and normative grounds.⁷

Even if we take these theories of informal amendment seriously and on their own terms, however, we are nonetheless left with profoundly difficult questions, some of which remain somewhat under-theorized and unresolved. These questions are both descriptive and normative in form, and while some of them may be impossible to resolve without first resolving the broader debates about interpretation,⁸ some of them may be less intractable. In particular, one question that seems insufficiently explored is whether such informal amendments are legitimate, and more importantly, how we are to determine if any given change is indeed legitimate.

This article explores the question of the legitimacy of informal amendments. It does so by examining the recent efforts to “reinterpret” the famous war-renouncing provision of the Japanese constitution. This attempt to significantly change the meaning of the provision was undertaken by the Japanese cabinet in a very deliberate and calculated manner to circumvent the formal amendment procedure, and even to minimize legislative involvement and public participation in the process. The legitimacy of the attempted reinterpretation is the subject of considerable controversy within Japan, though the change may be in the process of becoming a *fait accompli*. In exploring this reinterpretation effort through the lens of informal amendment theory, the article identifies and analyzes three features of informal amendment as important factors for determining the legitimacy of any given change. In doing so, the article reconceptualizes the contours of informal constitutional change, exploring not only the relationship among these three factors of

6. See *infra* Section I.B.

7. See *infra* Section I.B.

8. The exact criteria for identifying informal amendments, for instance, will obviously depend in large measure upon what theory of constitutional interpretation one embraces, and so it would be difficult to answer questions about the exact border between interpretive change and informal amendment with any degree of certainty or precision, until debates over interpretation are settled. That is not likely to happen any time soon, and yet these remain important questions if we are to consider theories about informal amendment as useful in identifying different forms of constitutional change.

legitimacy, but also the distinction and relationship between the concepts of legitimacy and authority in the context of constitutional change.

The first of the three factors that determine legitimacy, is the extent to which decision-makers within government are deliberately trying to bring about the specific change, in an intentional circumvention of the formal amendment procedure. The second is the extent to which there are explicit expressions of public will in favor of the change. And the third is the passage of time. With respect to the first factor, what I will call “deliberate agency,” the question is whether the claims to legitimacy of any particular informal amendment are (or ought to be) affected by the extent to which it is brought about by political actors who understand that the change constitutes an amendment, but nonetheless deliberately circumvent the formal amendment process in executing the change. This is in contrast to changes that might arise more organically through the complex dynamics of the law and policy making process among agencies and between the political branches of government, and are thus the product of the unintentional and unpredictable operations of a system.⁹ Put simply, does informal amendment theory accept as legitimate the deliberate circumventions of the formal amendment procedure? I will argue below that it should not.

The second factor is that of popular will. To the extent that informal amendment theory has addressed the issue of legitimacy, the debate has tended to focus on the role of popular sovereignty and expressions of public will. Bruce Ackerman, one of the driving forces of informal amendment theory,¹⁰ as well as Akhil Amar,¹¹ make explicit claims that informal amendments ratified or initiated by the people are legitimate precisely because they reflect an expression of popular sovereignty.¹² These claims are contested.¹³ But I will explore them here within the context of the Japanese developments, and examine the relationship between popular sovereignty and the

9. On system effects in the constitutional context, see Adrian Vermeule, *Forward: System Effects and the Constitution*, 123 HARV L. REV. 4 (2009).

10. See ACKERMAN, *supra* note 1.

11. See Amar, *supra* note 1.

12. See *infra* notes 79-86 and 108, and accompanying text.

13. See, e.g., Dow, *supra* note 1. For details see *infra* notes 99-101 and accompanying text.

separate factors of deliberate agency and time as a basis for legitimacy. I will argue that while Ackerman's theory cannot be applied to legitimate the Japanese experience, the reinterpretation in Japan reveals insights about the value of Ackerman's theory that have been missed or under-appreciated in some of the critiques of his model. Specifically, while the critics may be correct that explicit expression of popular consent may not be a sufficient condition for the legitimation of deliberate informal amendment, they perhaps miss the point that such expressions of popular will ought to be a necessary condition.¹⁴

The third factor is time. By the passage of time, I mean to focus on the fact that deeply contested constitutional changes, including informal amendments widely considered to be entirely unauthorized and illegitimate at the time they are undertaken, will gradually become legitimate over time, so long as the change can be sustained and entrenched.¹⁵ Thus, for instance, if some of the moves during the New Deal were illegitimate at the time (about which there is of course continued and vigorous debate), most of us will agree that with the passage of time they became legitimate in practical terms.¹⁶ This is due to the layers of law, policy, and precedent that are constructed upon the foundation of these changes. But there remains the question of whether such *ex post* recognition or acceptance could ever ground an argument for legitimizing *ex ante* the kinds of political or institutional developments that we are here calling informal amendment. In other words, can one look to examples such as the New Deal changes as precedents for purposes of legitimizing informal constitutional changes before or at the time they are effected? I will argue that such time-legitimated changes cannot serve as precedents for the *ex-ante* legitimation of informal amendments, particularly when such changes are the result of deliberate circumvention of the amendment process rather than the unconscious

14. See *infra* Section III.C.

15. Walter Murphy has turned his attention to the issue of time in the context of informal amendment, but does not focus on this particular aspect. See Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, in RESPONDING TO IMPERFECTION, *supra* note 1, at 163.

16. Levinson points out that even Justice Bork implicitly conceded this point even as he argued against the validity of informal amendments. See Levinson, *How Many Times Has the United States Constitution Been Amended?*, *supra* note 1, at 35 (citing ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 215 (1990)).

product of dynamic systems. Be that as it may, however, the recognition of the effects of time should also serve to galvanize into action those who believe a change is illegitimate, for time will be of the essence.¹⁷

What is more, in thinking about the relationship between time and legitimacy, we begin to understand that the passage of time is one factor that separates authority and legitimacy. That is to say, the legitimacy of any change is derived from and is almost synonymous with the constitutional authority for such change, at the time it is undertaken. But over time an unauthorized change may gain *de facto* legitimacy, while its lack of theoretical authority remains constant.¹⁸ This leads to a possible reformulation of the relationship among authority, legitimacy, and time, which in turn leads to insights into the role that deliberate agency and popular will might play in determining legitimacy. I will suggest that the three factors—deliberate agency, popular will, and time—need to be understood separately as distinct criteria for legitimacy, but also collectively, in terms of how they relate to one another in the determination of legitimacy. And in particular, I will argue that this insight into the relationship between time and legitimacy grounds both a descriptive hypothesis and a normative argument that deliberate informal amendments such as that undertaken in Japan, in the absence of any ratification by explicit popular consent, will and ought to take longer to be legitimated than other forms of change.¹⁹

The developments in Japan may be viewed as a case study of informal amendment that is unfolding in real-time. In order to properly use this case study, the article takes some time to explain the Japanese events in some detail.²⁰ The salient points, however, are that the Japanese government under Prime Minister Shinzō Abe has been engaging in an effort to relax the constitutional constraints on the use of military force.²¹ Article 9 of the Japanese Constitution famously renounces war as a sovereign right of the nation and prohibits the

17. *See infra* Section III.C.

18. It has been pointed out that one could reverse this relationship, depending on how one conceives of legitimacy and authority—that is to say that a change may become authoritative in practical terms over time, while we might continue to insist that it lacked, and continues to lack, formal legitimacy. Thanks to my colleague Freddy Sourgens for this point.

19. *See infra* Section III.C.

20. *See infra* Part II.

21. *See infra* Section II.C.

threat or use of force.²² The government quite deliberately sought to implement what it acknowledged to be a significant change to the understanding of Article 9, in a manner that was calculated to circumvent the formal amendment procedure.²³ The government implemented the reinterpretation through the issuance of a Cabinet Decision,²⁴ based in part on the recommendations of an *ad hoc* extra-constitutional body of so-called experts, and with little public input or legislative debate. It then committed the nation to the reinterpretation through international agreements with the United States. Only after all of this did the government submit legislation to the Diet (the legislature) that would revise national security laws in conformity with the reinterpretation—but even this did not require a debate on the substance of the reinterpretation itself.

Meanwhile, the government interfered with the independence of government agencies that might oppose the reinterpretation, and tried to suppress media criticism of the moves.²⁵ The entire effort gave rise to ferocious debate and protest within Japan, with tens of thousands of people protesting in the streets of Tokyo and other major cities. The majority of scholarly and professional opinion held the reinterpretation, and the subsequently revised national security laws, to be illegitimate and unconstitutional.²⁶ Yet, despite all of this, the governing party was nonetheless hugely successful in elections for the Upper Chamber of the Diet in July of 2016. The inevitable constitutional challenges to the national security legislation have not yet resulted in any judicial decisions—but they will surely reach the Supreme Court in due course. It is unclear how the Court, which has been traditionally timid and deferential on constitutional issues, will deal with the challenges. The government's effort is thus still very much a work in process and the jury is still out on whether the

22. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 9, para. 1 (Japan). For the full text of the provision, see *infra* note 127 and accompanying text.

23. See *infra* Section II.C.

24. CABINET DECISION ON DEVELOPMENT OF SEAMLESS SECURITY LEGISLATION TO ENSURE JAPAN'S SURVIVAL AND PROTECT ITS PEOPLE (provisional English translation) (July 1, 2014), available at http://www.cas.go.jp/jp/gaiyou/jimu/pdf/anpohosei_eng.pdf (last visited Aug., 2016) [hereinafter CABINET DECISION]. The original Japanese language version is available at: <http://www.cas.go.jp/jp/gaiyou/jimu/pdf/anpohosei.pdf>.

25. See *infra* Section II.C.

26. See *infra* notes 209-14 and accompanying text.

reinterpretation will end up being entrenched, becoming a legitimized change to the Constitution with the passage of time.

These developments provide the constitutional law academy with a striking and potentially important example of deliberate efforts to engage in constitutional change in circumvention of the formal amendment procedure. When examined through the lens of informal amendment theory, the over-arching question presented by the Japanese reinterpretation effort is whether it can be classified, either now or in the future, as nothing more than a legitimate interpretive development, as an informal amendment, or as something else again. I argue below that the reinterpretation of Article 9 cannot be accepted as a normal and legitimate interpretive move—that it was arrived at through an invalid process, and is in any event substantively outside of the reasonable range of possible meanings of the provision when interpreted in accordance with most widely accepted theories of constitutional interpretation.

Moving from this premise I examine the reinterpretation from the perspective of informal amendment theory. Specifically, I focus on the role of deliberate agency, popular will, and passage of time as determinants of legitimacy. The reinterpretation is one of the clearest examples of a government trying to implement significant constitutional change through methods that reflect a deliberate and self-conscious effort to circumvent the formal amendment procedure, and so brings the issue of deliberate agency into stark relief. Japan also provides us with an excellent example of the ambiguity and complexity involved in trying to attribute constitutional meaning to election results following putative informal amendments. It provides support for some of the theoretical criticism of popular sovereignty arguments for legitimacy, but also reveals some of the overlooked value in Ackerman's theories about the relationship between popular sovereignty and the legitimacy of informal amendment.²⁷ In sum, I conclude that the reinterpretation is not legitimate, and that it helps illustrate how and why deliberate agency and public will should be considered in assessing the legitimacy of informal amendments, and why time is of the essence in opposing them.

The article proceeds in three parts. Part I provides an examination of informal amendment theories, focusing on how they

27. *See infra* Section III.C.

treat the question of legitimacy, and in particular how or to what extent the different theories consider deliberate agency, popular will, and the passage of time as factors contributing to legitimacy. Part II provides an explanation of Article 9 of the Constitution of Japan and the efforts of the Japanese government to reinterpret the provision. Part III examines first whether the reinterpretation can be characterized as a normal interpretive development, and then analyzes the reinterpretation as an informal amendment, assessing what it tells us about the factors of deliberate agency, popular will, and time as determinants of legitimacy. In addition to evaluating the legitimacy of the reinterpretation, it examines how we might re-conceptualize the contours of informal amendment and our understanding of the determinants of legitimacy. The article has two audiences in mind: the first being American constitutional law scholars, for whom it seeks to clarify certain aspects of informal amendment theory, and explain the significance of the Japanese example; and the second being Japanese constitutional law scholars, for whom it seeks to provide insights and warnings regarding what American informal amendment theory may say about the legitimacy of the reinterpretation of Article 9.

I. INFORMAL AMENDMENT

This Part explores some of the defining features of informal amendment theory, and in particular those differences among the various explanations of informal amendment that are most salient to the issues of deliberate agency, popular will, and time as factors of legitimacy. But before launching into that examination, it may be prudent to clarify some of the underlying assumptions and premises of this study. As mentioned earlier, because the debate over informal amendment implicates much broader and more fundamental disagreements in constitutional law, it is important to be quite clear, if necessarily brief, about some of the principles and theoretical positions that form part of the foundation for my analysis.

A. Preliminaries - Assumptions and Premises

First, a constitution, as the legal framework that defines the distribution of power and authority within the State, has the dual purpose of both facilitating and making the exercise of political power

possible, and constraining government power in meaningful ways.²⁸ This idea that constitutions constrain the exercise of government power of course reflects the basic democratic rule of law principle that the law applies equally to all, including all branches and agencies of government, and is also a necessary condition for the concept of constitutionally protected individual rights.²⁹ But the idea is also the foundation of the notion that constitutions, or at least some constitutional provisions, serve as pre-commitment devices—that is, mechanisms designed by the drafters to bind future generations of government to specified values, principles, and conduct, particularly in circumstances of crisis or passion in which future governments might be expected to depart from the original vision of the constitution.³⁰ This all may seem rather obvious, yet it bears repeating here, because Prime Minister Shinzō Abe famously remarked in the context of the reinterpretation debate that the idea that constitutions are designed to limit state power was an anachronistic view.³¹ Finally, it should be noted that while binding on future generations of government, liberal democratic constitutions derive some of their legitimacy from the very fact that they can be changed—that they, in effect, delegate some of the drafting authority to future generations through the mechanism of an amending formula.³² At the same time, the amendment procedure is typically difficult, and must be more difficult than the mere passage of laws if the constitution is to fulfill its entrenchment function in any meaningful way.³³

28. Jack M. Balkin, *Constitutional Interpretation and Change in the United States: The Official and the Unofficial*, 14 *JUS POLITICUM* 1, 2 (2015) (constitutions are “frameworks for making politics possible”).

29. We will return to this relationship between constraints and rights, but on this see, e.g., Dow, *supra* note 1, at 136-37.

30. On constitutions as pre-commitment devices generally, see JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979); see also CASS SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 96-101 (2001); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195 (Jon Elster & Rune Slagstad eds., 1988).

31. *Lawyer Group Charges Abe with Constitutional Ignorance*, *JAPAN TIMES* (Feb. 14, 2014), <http://www.japantimes.co.jp/news/2014/02/14/national/lawyer-group-charges-abe-with-constitutional-ignorance/> (“the idea that the Constitution is intended to limit the power of the state is an old-fashioned view held at the time when a monarch was governing the country with absolute power.”).

32. Holmes & Sunstein, *supra* note 1, at 275-76.

33. Dow, *supra* note 1, at 136-37.

The concept of “constitution” here is more than the mere text or documents comprising the written constitution. In the United States (and many other constitutional systems) the actual document looms large in our thinking about the Constitution, and there are times when a focus on the text is necessary;³⁴ however, it is important to recognize that the Constitution in broader terms is best thought of as a system. That is to say, that in addition to any document that comprises the text of a constitution, there is a broader system of principles, jurisprudence, conventions, understandings, and quasi-constitutional statutes that together operate to form what may be called the “constitution-in-practice.”³⁵ And like most systems, it is assumed here that most democratic constitutional systems are dynamic and constantly changing. To say that they are always changing is to recognize the widely accepted idea that there is legitimate incremental change in constitutional meaning through judicial interpretation (recognizing, of course, that this is not accepted by certain strands of originalist theory).³⁶ This is so in part because many constitutional provisions are cast in general language, stipulating standards and principles rather than clear rules, and thus require judgment in interpretation, construction, and the development of doctrine and tests for their future application.³⁷

While there are differing theories of precisely how constitutional provisions ought to be interpreted, most accept that there is some reasonable range of possible meaning for any given provision, and the range of possible meaning under each of those theories overlap to a considerable degree.³⁸ With the passage of time, shifting ideas, and

34. See, e.g., GINSBURG ET AL., *supra* note 1, at 6 (emphasizing that for their study “we do indeed mean the text, specifically the written constitutional charter of independent countries.”).

35. Balkin, *supra* note 28, at 3; Griffin, *supra* note 1, at 38, 44; see also DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129 (2012).

36. For an overview of originalist theories, see, e.g., *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* (GRANT HUSCROFT & BRADLEY W. MILLER EDS., 2011). Not all strands of originalist theory would disagree. See, e.g., Balkin, *supra* note 28, at 3-4, 21-23.

37. Balkin, *supra* note 28, at 2, 6-7.

38. Levinson, *How Many Times Has the United States Constitution Been Amended?*, *supra* note 1, at 17-18; Lutz, *Toward a Theory - Responding to Imperfection*, *supra* note 1, at 241. For a short overview of theories of constitutional interpretation, see JOHN H. GARVEY ET AL., *MODERN CONSTITUTIONAL THEORY: A READER* 91-218 (5th ed. 2004); see also Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22

evolving political and social conditions, the interpretation of those constitutional principles, standards, and constructed doctrines will evolve incrementally in the jurisprudence of the judiciary. Moreover, while the ultimate interpretive move is typically undertaken by the judiciary (at least in those constitutional systems in which there is a strong convention of constitutional judicial review), this process of constitutional change is often driven by the other branches of government, and indeed by political parties and civil society acting through and on the political branches of government. In most instances, however, the judiciary is called upon in the final stage to either ratify or reject the resulting political action, policy, or law.³⁹ In many ways the starting point for any discussion of informal amendment is the idea that this form of interpretive development, occurring within what most would accept as the range of reasonable interpretation for any given provision, is valid and legitimate (with the noted exception of certain strands of originalism).

It is widely accepted that constitutions legitimately change through this process of interpretive development, but there is far less agreement on where the outer limits are for the range of reasonable and legitimate meanings of specific provisions in particular circumstances. Similarly, there is less agreement over what it means when any particular interpretation is widely perceived to have exceeded the limits of legitimate interpretive moves. That some change does exceed this limit is of course the very basis for the theory of informal amendment. But it should be made clear that many scholars and jurists do not accept the idea that putative interpretive moves, or other forms of constitutional change that exceed the legitimate bounds of this valid process of interpretive development, can be properly characterized and normalized as so-called informal amendments.⁴⁰

Many reject the informal amendment claims on descriptive grounds, simply accepting as legitimate interpretation that which

HARV. C.R.-C.L. L. REV. 95 (1987) (arguing that the differences among theories of constitutional interpretation are not as great as commonly thought).

39. Balkin, *supra* note 28, at 7-10. There are, of course, challenges to the idea that the judiciary has the primary role in constitutional interpretation. *See, e.g.*, MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Larry Alexander Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

40. *See, e.g.*, Dow, *supra* note 1; Barnett, *supra* note 1.

informal amendment proponents claim to be extraordinary change requiring special explanation.⁴¹ But more importantly, perhaps, many also reject the claims on normative grounds, even as some of these critics concede that as a descriptive matter significant and unauthorized changes—changes that do exceed the reasonable limits of interpretation—apparently do occur from time to time. I will explore their ideas further below. For some in this camp, however, the idea of informal amendment is bitterly acknowledged as being real, but at the same time the source of a paradox that cripples the very idea of rule of law constitutionalism.⁴² For others it is a theory to be denied, denounced, and rejected precisely because its acceptance would constitute a threat to rule of law constitutionalism.⁴³

While I am sympathetic to several of the normative arguments of the critics of informal amendment theory, in this article I assume that the phenomenon it seeks to explain is real, and that moreover it is an important issue that requires explanation. Certainly in the American context (but not only in the American context) there are changes that are difficult to account for by reference to “normal” interpretive developments. Moreover, efforts to reconcile such changes with our accepted theories of constitutional interpretation can end up weakening the coherence and integrity of those theories, and undermining the normative power of the Constitution. Thus, the article takes the theory of informal amendment on its own terms, and tries to explore the different approaches, explanations, and some unresolved questions about the process, with a view to advancing our understanding of the theory. At the same time, it is worth noting that the informal amendment theories under discussion here, as different as they are in their detail, all share the idea that a constitution itself, as a body of law, provides the framework within which one must consider the idea of constitutional change. This is in contrast to some scholars who argue that one can validly and legitimately think about bringing about constitutional change through the radical change to the socio-political presuppositions from which a constitution initially developed, in total disregard of what the constitutional system itself

41. See, e.g., Sunstein, *supra* note 1, at 279, n.9.

42. See, e.g., Griffin, *supra* note 1.

43. See, e.g., Dow, *supra* note 1.

provides regarding amendment.⁴⁴ I am not here engaging these more radical political theories of constitutional change.

Finally, some preliminary words are perhaps necessary on the question of whether it is proper or feasible to apply this American theory of constitutional law to a Japanese situation; and, similarly, whether it is possible to draw any meaningful lessons for the American theory from a Japanese case study. It is of course widely accepted that the comparative analysis of constitutional law is both valid and fruitful, and there is a growing literature on the topic.⁴⁵ With respect to theories of informal amendment more specifically, most writing in the American academy has been focused on the American constitutional experience. Indeed some aspects of American explanations relate to attributes that are unique to the American system and its history. But the phenomenon it explores is certainly not limited to the United States. Questions as to how far the range of reasonable and legitimate interpretive development extend, and what branches of government can be involved, are not unique. The principles involved are common to most liberal constitutional democracies.⁴⁶ What is more, there are have been other comparative

44. Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION*, *supra* note 1, at 145.

45. See, e.g., *COMPARATIVE CONSTITUTIONAL DESIGN: COMPARATIVE CONSTITUTIONAL LAW AND POLICY* (Tom Ginsburg ed., 2014); MARK TUSHNET, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* (2006); *COMPARATIVE CONSTITUTIONAL LAW* (Tom Ginsburg & Rosalind Dixon eds., 2013); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225 (1999).

46. There are analogous European theories of constitutional mutation that have much in common with informal amendment theory. In particular see the theories of informal constitutional change developed by Georg Jellinek, discussed in Carlos Bernal, *Forward-Informal Constitutional Change: A Critical Introduction and Appraisal*, 62 *AM. J. COMP. L.* 493, 505 n.40 (2014). Similarly, in several of the Commonwealth countries there are forms of constitutional change that might fall within the range of what is here being called informal amendment, such as the creation of “constitutional conventions,” some of which are recognized as legitimate and for which criteria are clearly established. See SIR W. IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 136 (5th ed., 1959) (articulating the seminal test for the establishment of a convention). See Ryan Patrick Alford, *War With ISIL: Should Parliament Decide?* 20 *REV. CONST. STUD.* 118, 123-28 (2015) (reviewing the modern law on conventions, and describing the establishment of a new convention on parliamentary approval of the use of force in the United Kingdom, 2003-14). It might be argued that it is a misnomer to classify such a convention an informal amendment, since the United Kingdom does not have a written constitution, and so no formal constitutional amendment procedure, but the fact that the concept has been adopted in commonwealth countries that do have written constitutions, with formal amendment procedures, arguably makes the process relevant to informal amendment theory. *But see* Richard Albert, *Constitutional Amendment by Stealth*, 60

studies that have examined putative examples of informal amendment in other countries through the lens of American informal amendment theory.⁴⁷ Thus, on both questions of whether the theory is applicable in other contexts, and whether a Japanese case study can provide insights, I would argue that the theory is entirely susceptible to analysis from a comparative law perspective—and for reasons I will explain in more detail below, American scholars and jurists can indeed learn from the Japanese experience. Nor is it inappropriate or inapt to suggest that the theory is relevant to Japan in particular, notwithstanding that the country is governed by a civil law system owing much of its legal tradition to Germany. The reality is that Japanese scholars, lawyers, and jurists increasingly look to American legal theory, jurisprudence, and scholarship in their own legal discourse, even on constitutional law, and thus this form of comparative analysis is not at all unusual in the Japanese context.⁴⁸

B. Theories of Informal Amendment and the Issue of Legitimacy

Considerable differences exist among theorists who argue that there has been constitutional change through some form of informal amendment in the United States. They differ in terms of their descriptive explanations of the modalities of the process, the scope of the phenomenon, and the means of identifying any given informal amendment. They also differ in terms of their normative claims regarding the legitimacy, putative benefits, or perceived dangers of informal amendments. Indeed, some of those who explain alternative means of constitutional change do not use the term “informal amendment” at all, and may not situate themselves directly within

MCGILL L.J. 673, 678 (2015) (arguing that efforts to deliberately create such constitutional conventions are a form of informal amendment, but are illegitimate).

47. See, e.g., Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Columbia: An Analysis of the Justification and Meaning of Constitutional Replacement Doctrine*, 11 INT'L J. CONST. L. 339 (2013); Sujit Choudhry, *Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures*, 6 INT'L J. CONST. L. 193 (2008).

48. See, e.g., Hidenori Tomatsu, *Judicial Review in Japan: An Overview of Efforts to Introduce U.S. Theories*, in FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 251-77 (Yoichi Higuchi ed., 2001); see also NOBUYOSHI ASHIBE, *KENPŌ* [CONSTITUTIONAL LAW] (3d ed. 2002) (this seminal constitutional text imports, for instance, American levels of scrutiny for judicial review of equality claims); SHINEGORI MATSUI, *NIHON KOKU KENPŌ* [JAPANESE CONSTITUTIONAL LAW] (2d ed. 2002) (Matsui, a former student of John Hart Ely, is the primary proponent of process theory in Japanese constitutional discourse).

that debate, though their theories certainly implicate any discussion of informal amendment.⁴⁹ Still, it is fair to say that all of the scholars involved share the common purpose of trying to explain constitutional change in more realistic and functional terms. They are trying to address the fact that the US Constitution, as a system, has changed markedly over its history, quite separate and apart from the changes wrought by the few formal amendments, and in ways that are at times very difficult to reconcile with most notions of legitimate interpretive development.⁵⁰

As will become apparent in this Part, these explanations and the differences among them give rise to a number of unresolved questions. I want to suggest, however, that one of the most fundamental of these questions relates to the issue of legitimacy. At root, all of these theories and explanations are in some form or another groping for a means of determining whether any particular form of constitutional change is or is not legitimate. Indeed, these explanations are to some degree motivated by the perceived problem that traditional perspectives, which apparently accept all of these problematic constitutional changes as “normal” interpretive developments, are simply ignoring and papering over the questions of legitimacy raised by potentially unauthorized forms of constitutional change. But while this may be the subtext, the explanations do not all address legitimacy explicitly, and those that do, tend to do so in various ways and to differing degrees.

Before comparing their theoretical explanations, however, it is worth pausing to further clarify what is meant here by the legitimacy of constitutional change. There is, of course, considerable literature on the distinction between legality, authority, legitimacy, and power, not only in legal discourse but in political science and political philosophy.⁵¹ I will argue in Part III that the passage of time operates to open up a distinction between the authority and legitimacy of informal amendments. But in the first instance, at the time that change occurs, I conceive of legitimacy as flowing from the formal

49. See, e.g., Balkin & Levinson, *supra* note 1.

50. See, e.g., Sanford Levinson, *Introduction: Imperfection and Amendability*, in *RESPONDING TO IMPERFECTION*, *supra* note 1, at 3-11.

51. See, e.g., Dan Priel, *The Place of Legitimacy in Legal Theory*, 57 *MCGILL L.J.* 1 (2011) (comparing legitimacy to validity, content, and normativity, with particular reference to Dworkin).

constitutional authority—like Murphy, who uses legitimacy as referring “not to popular support but to grounding in the existing system’s fundamental normative principles.”⁵² In this sense, legitimacy and authority are closely aligned at the time of the constitutional change, at least to the extent that the source of authority is itself then accepted and acknowledged as valid and legitimate. In this understanding, the authority for constitutional change relates to the formal source of that authority in either constitutional text or other fundamental normative principle. But the concept of legitimacy of the change has an additional aspect that is related to the perception and acceptance of the authoritativeness and validity of the change by those subject to the constitution. There is thus a psychological component to legitimacy, derived in the first instance from perceptions of the principled nature, virtue or validity of the institutional decision-maker or agent of change. It has been noted that the Supreme Court of the United States has itself referred to legitimacy in this sense, as depending in part upon the perceptions of the people.⁵³ But over time (as will be discussed below) legitimacy for a change initially viewed as insufficiently authorized, may develop from mere acceptance or acquiescence, due to the extent to which the change has become entrenched and insinuated into the broader legal system.⁵⁴

Returning to the discussion of how legitimacy is treated within informal amendment theory, Sandy Levinson is one theorist who does discuss the issue. He suggests that to accept a given constitutional interpretation as such, is to “accord it a certain dignity” as a legitimate understanding of the Constitution, while formal amendments are *ipso facto* legitimated by the authority of the formal amendment procedure. Thus, he suggests that to reject that a putative interpretation is the result of a good faith exercise in legitimate interpretation, or that it can be plausibly supported by accepted canons of constitutional interpretation, is to suggest that the effort is

52. Murphy, *supra* note 15, at 173.

53. Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L. J. 703, 709 (1994) (citing *Casey v. Planned Parenthood*, 505 U.S. 833, 2814-16 (1992)).

54. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 756 (1982) (citing HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1945)). For further discussion, see *infra* note 287 and accompanying text.

to surreptitiously amend the Constitution under the pretext of interpretation.⁵⁵ This is to acknowledge that informal amendments have a legitimacy problem, and even points to the fact that intent and good faith are factors in determining legitimacy. Yet he does not return to directly deal with the issue of how the legitimacy of any given informal amendment is to be determined. The critics, of course, squarely deny that informal amendments can ever be legitimate at all.⁵⁶

I would suggest that the question of legitimacy has not been sufficiently addressed in the discourse on informal amendment. Most of the proponents of informal amendment theory do not identify the factors that are essential to the legitimacy of constitutional change in general, and the criteria that might be applied to assess the legitimacy of specific changes, either at the time such change is unfolding or at some time after the fact.⁵⁷ In the rest of this Section I will explore several of the prominent theoretical explanations of constitutional change, paying particular attention to how they address the question of legitimacy, and more specifically how, under any particular explanation, these factors may impact the legitimacy of any given process of constitutional change.

It is helpful to be clear that these more realist and functional explanations of constitutional change are responding to a perceived traditional view. To varying degrees and in somewhat different ways, the proponents of informal amendment claim that there is a mythological and romantic conception of the US Constitution, in response to which they are offering what they suggest is a more realistic understanding.⁵⁸ The traditional narrative, they argue, tends to exaggerate the importance of the constitutional text, the meaning of which is understood to be authoritatively interpreted and enforced by the courts. This traditional view downplays or discounts the extent to

55. Levinson, *How Many Times Has the United States Constitution Been Amended?*, *supra* note 1, at 7, 17.

56. *See, e.g.*, Barnett, *supra* note 1; Dow, *supra* note 1.

57. This is not to say, of course, that there has been no consideration of the question of legitimacy. As discussed below, Ackerman does make a specific normative argument for the legitimacy of certain forms of informal amendment; Brannon Denning proposes a theory for the legitimacy of “constitutional change”, while carefully arguing that such change should not be characterized as an amendment. *See* Brannon P. Denning, *Means To Amend: Theories of Constitutional Change*, 65 *TENN. L. REV.* 155 (1997).

58. *See, e.g.*, ACKERMAN, *supra* note 1, at 162, 211-12.

which the Constitution is best understood as a system of principles, norms, conventions, and institutions. A system defined and governed, it is true, by the framework laid out in the constitutional document, but nonetheless far more complex in operation than can be discerned or even inferred from the mere text of the document. Moreover, under the mythological or romantic view, the Constitution is viewed as the highest law of the land that trumps all other law, due to the authority it enjoys as a result of the super-majoritarian process by which it was ratified and subsequently amended, consistent with the fundamental ideals of popular sovereignty.⁵⁹ Finally, according to the critics, myths have developed to explain dramatic constitutional changes, such as those that accompanied the New Deal, such that they can be implausibly reconciled with this traditional narrative and its principles of interpretative development.⁶⁰ The proponents of informal amendment are seeking to pull aside this formalistic account and provide not only a more realistic description, but also a more sophisticated functional explanation. And some of them are trying to provide a normative defense of these extra-textual non-formal amendments.

While these realist theories share a purpose of trying to better explain constitutional change, the explanations tend to differ in their understanding of the mechanisms and modalities of the process of change. I should also emphasize that some of these explanations of constitutional change relate to legitimate interpretive development as well as to what we are here calling informal amendment—they advance a more realistic account for all constitutional change along a spectrum, and do not always focus on defining the dividing line between interpretive change and informal amendment. Levinson breaks down the forms of constitutional change along this conceptual spectrum in the following way: (i) regular interpretation, typically by the judiciary; (ii) interpretive change in government powers effected by permissible legislation, executive order, or other policy; (iii) amendment, which represents a genuine change that is “not immanent within the pre-existing materials or allowable simply by the use of powers granted (or tolerated) by the [C]onstitution”; (iv) revision, which is a more significant kind of amendment, that alters more

59. ESKRIDGE & FEREJOHN, *supra* note 1, at 34.

60. ACKERMAN, *supra* note 1, at 199, 210-211.

fundamental aspects of the Constitution, but is nonetheless congruent with the values of the Constitution, and effected through the formal amendment procedure for such revision; and (v) revolutionary change, being constitutional change of such a dimension that it is not consistent with the immanent constitutional order, and which is “legitimated, if at all, by some extra-constitutional set of events.”⁶¹ The “amendment” in (iii) is, to the extent it is not done in accordance with the amending formula, what we are calling informal amendment. We need not concern ourselves here with the distinction between “amendment” and “revision,” but are interested in the difference between “amendment” and the two forms of “interpretive change” on the one hand, or “revolution” on the other.

While differing in their emphasis, the most common explanations tend to focus on changes arising from some combination of the judgments of courts, the implementation of law and policy by the political branches and the bureaucracy, and activities of various actors within civil society. As Jack Balkin describes it, constitutional change generally comes through a recursive process in which courts develop and apply constitutional constructions, which are more than mere interpretations of the text but rather are doctrines and tests developed for use in the analysis and application of principles and standards articulated in the Constitution.⁶² But construction is also developed by political branches of government and applied in the form of new laws, policies, institutions, and practices, and then pressed upon the judiciary to accept and endorse in the course of constitutional litigation. What is more, the political branches frequently develop such constructions under pressure or influence from other actors in civil society. There is, therefore, a recursive dialectical process among all these actors that leads to new constitutional constructions.⁶³

Most of the results of this process of constitutional change would be characterized by many or even most jurists as being within the

61. Levinson, *How Many Times Has the United States Constitution Been Amended?*, *supra* note 1, at 21. It should be noted that different scholars use the term or concept of “revision” somewhat differently, but here Levinson is drawing from certain State constitutions, such as that of California, that explicitly contemplate a revision as being a more fundamental and significant form of amendment. We can put this distinction to one side for the moment.

62. Balkin, *supra* note 28, at 6-7.

63. *Id.* at 8-10.

scope of legitimate interpretive development, and thus not within the realm of informal amendment. But the implication here is that there will be times when the dialectic process results in “state building constructions,” by which Balkin means new constructions that both constitute significant interpretive moves and result in the construction of new state capacities.⁶⁴ Some of these state building constructions will exceed the range of reasonable meaning supported by most theories of constitutional interpretation, at which point we have what some would call informal amendment.

Some (but by no means all) proponents of informal amendment have drawn examples from the New Deal as reflecting this kind of combined construction, with judicial ratification of government action in the form of judgments that exceeded the limits of normal interpretive development.⁶⁵ This would include several of the innovative government programs, such as the National Labor Relations Act⁶⁶ and the Social Security Act,⁶⁷ advanced by the Roosevelt administration during the later stages of the New Deal. These were then validated in a string of decisions by the Supreme Court, which had begun to exhibit a clearly shifting understanding of the relevant provisions of the Constitution.⁶⁸ The constitutional changes wrought during the later stages of the New Deal quite obviously reflect one of the primary practical examples of the difficulty in determining the border between legitimate interpretive development and informal amendment. Ackerman, Strauss, and Levinson are just some of the more prominent scholars to suggest that these changes exceeded the range of normal interpretive development, while Stephen Holmes and Cass Sunstein, David Dow, and many others involved in the debate clearly disagree.⁶⁹

64. *Id.* at 9. See also Heather Gerken, *The Hydraulics of Constitutional Reform*, *supra* note 1, (arguing that informal amendment is the result of a dialogical process involving inter-institutional debate and input from civil society).

65. ACKERMAN, *supra* note 1, at 1-420; ESKRIDGE & FEREJOHN, *supra* note 1, at 46; Strauss, *supra* note 1, at 1475-76; Balkin, *supra* note 28, at 11-12; Stephen Griffin, *The Problem of Constitutional Change*, 70 TUL. L. REV. 2121 (1996).

66. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (2012)).

67. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended at 42 U.S.C. ch. 7 (2012)).

68. ACKERMAN, *supra* note 1, at 141-50.

69. See, e.g., Dow, *supra* note 1, at 126-27; Sunstein, *supra* note 1, at 279, n.9.

What is less clear in the debate, however, is how the proponents of informal amendment understand the legitimacy of these changes. Ackerman, as we will see below, makes very explicit claims regarding their legitimacy, but many of the others do not. If the decisions of the Supreme Court that ratified or acquiesced in these changes exceeded the range of reasonable interpretation, were they thus illegitimate at the time? Did the fact that Roosevelt and his Cabinet thought the programs *were* constitutional, and that the Supreme Court of the early 1930s had been wrong in its understanding of the relevant provisions of the Constitution, make a difference to how legitimate the changes were at the time? To put it another way, if there was evidence that Roosevelt thought that his programs were inconsistent with the Constitution but he set out to implement them anyway in order to force an informal change to constitutional understanding, rather than pursue a formal Article V amendment, would that (or should that) influence our assessment of their legitimacy?

The proponents of informal amendment do not directly explore these questions in any sort of comprehensive way. Ackerman, one of the few who tackles legitimacy head on, focuses on the role of expressions of popular will as legitimating these changes, rather than on the intent of the agents of change.⁷⁰ What is clear, however, is that none of the proponents of informal amendment argue that the changes are *now* illegitimate. In other words, with the passage of time the changes were entrenched and at some point accepted as legitimate within the constitutional system.

Some observers, such as David Strauss (who goes so far as to argue that informal amendments are far more significant mechanisms of constitutional change than formal amendments),⁷¹ go further back in time to identify such cases as *McCulloch v. Maryland*⁷² as being illustrative of this process of combined government-judiciary constructions. In *McCulloch* the Supreme Court adopted a very broad interpretation of the Necessary and Proper Clause⁷³ to validate the

70. ACKERMAN, *supra* note 1, at 141-50.

71. Strauss, *supra* note 1, at 1459.

72. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

73. U.S. CONST. art. I, § 8, cl. 18 (which provides that: "The Congress shall have Power. . . To make all Laws which shall be necessary and proper for carrying into Execution

Federal Government's constitutional authority to establish the Second Bank of the United States.⁷⁴ When Hamilton had earlier relied on similar arguments to justify the establishment of the First Bank, James Madison had responded that the Constitution would not likely have been ratified had the clause been so understood at the time. Yet some twenty five years later, as President Madison, he accepted that this understanding was by then entrenched and so must be accepted.⁷⁵ While Strauss does not make explicit what his views are on the legitimacy of the decision in *McCulloch* at the time it was made, the implication is certainly that the Court's judgment was outside of the reasonable range of meanings supported by accepted theories of constitutional interpretation. That would suggest that Strauss considers it to have been illegitimate at the time. Yet he describes how it became accepted—and thereby arguably legitimate—with the passage of time; and in Madison's eyes, the passage of a mere twenty five years was sufficient.

While Strauss and others tend to emphasize the judicial role in this process, others such as Eskridge and Ferejohn tend to focus on the role of legislation, and of unelected officials within both the legislature and the executive, in driving change.⁷⁶ Again, this approach is more of a shift in emphasis than an entirely different theory of change. It too is responding to the formalistic and traditional view of constitutional law, an account which critics such as Eskridge argue must be revised to acknowledge the role of "super-statutes" and "administrative constitutionalism" in expanding and developing the constitutional system.⁷⁷ Without getting into the details of their explanations, they rely to a considerable extent on the deliberative process by which these super-statutes are enacted. It is for this reason that Eskridge and Ferejohn term the process "administrative

the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

74. See Strauss, *supra* note 1; see also ACKERMAN, *supra* note 1, at 126 (in which Ackerman also identifies *McCulloch v. Maryland*, and the consequent expansion of the Necessary and Proper clause, as an informal amendment).

75. Strauss, *supra* note 1, at 1473; see PETER SUBER, THE PARADOX OF SELF-AMENDMENT 197-206 (1990); JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 263 (1984); see also Levinson, *How Many Times Has the United States Constitution Been Amended?*, *supra* note 1, at 22.

76. ESKRIDGE & FEREJOHN, *supra* note 1.

77. *Id.* at 26.

constitutionalism,” in contrast to a “judicial constitutionalism” that emphasizes the role of the judiciary in driving interpretive change.⁷⁸ This emphasis on the deliberative process and the extent to which the statutes reflect the popular will might be seen as grounding some claim to legitimacy. But suppose that the judicial decisions ratifying these super statutes provide interpretations of the implicated constitutional provisions that are outside the reasonable range of legitimate interpretation—Eskridge and Ferejohn do not actually focus directly on the issue of whether such changes may raise questions of legitimacy.

The proponents of informal amendment who are clearest on the issue of legitimacy are perhaps Ackerman and Amar, both of whom ground their arguments in favor of informal amendment in notions of popular sovereignty (though in strikingly different ways). Ackerman, who is perhaps the most closely associated with theories of informal amendment, also delves more deeply into the process by which such amendments might unfold and the form they might take. In so doing he provides some criteria for how to assess constitutional changes that are candidates for classification as informal amendment.⁷⁹ He begins with the notion that while most law is made by the government, there is also (in the American context at least) a “higher law” that is created by the people. From this he argues that informal amendment can be characterized as an example of this form of higher law, which may be made in violation of the formal amendment procedure, and yet still fall within the framework of the Constitution and be consistent with its underlying vision.⁸⁰ This creation of higher law by the people occurs in “constitutional moments,” characterized by a response to some form of constitutional crisis. Three examples of such constitutional moments that lead to informal amendments, in Ackerman’s view, are the original drafting and ratification process (as a change to the Articles of Confederation), the Reconstruction Amendments, and the New Deal programs discussed above. From these examples he abstracts a five-stage model of the process by which this form of constitutional change occurs.⁸¹

78. *Id.* at 33.

79. ACKERMAN, *supra* note 1, at 403-20.

80. *Id.* at 248, 296.

81. *Id.* at 402.

The first stage is characterized by a constitutional impasse, in which there is increasing disagreement over not only specific substantive policy being pursued by one of the political branches, but also over the extent to which such policy is constitutionally permissible. In the New Deal this impasse was over the President's efforts, through both executive orders and federal legislation, to establish a foundation for more progressive social welfare, labor, and financial regulatory regimes.⁸² The second stage is electoral success by the party pressing for change, which is seen as a public ratification of the contentious programs, and is the initial step in the people's role in the process. The third stage involves the political branch that is pressing for change, taking steps to challenge and confront those institutions that are "dissenting" or standing in the way of progress and thereby causing the impasse. During the New Deal, the executive was the branch pressing for change, with support from Congress, while the dissenting institution was the Supreme Court, which viewed the innovations as inconsistent with an interpretation of the Constitution that was strongly infused with ideas of *laissez-faire* economic theory and States' rights. The challenge to the Court came most explicitly with Roosevelt's threat to "pack the Court," but political pressure had been mounting even prior to that.⁸³

The fourth stage of Ackerman's framework is what he calls the "switch in time," which is characterized by the challenged institution essentially buckling under the pressure or threat and changing course in line with the wishes of the moving branch before any lasting harm can be caused to the challenged institution or the system as a whole. The switch in time during the New Deal era, of course, was in the form of the Supreme Court beginning to change direction with its repudiation of the *Lochner* line of cases and acceptance of Roosevelt's new labor and social security legislation.⁸⁴ The entire process of informal amendment, however, is not complete until, in the fifth stage, the people ratify the changes through a consolidating popular election, in which the branch that had been pressing for the changes is vindicated with electoral success.⁸⁵ Assessing whether this stage of the model has been met, of course, requires significant

82. *Id.* at 464.

83. *See id.*

84. ACKERMAN, *supra* note 1, at 400.

85. *Id.* at 402.

interpretation and attribution of meaning to electoral results, which is open to significant question and has been the subject of considerable criticism.⁸⁶

A great deal has been written about Ackerman's model, and while it has been very influential, aspects of it have also been heavily criticized. For the moment, however, I want to focus on how it relates to the three elements I am examining here. First, Ackerman is clearly making a normative claim that such informal amendments are legitimate precisely because they are expressions of popular sovereignty. But because of the elaborate nature of the process, with the determination that a given constitutional change is a legitimate informal amendment being contingent upon it satisfying the key elements of the five-stage model, it too would seem to be entirely retrospective. It does not depend upon the passage of time to confer legitimacy, since that is derived from the expression of popular sovereignty, but the passage of some time appears to be nonetheless required before one can identify developments as a legitimate informal amendment according to this model. Balkin and Levinson have made this point, arguing that Ackerman's theory "works best in hindsight" and that it "offers little help for someone in the midst of potential constitutional revolution who needs guidance."⁸⁷ Moreover, they note that Ackerman's theory requires actors to intuitively recognize, understand, and embrace the criteria for constitutional change that his model stipulates in order for them to understand whether some of the pre-conditions for action have been satisfied—"they must understand that a key moment of transition has occurred or that a form of unconventional adaptation has been confirmed through subsequent election."⁸⁸

These last comments also get at the issue of intent in Ackerman's theory. I think that Ackerman, in contrast to many of the other proponents discussed thus far, would not view it as a problem that some of the actors involved in the process of informal amendment were acting with a deliberate view to effecting change outside of the formal amendment process. They would be viewed as merely engaging in what he calls constitutional politics. I do not read

86. See, e.g., Dow, *supra* note 1, at 117.

87. Balkin & Levinson, *supra* note 1, at 1079-80.

88. *Id.*

Ackerman as suggesting that it would have deprived the informal amendment of legitimacy had Roosevelt been acting in a self-conscious and deliberate fashion to circumvent the Article V amendment procedure in order to effect constitutional change. But this is precisely because for Ackerman the legitimacy is derived from the popular ratification after a period of contested deliberative democratic process, in not one but two stages of the process. And, as Balkin and Levinson suggest, whether the change has been so ratified can only be assessed after the fact, and thus the model is of little assistance to those acting in the moment, in the middle of the process.

Balkin and Levinson have proposed an alternative theory of what they call “constitutional revolution.” While presented as an alternative to Ackerman’s theory of constitutional change, it builds on Balkin’s idea of the state-building construction through a dialectic process among the judiciary, the other branches of government, and civil society. What is different is that it suggests that the process can be skewed by a process of “partisan entrenchment” to create more radical or “revolutionary” change.⁸⁹ Partisan entrenchment refers to a sustained ideological shift in the Federal judiciary during periods in which one political party is dominant for sufficient time to significantly alter the composition of the judiciary, and particularly the Supreme Court, by appointing judges who subscribe to a particular ideological position on constitutional issues. Because Supreme Court justices serve for almost two decades on average, their influence persists well after the period of domination by the political party that appointed them. Balkin and Levinson argue that when a party has been able to dominate long enough to appoint sufficient numbers of judges and justices to create an imbalance within the Federal judiciary, an imbalance that tends to then be entrenched for a period lasting well beyond the party’s ascendancy, the judiciary will tend to represent and express their nominating party’s understanding of the Constitution and public policy. The cumulative and aggregate effect of their constitutional decisions begin to change the interpretation and construction of the Constitution along the lines consistent with their party’s understanding of the Constitution.⁹⁰ And this can give rise to constitutional revolutions, which are significant,

89. *Id.*

90. *Id.* at 1067-68.

sustained departures from established understandings of the Constitution and its fundamental constitutive principles, and at times outside the range of the reasonable possible meanings of specific provisions.⁹¹

Balkin and Levinson do not explicitly suggest that they view such “revolutions” as being *per se* illegitimate, or indicate whether some may be legitimate while others are not. But the implication is that they view some revolutions as having been legitimate, at least with the passage of time. For instance, they explain the judicial appointments by Roosevelt and the subsequent ratification of Roosevelt’s New Deal programs by the reformed Supreme Court as being an example of constitutional revolution resulting from partisan retrenchment.⁹² Yet they do not seem to suggest that this was in any way an illegitimate constitutional change. Indeed, Balkin has elsewhere viewed the New Deal as being within the ambit of natural and legitimate constitutional change.⁹³ On the other hand, they also argue that the changes wrought with respect to States’ rights, racial equality, and civil rights by the Rehnquist Court in the fifteen years leading up to *Bush v. Gore* constitute a constitutional revolution resulting from partisan entrenchment.⁹⁴ While they do not explicitly state that this revolution constitutes illegitimate change, they are clearly far more critical of the substance of these changes under the Rehnquist Court than they are of the New Deal changes, or changes wrought by the Warren Court.

Intent or deliberate agency would not seem to be a factor in determining legitimacy under this theory, but this is largely due to the nature of the process itself. There is of course a deliberate and self-conscious aspect to the decisions of politicians to appoint judges that share a particular understanding of the Constitution. Increasingly, in the last couple of decades, this can be seen as part of a deliberate strategy to effect precisely the kind of partisan entrenchment that

91. It is not entirely clear whether Levinson would characterize these revolutions as being the same as the “revolutions” in his five-stage spectrum of constitutional change. See Levinson, *How Many Times Has the United States Constitution Been Amended?*, in *RESPONDING TO IMPERFECTION*, *supra* note 1, at 21, and text associated with note 73, *supra*. (It does not seem to me that what he and Balkin describe in their theory is change of quite that magnitude).

92. Balkin & Levinson, *supra* note 1, at 1073.

93. Balkin, *supra* note 28, at 11-12.

94. Balkin & Levinson, *supra* note 1, at 1052-53.

Balkin and Levinson identify. But as they argue, the process of change that results from this appointment of like-minded judges is incremental and unpredictable—the result of a complex mix of factors—and contingent on such variables as the mix of cases that come before the courts.⁹⁵ The government actors cannot be said to have acted with deliberation and calculation in trying to bring about any specific change, but rather only to move the ideological center of constitutional understanding in a particular direction. Thus, it would seem to follow that intent or deliberate agency in trying to circumvent the formal amendment procedure are not going to be elements in determining the legitimacy of any particular change under this theory of constitutional change.

It may be that the key to understanding their position on the legitimacy of this more radical form of constitutional change is to be found in their arguments on how best to respond to constitutional revolution. They argue that it is somewhat meaningless, at least *ex post*, to criticize constitutional revolutions on the grounds that the changes wrought failed to comply with the constitutional principles that govern and define legitimate constitutional change. That is, to argue that the changes failed to comply with amendment procedure, or that they are outside of the range of reasonable interpretation. Meaningless not because such arguments are wrong, but because they will have little or no purchase—they are not, for instance, going to convince Supreme Court justices to alter their views or their subsequent judgment. Rather, Balkin and Levinson argue, constitutional revolutions must be criticized on the basis of the substantive public policy principles that the revolution seeks to advance, its conception of “we the people,” and “the constitutional principles that [the revolution] espouses and the vision of the country that it summons.”⁹⁶ In short, they argue that one must criticize such changes not in terms of constitutional law, but in terms of what they call “high-politics,” with a view to winning the political battle over control of the appointments process.⁹⁷

95. *Id.* at 1081-82.

96. *Id.* at 1088.

97. They conceive of high-politics as the discourse and struggle over constitutional and political ideologies regarding such issues as State rights, civil rights, distributive justice, and so forth, as distinguished from the kind of partisan politics that can be called low-politics, which they claim was reflected in *Bush v. Gore*. See *id.* at 1061-62.

This would seem to suggest that at least when assessing the legitimacy of the kind of change that takes the form of constitutional revolution through partisan entrenchment, the determination is likely to be deeply divided and contested along partisan or ideological lines, based on each observer's ideological and normative understanding of the Constitution's vision. Legitimacy will be based on one's agreement or disagreement with the substance of the change, and not by reference to legal arguments over the range of reasonable meanings that can be supported by the text, purpose, history and operation of a constitutional provision, in accordance with accepted theories of interpretation. In short, the passage of time will likely confer legitimacy on any revolutionary change so long as it can be sustained over time, regardless how contested it is at the time of its development, and this means it will be more difficult to overturn such changes absent a countervailing revolution.

As I will take up in more detail below, this conclusion means that time is of the essence in disputing such changes at the time that they get underway. Balkin and Levinson, writing in the aftermath of *Bush v. Gore* and bewailing the conservative constitutional revolution flowing from the Republican Party's partisan entrenchment of appointees in the judiciary leading up to that most political of cases, suggest that if President Bush were to win the upcoming 2004 election, it would tend to further entrench and perhaps even legitimate the changes wrought in the revolution.⁹⁸ Thus, while certainly not the kind of normative arguments for legitimating constitutional change through popular sovereignty advanced by Ackerman and Amar, in practical and descriptive terms we are back to the idea that legitimation may come through some form of ratification by the expression of popular will, if only because success in the election will lead to an extension of the entrenchment period and thus legitimation through the passage of time.

C. Critics and the Contours of Legitimacy

These claims of informal amendment have been the subject of considerable criticism. These criticisms relate to both the descriptive and normative aspects of the claims. As a descriptive matter, critics question what the criteria are for determining whether any given

98. *Id.* at 1103-04.

constitutional change constitutes an informal amendment. And from a normative perspective, if such change can ever be legitimate in principle, what exactly are the criteria for determining whether any such specific change is legitimate?

Going beyond such questions, many of the critics advance affirmative normative arguments against the theories of informal amendment. David Dow is one of the harshest critics along these lines. He, like Griffin, seems to concede that informal amendments may occur as a descriptive matter, but he argues that proponents such as Ackerman and Amar fatally confuse an ability and power to effect informal amendment with the authority and legitimacy to do so. That such change may happen does not make it right or suggest that there was any legal authority for it, or that any legitimacy can or should be conferred upon it after the fact. Thus, in his view, the claims of Ackerman and Amar that such informal amendment could ever be legitimate is flawed.⁹⁹

The theoretical foundation for Dow's argument is not mere formalism and a dogmatic adherence to the text of the Constitution. Rather, he argues that to accept the idea that the Constitution can be amended by majority whim, apart from the formal amendment process, would be to hopelessly undermine the notion of strong individual rights.¹⁰⁰ Moreover, he points out that the projects of both Ackerman and Amar are in part trying to wrestle with the counter-majoritarian problem posed by the difficulty of amendment. But they make the crucial error of conflating popular sovereignty with majoritarianism in the process. It is due to this conflation that they mistakenly argue that change wrought by a popular majority somehow constitutes an expression of popular sovereignty. Yet, the formulation and ratification of a difficult amendment process, one that requires a supermajority, was itself an exercise of popular sovereignty.¹⁰¹

Cass Sunstein and Stephen Holmes similarly note that while the difficulty of formal amendment does pose a counter-majoritarian problem, it is not inconsistent with democratic principles. While a liberal democratic constitution derives much of its legitimacy from

99. See, e.g., Dow, *supra* note 1; see also Barnett, *supra* note 1.

100. Dow, *supra* note 1, at 127-28.

101. *Id.*

the idea that it can be amended in the future, with the amendment procedure comprising a delegation of drafting authority to future generations, the process must be sufficiently difficult in order to safeguard the individual rights that are also a fundamental component of liberal conceptions of democracy.¹⁰² Those in this camp more generally argue that a theory that accepts as legitimate the idea that a constitution can undergo change in some way that exceeds the normal interpretive development, but in the absence of formal amendment, is to normalize and validate an idea that negates the very purpose of mandating a difficult amendment procedure. This in turn undermines the constraining nature of constitutions as the highest law of the land, erodes the strength of constitutional provisions as pre-commitment devices, and guts the commitment to strong constitutional rights for individuals, and particularly for minorities.¹⁰³

Stepping back from this survey of both proponents and critics of informal amendment, it remains difficult to distill the exact contours of the normative claims, particularly on the issue of legitimacy. At one end of the spectrum is Griffin, who acknowledges the existence of informal amendments while at the same time condemning them from a normative perspective, arguing that they constitute an illegitimate phenomenon that arises from a paradox inherent in liberal constitutionalism.¹⁰⁴ Somewhere in the middle are proponents such as Levinson, who not only acknowledge the existence of informal amendments as a descriptive matter, but also seem to concede that such changes must be accepted as being legitimate after the fact, even if they may not have been so at the time they were made. Balkin views some such change resulting from a dialectic among branches of government as clearly legitimate, though it is a little less clear what his position is on the legitimacy of constitutional revolutions arising from partisan entrenchment. He is clear that such changes should be attacked (or defended) on the ideological level by engaging in what he calls high politics, but that is not to say that the process of change is itself illegitimate. At the other end of the spectrum are Ackerman and Amar, who clearly suggest that informal amendment as they each

102. Sunstein, *supra* note 1, at 276-77; *see also* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 387 (1983).

103. *See, e.g.*, Barnett, *supra* note 1; Dow, *supra* note 1; Sunstein, *supra* note 1.

104. Griffin, *supra* note 1, at 42-43.

define it is legitimate, but even here there is some uncertainty regarding the contours. It is clear that Ackerman accepts the legitimacy of such informal amendments *ex post*, once ratified by “we the people” in an election—but it is less clear whether he accepts that it would be legitimate for actors in either of the political branches to self-consciously set out to deliberately circumvent the Article V amendment process by seeking to follow the five-step process he outlines.

Indeed, Balkin and Levinson, in their work on partisan entrenchment, reject Ackerman’s theory in part for reasons that flow from this normative uncertainty. They suggest that it offers very little assistance or guidance to political actors in the midst of a potential constitutional change, and rather “works best in hindsight.”¹⁰⁵ Nor, they argue, does Ackerman’s theory help in the moment for determining whether a “judicial adventure” such as *Bush v. Gore* should be condemned as illegitimate, or acknowledged as an early stage of a “constitutional moment.”¹⁰⁶ By the same token, however, Balkin and Levinson’s theory of constitutional revolution through partisan entrenchment contemplates a cumulative and unpredictable process, which may involve self-conscious efforts in terms of the appointment of ideologically committed judges, but the legitimacy of any resulting constitutional revolution would seem to depend on whether the revolution can be sustained through victory in the intense high-politics debate that follows.¹⁰⁷ Amar would appear to come closest to arguing that there may be some *ex ante* justification for claims of informal amendment, but he places the legitimacy for such claims squarely with “we the people” and the direct exercise of popular sovereignty. He explicitly states that the Article V amendment procedure is the only legitimate avenue for government itself to amend the Constitution.¹⁰⁸ Amar’s approach would thus seem to rule out any self-conscious effort by political actors within government to initiate such an informal amendment.

The forgoing discussion has not yet answered with any specificity where the borders between authorized change and informal amendment may lie, what the criteria may be, or how and when

105. Balkin & Levinson, *supra* note 1, at 1080-81.

106. *Id.* at 1081.

107. *Id.* at 1082.

108. Amar, *supra* note 1, at 89-90.

legitimacy may be enjoyed by such informal amendments. Rather, it attempts to clarify the landscape of constitutional change and helps bring into focus the scope and importance of these questions. I will return to again engage the questions later in the article with a view to getting closer to the answers, particularly on the issue of legitimacy. Thinking about whether Japan's reinterpretation effort constitutes an informal amendment, and on what basis we would know that, and whether it is now or under which conditions it could be considered legitimate, should help illuminate and sharpen our understanding of the contours of the model and perhaps even suggest ways in which we need to alter our thinking about informal amendment.

II. *THE JAPANESE CONSTITUTIONAL REINTERPRETATION*

In this Part of the article I will explain the process and substance of the reinterpretation of Article 9 of the Constitution of Japan. In order to understand that within the broader context of Japanese constitutional law, however, a brief preliminary explanation of Article 9 and the Constitution itself is necessary.

A. *The Constitution of Japan and Article 9*

The story of the origins of the Constitution of Japan is extraordinary, full of drama, intrigue, and sources of inspiration.¹⁰⁹ The current Constitution was drafted in 1946, though it was technically promulgated as a revision of the original Meiji Constitution of 1889, which had been modeled on the Prussian Constitution.¹¹⁰ The failure of the Meiji Constitution was viewed by

109. There is a large literature on the history of the Constitution of Japan. For my own short account, see Craig Martin, *Binding the Dogs of War: Japan and the Constitutionalizing of Jus ad Bellum*, 30 U. PENN. J. INT'L L. 267 (2008), [hereinafter Martin, *Binding the Dogs of War*] which in turn is based upon RAY A. MOORE & DONALD L. ROBINSON, *PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR* (2002); KOSEKI SHŌICHI, *THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION* (1997); OSAMU NISHI, *THE CONSTITUTION AND THE NATIONAL DEFENSE LAW SYSTEM IN JAPAN* (1987); OSAMU NISHI, *TEN DAYS INSIDE GENERAL HEADQUARTERS (GHQ): HOW THE ORIGINAL DRAFT OF THE JAPANESE CONSTITUTION WAS WRITTEN IN 1946* (1989); THEODORE MCNELLY, *THE ORIGINS OF JAPAN'S DEMOCRATIC CONSTITUTION* (2000); Charles L. Kades, *The American Role in Revising Japan's Constitution*, 104 POL. SCI. Q. 215 (1989).

110. The story of the drafting, operation, and failure of the Meiji Constitution is part of the remarkable story of the constitution as a whole. See, e.g., HIDEHIGE HARA, *NIHONKOKU KENPŌ SEITEI NO KEIFU* [THE ORIGINS OF THE JAPANESE CONSTITUTION] (2004); GEORGE M.

the allied powers as one of the causes of World War II, and the United States demanded that the post-surrender Japanese government substantially revise or replace the Meiji Constitution.¹¹¹ When the Japanese government made little headway on the project by early 1946, MacArthur's staff in General Head Quarters ("GHQ") took over the task, shortly before the United States was to lose jurisdiction over the issue to the Far Eastern Commission.¹¹² MacArthur directed that a team of young American staff members develop an entirely new draft constitution based on four major points, two of which were that sovereignty was to reside in the people (as opposed to the Emperor, as it was in the Meiji Constitution), and that war and the maintenance of armed forces were to be renounced.¹¹³ The small group of young military and civilian members of General Whitney's staff in Tokyo worked around the clock for six days (unbeknownst to the Japanese government, the US government, or even much of the senior staff in GHQ) to produce the first draft of what is now the Constitution of Japan.¹¹⁴ It was then presented to the Cabinet of Prime Minister Shidehara as a *fait accompli*, with considerable pressure to accept the draft as the working basis of a new constitution to replace the Meiji Constitution.¹¹⁵ After initial resistance the Japanese government did accept the American draft, though it managed to negotiate some changes to it in the following weeks. The draft was then translated and made public, and then went through a year of

BECKMANN, THE MAKING OF THE MEIJI CONSTITUTION: THE OLIGARCHS AND THE CONSTITUTIONAL DEVELOPMENT OF JAPAN 1868-1891 (1957).

111. Potsdam Declaration Defining Terms for Japanese Surrender, U.S.-P.R.C.-U.K., July 26, 1945, *reprinted in* A Decade of American Foreign Policy, Basic Documents: 1941-49, at 49-50 (S. Comm. on Foreign Relations, Washington, D.C.: Government Printing Office 1950), available at <http://www.ndl.go.jp/constitution/e/etc/c06.html> (last accessed Dec. 2016); *and see* MOORE & ROBINSON, *supra* note 109, at 28-29.

112. MOORE & ROBINSON, *supra* note 109, at 74-75, 89-90.

113. The other two were that the feudal system and the nobility were to be abolished and a British style budget system was to be adopted. *See* THREE BASIC POINTS STATED BY SUPREME COMMANDER TO BE "MUSTS" IN CONSTITUTIONAL REVISION, NATIONAL DIET LIBRARY, available at http://www.ndl.go.jp/constitution/e/shiryō/03/072/072_0021.html (last visited Dec. 2016) (containing the photographic image of the original memo). The original handwritten note, thought to have been written by Gen. Whitney as dictated to by Gen. MacArthur, has been lost. *See* MCNELLY, *supra* note 109, at 115-116.

114. SHŌICHI, *supra* note 109, at 74-76.

115. Robinson and Moore argue that MacArthur essentially threatened to put the draft to the people for consideration, and also suggested that only if the government accepted this draft could MacArthur's staff stave off a possible prosecution of the Emperor for war crimes. *See* MOORE & ROBINSON, *supra* note 109, at 109-10.

further debate and revision within the Privy Council and each of the two Chambers of the Diet, during which its provenance remained a secret to the public and most members of the Diet.¹¹⁶

There are recurring arguments by conservatives and nationalists within Japan that the Constitution lacks legitimacy precisely because it was initially written by Americans and imposed upon Japan. It is also sometimes argued, more technically, that it is illegitimate because it could not possibly constitute a valid “amendment” to the Meiji Constitution, not having conformed to the amendment procedure.¹¹⁷ This is not the place to make the fully developed counter-arguments to those claims, as the arguments are not central to the issues here, but it is worth addressing them both briefly. On the first point, it may be noted in passing that constitutions frequently and indeed quite typically arise in circumstances in which the authority of the drafters is very much in question—whether it is the aftermath of revolution or coup, or simply an amendment conference in which the delegates vastly exceed their mandate. As others have argued, it is not so much the process of inception or creation that determines the legitimacy of a constitution, as it is the process of ratification and subsequent acceptance and valid operation of the constitutional system.¹¹⁸ On this measure, the Constitution of Japan was markedly successful. It was not only ratified by overwhelming numbers in both Chambers of the Diet, but it was vocally embraced by the rank and file within the political world. The finalized document was promulgated in 1947, and it very quickly captured the imagination and overwhelming support of the people of Japan.¹¹⁹ What is more, Article 9 became a constitutive norm that played an enormous role in shaping a national identity of post-war Japan that was imbued with pacifist values.¹²⁰ As to the second point, it is probably true enough to say that the 1947 Constitution simply replaced the Meiji Constitution, notwithstanding the effort at the time to characterize the process as an amendment.

116. *Id.*

117. *Id.*

118. Christopher F. Zurn, *The Logic of Legitimacy: Bootstrapping Paradoxes of Constitutional Democracy*, 16 *LEGAL THEORY* 191 (2010).

119. MOORE & ROBINSON, *supra* note 109.

120. PETER J. KATZENSTEIN, *CULTURAL NORMS AND NATIONAL SECURITY: POLICE AND MILITARY IN POSTWAR JAPAN* 44 (1996); Martin, *Binding the Dogs of War*, *supra* note 109, at 284-85.

Aside from Article 9, to which I will return shortly, the Constitution of Japan conforms to many of the ideas thought typical of the liberal democratic constitution. Notwithstanding its American origins, it was modeled on a Westminster parliamentary system of government, but in keeping with the ideals of its New Deal drafters it enshrined a strong set of individual rights, and provided for a robust power of judicial review. It provides (in Articles 97 through 99) that the Constitution is the supreme law of the land,¹²¹ and (in Articles 76 and 81) that the judiciary, with the Supreme Court of Japan as the highest court, is to be both independent and charged with the authority to interpret and enforce this supreme law.¹²² The Constitution also provides for its own entrenchment, with the sole means of amendment laid out in Article 96, which requires that amendment proposals be initiated in the Diet and voted for by a two-thirds majority in each chamber, following which it must be approved by a majority of votes cast in a referendum or election.¹²³ According to well-regarded studies on the comparative difficulty of the amendment procedures of many of the liberal democratic constitutions of the world, the procedure in Article 96 is of average difficulty.¹²⁴ Nonetheless, and notwithstanding considerable pressure from some quarters at various points over the last sixty-five years, the Constitution of Japan has never been amended. This is due to a complex set of political dynamics both among the factions of the Liberal Democratic Party (“LDP”), which has governed Japan for almost sixty of the last sixty-five years, and among the LDP and the various opposition parties. Another significant factor has been the

121. See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], ch. X, arts. 97-99 (Japan).

122. See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], ch. VI, arts. 76, 81 (Japan).

123. See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], ch. IX, art. 96 (Japan).

124. See Lutz, *Toward a Theory - Responding to Imperfection*, *supra* note 1, at 260-61. See also Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 362-64 (1994) [hereinafter Lutz, *Toward a Theory of Constitutional Amendment*]; but see Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All?: Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 14 INT'L J. CONST. L. 686 (2014) (arguing that there are problems with the social science literature on amendment difficulty, and suggesting that amendment culture is more important than amendment rules).

consistently strong public opinion opposed to any constitutional amendment, particularly of Article 9.¹²⁵

Article 9 gives expression to the second of the four principles initially laid down by MacArthur, and it is relatively unique in the world as a pre-commitment device prohibiting future governments from any involvement in war.¹²⁶ The language of Article 9 was subject to considerable negotiation and revision, both between the Americans and Japanese during the initial translation process, and later during the debate and revision in the Diet. The final language in English is as follows:

Chapter II. Renunciation of War

Article 9. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.¹²⁷

There are three distinct elements to the provision: (i) the renunciation of war and the threat or use of force; (ii) the prohibition on the maintenance of armed forces or other war potential; and (iii) the non-recognition of the rights of belligerency. The first was drawn directly from the principles of the *jus ad bellum* regime in international law, incorporating the language of the Kellogg-Briand Pact 1928¹²⁸ and the then recently established UN Charter;¹²⁹ the

125. For one of the best explanations of these dynamics, see generally J. PATRICK BOYD & RICHARD J. SAMUELS, *NINE LIVES?: THE POLITICS OF CONSTITUTIONAL REFORM IN JAPAN* (2005).

126. There continues to be some dispute over whether the initial idea for Article 9 came from MacArthur or Prime Minister Shidehara. Not much turns on the issue, but for reasons I have explained elsewhere, I think the evidence strongly supports it being MacArthur. See MCNELLY, *supra* note 109, at 106-13; SHŌICHI, *supra* note 109, at 83-86; Martin, *Binding the Dogs of War*, *supra* note 109, at 295 n.76.

127. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], ch. II, art. 9 (Japan).

128. See General Treaty for Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact 1928], available at http://avalon.law.yale.edu/20th_century/kbpact.asp.

129. See generally U.N. Charter, available at <http://www.un.org/en/charter-united-nations/>.

second was a *sui generis* provision that has almost no equivalent in any other constitution;¹³⁰ and the third is a unique incorporation of principles from the *jus in bello* regime aimed at buttressing the prohibition on the use of force in the first paragraph.¹³¹ It is the first paragraph and the first of these elements that has operated most effectively to constrain government policy—with the impressive result that Japan has not been a belligerent in any armed conflict since 1945—and it is this paragraph that is the subject of the reinterpretation effort. The second element, the prohibition on the maintenance of armed forces, has typically attracted the most controversy, in ways that often cloud and confuse the discourse around Article 9, and this is no less true for the debate around the reinterpretation. The third element is quite often ignored, and as I have argued elsewhere, is often misunderstood.¹³² My primary focus here is what I will refer to as Article 9(1), and I will only mention the other two elements in Article 9(2) where it is necessary to clarify the relevant debate about the entire provision.

B. The Government Interpretation and Operation of Article 9

In order to understand the extent to which the recent reinterpretation has diverged from the long-established understanding of the provision, it is necessary to consider in some detail the government interpretation of Article 9.¹³³ Similarly, I need to explain a little of its history in order to respond to arguments, made recently by some members of the LDP, that the interpretation of the provision has changed in the past and thus the recent reinterpretation effort should not be viewed as either unprecedented or extraordinary.¹³⁴

130. The Constitution of Costa Rica is frequently cited as being one of the only analogues, but it differs in material respects. See CONSTITUCIÓN DE COSTA RICA, art. 12 (Costa Rica), unofficial English translation available at <http://costaricalaw.com/costa-rica-legal-topics/constitutional-law/costa-rica-constitution-in-english/>.

131. For more on the proper analysis of this third element, see Martin, *Binding the Dogs of War*, *supra* note 109, at 316-19.

132. *Id.*

133. This Section II.B is based largely on a section of my earlier work, see generally Martin, *Binding the Dogs of War*, *supra* note 109, at 318 *passim*.

134. This argument was asserted by the Advisory Panel itself. See generally ANZENHOSHŌ NO HŌTEKIKIBAN NO KŌCHIKU NI KANSURU KONDANKAI (Japan), translated in REPORT OF THE ADVISORY PANEL ON RECONSTRUCTION OF THE LEGAL BASIS FOR SECURITY, (May 15, 2014) [hereinafter ADVISORY PANEL REPORT 2014], available at http://www.kantei.go.jp/jp/singi/anzenhosyou2/dai7/houkoku_en.pdf. (last visited Dec. 2016).

These latter arguments are misguided, for as I will explain below, the government interpretation of Article 9(1) has remained remarkably consistent in its essentials since it was formally established in 1954, very shortly after full sovereignty was restored to the country. While there has been some shifting in the national security posture and military capability permissible under the interpretation of Article 9(2), it has been in ways that were made possible by the elasticity built into the initial interpretation of the “no armed forces” element of Article 9(2), rather than being developed through any extraordinary process resembling that which gave rise to the current reinterpretation.

The arguments that the interpretation of Article 9(1) has previously changed are based in large part on the fact that Prime Minister Shigeru Yoshida had, during the initial ratification process in 1946, taken the position that Japan was not necessarily denied the right of self-defense but that the point was moot because Japan would be denied the right to maintain even the most limited military forces necessary for self-defense.¹³⁵ His government maintained that position against mounting pressure both inside the party and from the United States to begin re-arming Japan, but in 1954 he finally relented and the force that had been established in 1950 as a National Police Reserve was transformed into the Self-Defense Force (“SDF”).¹³⁶ For constitutional legitimation of the move, Yoshida looked to the Cabinet Legislation Bureau (“CLB”) for a formal interpretation of Article 9. The CLB’s 1954 interpretation of Article 9 was the first formal interpretation of the provision based on careful legal analysis that had thus far been issued by any branch of government, and it was undertaken within less than two years of the country having had full sovereignty returned to it, and a mere seven years after the Constitution had been promulgated. The interpretation can thus be viewed as the establishment of the formal understanding during the period when constitutional meaning is most dynamic and is in the

135. See MOORE & ROBINSON, *supra* note 109, at 212; see also NISHI, CONSTITUTION AND THE NATIONAL DEFENSE LAW SYSTEM IN JAPAN, *supra* note 109, at 5, 100–02 (quoting Yoshida on the non-right to self-defense); cf. KIICHIRO YASUZAWA, *KENPO DAIKYUJO NO KAISHAKU* [INTERPRETATION OF ARTICLE 9 OF THE CONSTITUTION] 156, 186 (1981) (Japan) (criticizing Yoshida’s comments and dismissing them as irrelevant).

136. For this history of the development of Japan’s SDF, see generally CHRISTOPHER W. HUGHES, *JAPAN’S RE-EMERGENCE AS A ‘NORMAL’ MILITARY POWER* (2006).

process of “settling.”¹³⁷ The fact that there were differences between this initial CLB interpretation and comments made by the Prime Minister in the Diet during the ratification process, before the Constitution had even been promulgated, does not amount to a “reinterpretation” of the Constitution, and is certainly no precedent for the current effort.

The CLB is an administrative agency attached to the Cabinet Secretariat and has been described as having greater prestige and greater independence than any other agency in the Japanese government.¹³⁸ The predecessor to the CLB, established in the late Eighteenth Century, was modeled after the French *Conseil d'État*, and it can also be loosely analogized to the Office of Legal Counsel in the US Department of Justice. It performs the fundamental role of vetting draft legislation for consistency with other laws and with the Constitution, and from time to time pronouncing on the proper interpretation of constitutional provisions.¹³⁹ While it has no formal institutional authority specified in the Constitution, it has developed enormous respect and authority over the years as an independent agency within the government that serves as the guardian of the Constitution.¹⁴⁰ Given that the Supreme Court took an increasingly passive and hands off approach to Article 9 after 1959 (as will be discussed further below), the CLB increasingly took on the role as the

137. See, e.g., Strauss, *supra* note 1, at 1460 (“[A] constitutional system is first getting underway and making its shakedown voyage, so to speak, amendments are more properly seen as part of the initial establishment of the regime, rather than as a means of changing it.”).

138. See Richard J. Samuels, *Politics, Security Policy, and Japan's Cabinet Legislation Bureau: Who Elected These Guys Anyway?* 2 (Japanese Pol'y Res. Inst., Working Paper No. 99, 2004), <http://www.jpri.org/publications/workingpapers/wp99.html> (last visited Dec. 2016).

139. The Legislation Bureau had been disbanded by SCAP in 1947 but was restored as the CLB by Yoshida in 1952. See SHINICHI NISHIKAWA, *SHIRAREZARU KANCHŌ: NAIKAKU HŌSEIKYOKU* [THE UNKNOWN AGENCY: THE CABINET LEGISLATION BUREAU] ch. 2 (2000) (Japan) [hereinafter NISHIKAWA, THE UNKNOWN AGENCY]; see also AKIRA NAKAMURA, *SENGOSEIJI NI YURETA KENPŌ KYŪJŌ – NAIKAKU HŌSEIKYOKU NO JISHIN TSUYŌSA* [ARTICLE 9 OF THE CONSTITUTION ROCKED BY POST WAR POLITICS: THE STRENGTH AND SELF-CONFIDENCE OF THE CABINET LEGISLATION BUREAU] ch. 1 (1996) (Japan); Samuels, *supra* note 138, at 3.

140. More recently, see generally SHINICHI NISHIKAWA, *KOREDE WAKATTA! NAIKAKU HŌSEIKYOKU* [HERE UNDERSTOOD! THE CABINET LEGISLATION BUREAU] (2013) (Japan) [hereinafter NISHIKAWA, HERE UNDERSTOOD]; MASAHIRO SAKATA, *HŌ NO BANJIN: NAIKAKU HŌSEIKYOKU NO KYŌJI: KAISHYAKU KAIKEN GA YURUSANAI RIYŪ* [THE LAW'S GATEKEEPER – THE DIGNITY OF THE CABINET LEGISLATION BUREAU: REASONS WHY THE REINTERPRETATION IS UNACCEPTABLE] (2014) (Japan).

primary authority for the interpretation of Article 9, arbiter of what was consistent with that interpretation, and at times enforcer of the provision.¹⁴¹

Turning to the content of the 1954 CLB interpretation, it provided that while Article 9(1) renounced war and the threat or use of force as a means of settling international disputes, it was not understood to renounce Japan's inherent and sovereign right under international law to use force in the individual self-defense of Japan. Moreover, it was only natural for a country with such a right of self-defense to have the capability necessary to defend its national territory in the event that it came under foreign attack. Thus it followed that Article 9(2) was not to be understood to prohibit the maintenance of the defensive capability "necessary" for such individual self-defense. Therefore, such "necessary" defense capability, which would comprise the new SDF, would not be understood to constitute the "land, sea, and air forces or other war potential" that was prohibited by Article 9(2).¹⁴² Put another way, the armed forces or other war potential prohibited by Article 9(2) was interpreted as being armed forces or weapons in excess of that which was necessary for individual self-defense. In 1957, the CLB refined and narrowed the interpretation further, opining that a defense capability that constituted "the minimum necessary force" for the exercise of self-defense was not the kind of war potential prohibited

141. See, e.g., NAKAMURA, *supra* note 139, at 3-6 (discussing the power and authority of the CLB), at 11-18 (discussing the independence of the CLB), and at 32-34 (arguing that the courts' avoidance of Article 9 enforcement has made the CLB role that much more important); NISHIKAWA, *THE UNKNOWN AGENCY*, *supra* note 139, at ch. 2 (detailing the CLB's role in interpreting Article 9, and arguing that its interpretations have constrained policy on the issue of collective self-defense and troop deployment); John O. Haley, *Waging War: Japan's Constitutional Constraints*, 14 CONST. F. 18, 19, 21, 23, 28-29 (2005) (arguing that the stance of the judiciary on Article 9 opened the way for the CLB to become the principal authority on the question, and that the CLB has imposed a "lasting and politically effective constitutional constraint" on Japanese defense policy). See also BOYD & SAMUELS, *supra* note 125, at 51 (discussing the power of the CLB in vetting legislation, and its power vis-à-vis other ministries); Samuels, *supra* note 138, at 4 (similarly arguing that the CLB filled the void left by the Courts). On enforcement, see Samuels, *supra* note 138, at 8-9 (noting the role of the CLB in the government decision not to participate in the Gulf War in 1991).

142. This interpretation was provided by Director Hayashi in the House of Representatives Budget Committee deliberations, on December 21, 1954. See NISHIKAWA, *THE UNKNOWN AGENCY*, *supra* note 139, at 40; see also BOYD & SAMUELS, *supra* note 125, at 5, 24-29 (tracing the development of the "minimum necessary force" doctrine).

by Article 9(2).¹⁴³ Japan was entitled to both maintain and to use the “minimum necessary force” for individual self-defense.

The CLB interpretation of 1954 was extremely significant in terms of the constraints that it entrenched under Article 9(1). Though it defined what was permissible in the form of individual self-defense, the interpretation also made clear what was not permissible, namely collective self-defense and collective security operations.¹⁴⁴ This is a crucial point that rests on distinctions between the different bases for the legitimate use of force in the modern *jus ad bellum* regime of international law. The language of Article 9 was drawn from the prohibition against the threat or use of force provided for in Article 2(4) of the UN Charter. There are three exceptions to this broad prohibition. The first two, provided for in Article 51 of the Charter, are the right to use force for individual or collective self-defense, while the third is the use of force authorized by a resolution of the UN Security Council to restore or maintain international peace and security, as authorized under Articles 39 and 42 of the Charter.¹⁴⁵

While the two forms of self-defense are provided for in the same Article of the UN Charter, there are important differences between them, particularly for purposes of the interpretation of Article 9. The right of individual self-defense permits the use of force by a State to defend itself in the face of an armed attack against it by some aggressor. The right of collective self-defense permits a State to use force, alone or with others, to assist some other State that has been the victim of armed attack by some other aggressor, and has requested

143. Prime Minister Kishi provided this interpretation in the House of Councilors Cabinet Committee on May 7, 1957. See NISHIKAWA, *THE UNKNOWN AGENCY*, *supra* note 139, at 41, and NISHIKAWA, *HERE UNDERSTOOD*, *supra* note 140, at 48-51.

144. NISHIKAWA, *THE UNKNOWN AGENCY*, *supra* note 139, at 46, NISHIKAWA, *HERE UNDERSTOOD*, *supra* note 140, at 63-66, SAKATA, *THE LAW'S GATEKEEPERS*, *supra* note 140, at 145-46 and 155-56, and Samuels, *supra* note 138, at 5; also see Haley, *Waging War: Japan's Constitutional Constraints*, *supra* note 141, at 29-33 (noting that the “prevailing view” [is that] Article 9 prohibits any deployment of combat forces for collective security measures in the absence of a direct threat to Japanese security.”

145. In international law these are typically characterized as being two exceptions—the right of individual and collective self-defense being one, and collective security operations being the second—but there are differences between individual and collective self-defense, and given the importance of those differences for purposes of Article 9, I am here characterizing them as three distinct exceptions. See generally YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* (2005); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* (2004); and for my own analysis of Article 9 from an international law perspective, see Martin, *Binding the Dogs of War*, *supra* note 109, at 309 *passim*.

assistance.¹⁴⁶ The use of force in either collective self-defense or for purposes of collective security operations authorized by the UN Security Council is part of the collective security system developed as part of the UN system. The CLB interpretation made clear that Article 9(1) renounced, as sovereign rights of the nation, and thus prohibited, the use of force for either of these collective security purposes. Indeed, for many years this interpretation operated to effectively constrain SDF participation in even those UN peacekeeping operations that were not conducted under Chapter VII authority, which are not typically understood to constitute a use of force under international law.¹⁴⁷

It will be noted that while the interpretation of Article 9(1) articulated a fairly clear rule (namely, no use of force except for individual self-defense), the interpretation of Article 9(2) created a rather vague and relative standard for what was a permissible size and capability of the armed forces, constituting a sliding scale that required reference to external threat levels. The CLB justification for the establishment and maintenance of the SDF has long been assailed by scholars inside and outside Japan as being contrary to the purpose and text of the Article 9(2) prohibition on the maintenance of armed forces.¹⁴⁸ Moreover, the relative nature of the standard is what made possible the several changes in defense posture over the years, which defenders of the current reinterpretation now claim constituted previous “reinterpretations” of Article 9.¹⁴⁹

146. See generally DINSTEIN, *supra* note 145; GRAY, *supra* note 145; and for my own analysis of Article 9 from an international law perspective, see Martin, *Binding the Dogs of War*, *supra* note 109, at 309 *passim*.

147. For more on the relationship between Japan’s participation in UN peacekeeping and Article 9, see, e.g., Caroline Rose, *Japanese Role in PKO and Humanitarian Assistance*, in *JAPANESE FOREIGN POLICY TODAY: A READER* 122, 124 (Takashi Inoguchi & Purnendra Jain eds., 2000). See also YOSHIO HIROSE, *KOKUREN NO HEIWALJI KATSUDO—KOKUSAIHŌ TO KENPŌ NO SHIZA KARA* [U.N. Peacekeeping Activity: From the Perspective of International Law and the Constitution] (1992) (Japan).

148. For the discussion in English, see Kenneth L. Port, *Article 9 of the Japanese Constitution and the Rule of Law*, 13 *CARDOZO J. INT’L & COMP. L.* 127, 128 (2005). See also James E. Auer, *Article Nine: Renunciation of War*, in *JAPANESE CONSTITUTIONAL LAW* 69, 74-80 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1993) (outlining the political process by which Article 9(2) was reinterpreted). There is a massive body of literature in Japanese criticizing the interpretation and government policy on Article 9(2).

149. For an examination of and response to these arguments, see NISHIKAWA, *HERE UNDERSTOOD*, *supra* note 140, at 132-47.

While debate has raged for decades over what, precisely, a “minimum necessary force” might mean in practical terms, and whether the SDF has exceeded it, the fact remains that the CLB has been remarkably consistent in its adherence to the fundamental interpretation of the “use of force” aspect of its understanding of Article 9. While there has been some whittling away of the policy limitations once imposed on the overseas dispatch of troops for UN peacekeeping operations, and the conditions under which Japan might be able to provide rear-area support to the United States in crisis circumstances in “areas surrounding Japan,”¹⁵⁰ the fundamental prohibition on participation in collective self-defense or UN authorized collective security operations has been assiduously maintained.¹⁵¹ Even when the limitations were relaxed with respect to the dispatch of troops for UN peacekeeping missions, and to provide logistical support for such operations as the post-9/11 coalition activities in Afghanistan and Iraq, stringent conditions on SDF operations were designed and implemented to keep their conduct within the scope of the broader constitutional interpretation.¹⁵²

What is more, this interpretation has operated to constrain policy. The fact that Japan has not engaged in the use of force since World War II—a feat that is almost unique among the major industrial nations—was not the result of mere policy choice or preference. Article 9(1) has operated in precisely the manner for which pre-commitment devices are designed, effectively constraining government policy and preventing the use of force, even in perceived crisis conditions when the government was under great pressure to participate in international collective security operations. The most famous and clear illustration of this was when the Kaifu administration was under enormous pressure from the Administration of George H.W. Bush and the US Congress to contribute troops to the international effort to drive Iraqi forces from Kuwait in the Gulf War

150. The “rear-area support” and “situations in areas surrounding Japan” are concepts articulated in the 1997 Guidelines, which are discussed in the text associated with notes 194, *infra*.

151. The CLB reinforced its interpretation in 1981, explicitly stating that participation in collective self-defense was prohibited by Article 9(1). See BOYD & SAMUELS, *supra* note 125, at 30-33 (providing a more complete account of the CLB interpretation). See also SAKATA, *supra* note 140, at ch. 3.

152. For details on these operations and the limits thereon, see Martin, *Binding the Dogs of War*, *supra* note 109, at 321 *passim*.

of 1991.¹⁵³ The government was inclined to accede to US requests, until the Director of the CLB informed Prime Minister Kaifu that any such participation would be a violation of the Article 9(1) prohibition against the use of force for anything other than individual self-defense. There was a growing sense of crisis within the Japanese government, with the view that failure to participate would do irreparable harm to the alliance with the United States, but the government nonetheless respected the CLB view and complied with the understood constitutional limits.¹⁵⁴ Regardless of whether one views this constraint on policy to have been in the national interest, the evidence is fairly clear that it was effective.

Factions within the ruling LDP have sought for decades to amend Article 9. This has proved impossible for complex political reasons involving both dynamics among factions within the party and among the LDP and the opposition parties, as well as enduring public resistance to the idea.¹⁵⁵ The myth has thus arisen that the formal amendment procedure in the Constitution is simply too difficult, and that other means of revision are thus justified.¹⁵⁶ But as mentioned previously, the comparative analysis of the relative difficulty of constitutional amendment procedures indicates that, at least as a structural matter, the Constitution of Japan is merely average.¹⁵⁷ The constitutions of several countries, such as the United States and Germany, are significantly more difficult to amend,¹⁵⁸ and have nonetheless been formally amended many times. That said, the

153. There are differences of opinion among international law scholars whether this operation constituted an exercise of collective self-defense under Article 51 or a collective security operation authorized by Article 42, or both—but it was certainly at least one of these. *See, e.g.*, DINSTEIN, *supra* note 145, at 273-77 (arguing that it was an act of collective self-defense) and THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 24-30 (2002) (arguing that it was an instance of collective security authorized under Article 42).

154. *See generally* KENNETH B. PYLE, *JAPAN RISING: THE RESURGENCE OF JAPANESE POWER AND PURPOSE* (2007); Martin, *Binding the Dogs of War*, *supra* note 109, at 343 *passim*, *relying on* KAZUHIKO TOGO, *JAPAN'S FOREIGN POLICY 1945-2003* (2d ed. 2005); Samuels, *supra* note 138.

155. *See generally* BOYD & SAMUELS, *supra* note 125.

156. *See generally* GLENN D. HOOK & GAVAN MCCORMACK, *JAPAN'S CONTESTED CONSTITUTION: DOCUMENTS AND ANALYSIS* (2001).

157. *See* Lutz, *Toward a Theory of Constitutional Amendment*, *supra* note 124.

158. *See id.*

Constitution of Japan has never been amended in its almost seventy years of existence, and as such is a significant outlier.¹⁵⁹

C. The Process of Reinterpretation

Prime Minister Shinzō Abe, beginning during his first term as prime minister in 2007, decided to make revision of Article 9 one of his primary objectives.¹⁶⁰ He paid lip service to the ongoing efforts to formally amend the provision in accordance with the procedure laid out in Article 96 of the Constitution, but he also set out to circumvent and subvert that legitimate procedure if necessary. He lay the foundation for a “reinterpretation” process by establishing an *ad hoc* Advisory Panel on the Reconstruction of the Legal Basis for Security (the “Advisory Panel”, also known as the “Yanai Committee”, named after its chairman Shunji Yanai).¹⁶¹ This was a group of experts in fields from international relations and diplomacy to international law, but nonetheless contained few lawyers, and only one constitutional scholar.¹⁶² It was argued in the media that members of the panel were primarily selected for their hawkish views on national security.¹⁶³ It was given a mandate to provide recommendations on how, not whether, Article 9 should be reinterpreted.¹⁶⁴ Before it could finish its work, however, Abe had to resign on grounds of ill health, and his successor quietly shelved the first report of the Advisory Panel. Efforts at constitutional revision of any kind were put on hold.

159. See generally GINSBURG ET AL., *supra* note 1.

160. Consistent with the vision of the country he laid out in his 2006 book: SHINZŌ ABE, *UTSUKUSHII KUNI HE* [Towards a Beautiful Country: My Vision for Japan] (2006).

161. *Abe Shapes Agenda for Defense Panel*, ASAHI SHIMBUN, May 19, 2007.

162. A list of the members can be found at the back of the 2008 report of the committee. See THE ADVISORY PANEL ON RECONSTRUCTION OF THE LEGAL BASIS FOR SECURITY, REPORT OF THE ADVISORY PANEL ON RECONSTRUCTION OF THE LEGAL BASIS FOR SECURITY (June 24, 2008) [hereinafter ADVISORY PANEL REPORT, 2008], <http://www.kantei.go.jp/jp/singi/anzenhousyou/report.pdf> (last visited Dec. 2016).

163. *Abe's Panel on Defense Dominated by Hawks*, JAPAN TIMES, May 6, 2007, <http://www.japantimes.co.jp/news/2007/05/06/national/abes-panel-on-defense-dominated-by-hawks/> (last visited Dec. 2016).

164. Yanai Committee Mandate, Order of the Prime Minister, April 17, 2007. <http://www.kantei.go.jp/jp/singi/anzenhousyou/konkyo.pdf>. In 2007 I published an essay critical of the effort to then “revise” the interpretation of Article 9. See Craig Martin, *The Case Against Revising Interpretations of the Japanese Constitution*, 5:5 ASIA-PACIFIC J.: JAPAN FOCUS, May 2007, <http://apjif.org/-Craig-Martin/2434/article.pdf> (last visited Dec. 2016).

Upon returning to power in 2012, Abe immediately revived his efforts to change Article 9. The LDP published a proposal for the amendment of the Constitution, which included extensive revisions to not only Article 9, but individual rights and various other aspects of the Constitution.¹⁶⁵ He also revived the Advisory Panel and gave it a renewed and broadened mandate to update its prior report.¹⁶⁶ When it soon became apparent that amendment of Article 9 would again prove too difficult, Abe proposed to first amend only the amending formula in Article 96 itself, so as to make amendment of the Constitution possible with a bare majority vote in each chamber of the Diet, and approval by a majority of votes cast in a referendum.¹⁶⁷ This move was quite transparently made for the purpose of laying the foundation for then more easily amending Article 9. The proposal was heavily criticized by Japanese scholars, as it would have had the effect of undermining the Constitution's status as the supreme law, and its ability to provide effective constraints on government power.¹⁶⁸ While it still lingers in the background of government constitutional commentary, the effort was shelved in 2013 as a result of the opposition, and Abe reverted to the plan-B of orchestrating a

165. JIMINTŌ, KENPŌ KAISEI SŌAN [LIBERAL DEMOCRATIC PARTY, CONSTITUTIONAL AMENDMENT PROPOSAL], 2012, <http://constitution.jimin.jp/draft/>. For a more extensive Q&A document explaining the proposal, see JIMINTŌ, *NIHONKOKU KENPŌ KAISEI SOAN Q&A*, [LIBERAL DEMOCRATIC PARTY, JAPAN'S CONSTITUTIONAL AMENDMENT PROPOSAL Q&A], https://www.jimin.jp/policy/pamphlet/pdf/kenpou_qa.pdf. For my essay analyzing the proposal, see Craig Martin, *LDP's Dangerous Proposals for Amending Antiwar Article*, JAPAN TIMES (June 6, 2012), <http://www.japantimes.co.jp/opinion/2012/06/06/opinion/ldps-dangerous-proposals-for-amending-antiwar-article/>, and a more recent article, Craig Martin, *Change it to Save it: Why and How to Amend Article 9*, 17 RITSUMEIKAN J. PEACE STUD. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2883588; see also Lawrence Repeta, *Japan's Democracy at Risk – The LDP's Ten Most Dangerous Proposals for Constitutional Change*, 11:28 ASIA-PACIFIC J.: JAPAN FOCUS, July 2013, <http://apjjf.org/2013/11/28/Lawrence-Repeta/3969/article.html>.

166. Mizuho Aoki, *Clearing the Way for Wider Military Role*, THE JAPAN TIMES, Aug. 19, 2013, <http://www.japantimes.co.jp/news/2013/08/19/reference/clearing-way-for-wider-military-role/> (last visited Dec. 2016); all the documents of the re-constituted *ad-hoc* Advisory Panel can be found on the webpage of the Kantei: <http://www.kantei.go.jp/jp/singi/anzenhosyou2/index.html>.

167. Jiji, *Article 96 Invites Sent Out to Ishin, Your Party*, JAPAN TIMES (May 5, 2013), <http://www.japantimes.co.jp/news/2013/05/05/national/politics-diplomacy/article-96-invites-sent-out-to-ishin-your-party/#.VeZjGdNVhBc>.

168. *Back to the Future: Shinzo Abe's Plan to Re-Write Japan's Constitution is Running Into Trouble*, ECONOMIST, June 1, 2013, <http://www.economist.com/news/asia/21578712-shinzo-abes-plan-rewrite-japans-constitution-running-trouble-back-future>.

reinterpretation of Article 9. The work of the Advisory Panel thus took center stage.

While the Advisory Panel got back to work, Prime Minister Abe made one more move to lay the foundation for his reinterpretation efforts. In 2013, he asked for the resignation of the Director of the CLB and replaced him with the political appointment of an outsider, a diplomat from the Foreign Ministry named Ichiro Komatsu.¹⁶⁹ This was an unprecedented departure from a long-standing convention of appointing legal experts from within the ranks of CLB, and sometimes from among former Supreme Court Judges or from within the Ministry of Justice.¹⁷⁰ The appointment of Komatsu, who was known to be a supporter of the reinterpretation efforts, was criticized by many at the time as being a cynical and transparent effort to preempt any possible challenge the CLB might have otherwise made to the constitutionality of the planned reinterpretation.¹⁷¹ As it turned out, Komatsu himself had to resign in 2014 due to ill health, but it is thought that he had by then done the important work of laying the groundwork for acceptance of the reinterpretation. Many prominent Japanese scholars have argued that the political interference not only broke the CLB's potential resistance on this particular issue, but has grievously weakened and undermined the integrity of the institution within the constitutional system as a whole.¹⁷²

The Advisory Panel, now under the effective leadership of Shinichi Kitaoka, submitted a revised and updated final report in May, 2014.¹⁷³ As will be discussed in more detail below, this *ad-hoc* committee was an extra-constitutional body with no authority whatsoever to engage in constitutional interpretation, but was formed to provide a veneer of authority and legitimacy for subsequent executive moves to effect a reinterpretation of Article 9. On the basis

169. *Abe to Pick Backer of Collective Self-Defense as Head of Legislation Bureau*, ASAHI SHIMBUN (Aug. 2, 2013).

170. *Abe to Pick Backer of Collective Self-Defense*, *supra* note 169. For detailed discussion of the convention and criticism of the appointment by Abe, see NISHIKAWA, *HERE UNDERSTOOD!*, *supra* note 140, ch. 2.

171. *Abe's Personnel Move Could Hamper Constitutional Debate*, ASAHI SHIMBUN (Aug. 3, 2013); *See also* NISHIKAWA, *HERE UNDERSTOOD!*, *supra* note 140, ch 2.

172. Yasuo Hasebe, *The End of Constitutional Pacifism?* (Aug. 12, 2016) (unpublished manuscript, presented at the University of New South Wales Faculty of Law) (on file with author); *See also* NISHIKAWA, *HERE UNDERSTOOD!*, *supra* note 140, ch. 2.

173. THE ADVISORY PANEL REPORT 2014, *supra* note 134.

of the “recommendations” of the Advisory Panel (though, to be fair, not implementing all of its recommendations), the Cabinet in July 2014 passed a resolution as the mechanism for purporting to unilaterally change the meaning of Article 9.¹⁷⁴ This “Cabinet Decision” provided both the rationale for a reinterpretation of the provision, and an outline for how key legislation would be revised to facilitate and enable an expanded national security posture. The rationale for the reinterpretation was essentially that which had been provided by the Advisory Panel, namely that the strategic environment around Japan had become more threatening, and that the government’s obligation to guarantee the security of the Japanese people required a more robust national security posture, and particularly the development of a more proactive role within the US-Japan security arrangements.¹⁷⁵ In short, it was a transparently result-oriented argument that the situation had changed so as to require greater latitude in the use of military force, and therefore the meaning of Article 9 must be deemed to have changed in a manner that would allow such a use of force. The Cabinet Decision laid out three basic categories of policy for which legislation would be developed to achieve the new policy objectives, and for which a new interpretation of Article 9 would be required. In order to later assess the constitutionality of the reinterpretation, these must be examined here in some detail.

The first category related to the use of the SDF in response to “an infringement that does not amount to an armed attack.” Such use of the military is to be permitted in “situations that are neither pure peacetime nor contingencies.” The word “contingencies” is taken from the formal Cabinet translation of the Cabinet Decision, but it represents the word *yūji* in Japanese, which might be better translated as “emergency”, though in this context the word would appear to have a meaning that is closer to “hostilities” or “armed conflict”. As an aside, this is merely one example of the incredibly euphemistic terminology, in both languages, that is employed in both the Cabinet Decision and the U.S-Japan Guidelines (which will be examined further below), such that one might suspect it is quite deliberately

174. CABINET DECISION, *supra* note 24.

175. *Id.* at 2.

designed to obfuscate.¹⁷⁶ But returning to the substance of this change articulated in the Cabinet Decision, it provides that the use of force in circumstances that do not involve an armed attack would include responses to “infringements” that occur in the areas “surrounding remote islands”, and in circumstances in which the police are not able to effectively respond.¹⁷⁷ It is likely that this policy change is precisely to provide authority to use force in response to any Chinese encroachments in the area of such islands as the *Senkaku* chain, over which China and Japan have ongoing territorial disputes.¹⁷⁸ This section of the Cabinet Decision also provides that Japan could use force to provide assistance to US forces that had come under attack while engaged in activities which contribute to the defense of Japan, but not necessarily in the territory of Japan.¹⁷⁹

The second category of policy for which new legislation would be required, according to the Cabinet Decision, is to further Japan’s contributions to “the peace and stability of the international community.”¹⁸⁰ This policy development is to permit an expansion of the scope and nature of logistical and rear-area support to foreign armed forces engaged in hostilities.¹⁸¹ Japan has in the past imposed stringent limits on such support, with the view that extensive logistical support and transport assistance for the armed forces of belligerents may be deemed “integral” to the use of force by such foreign armed forces, and thus prohibited by Article 9. Indeed, in a notorious decision in 2008 the Nagoya High Court opined (in what was extensive *obiter dicta*, in a judgment that ultimately dismissed the claim of the applicants for lack of standing) that Japanese support for coalition forces during the belligerent occupation of Iraq

176. This is not a new phenomenon. The 1997 Guidelines themselves were also excessively and deliberately ambiguous, leading to controversy when the Japanese Government insisted that the phrase “situations surrounding Japan” was not actually geographic in nature, and thus did not impose any geographic limit on SDF support operations. The 1997 Guidelines are described in more detail below. See *infra* note 194 and accompanying text.

177. CABINET DECISION, *supra* note 24, at 3.

178. See, e.g., Ryan Scoville, *A Defense of Japanese Sovereignty Over the Senkaku/Diayu Islands*, 46 GEO. WASH. INT’L L. R. 571 (2014).

179. CABINET DECISION, *supra* note 24, at 2. Depending on the exact circumstances this would be more likely an exercise of collective self-defense (which is addressed later in the Cabinet Decision), rather than a response to infringements not amounting to an armed attack.

180. *Id.* at 3.

181. See *id.*

beginning in 2005, constituted action that was integral to the use of force by coalition forces and was thus a violation of Article 9.¹⁸² The Cabinet Decision purported to revise the interpretation of these limits, and particularly this concept of integration with the use of force by other belligerents to an armed conflict (known in Japanese as the “*ittaika*” doctrine). Under the new revised understanding, Japanese support for the armed forces of other countries would only constitute an integral component of their use of force if the support was provided directly to foreign armed forces actually operating in active theatres of combat. Providing such support for armed forces behind the lines, or on their way to the theatre of conflict, would not constitute a use of force under the new interpretation.¹⁸³

The third category in the Cabinet Decision, the “Measures for Self-Defense Permitted under Article 9”, was the most controversial. Noting that “sufficient responses would not necessarily be possible if the constitutional interpretation to date were maintained,” the Cabinet Decision purported to expand the scope of Article 9 to permit the use of force in the exercise of the right of collective self-defense.¹⁸⁴ This, of course, makes permissible a form of use of force that was precisely understood to be prohibited under the long-standing interpretation of Article 9. The Cabinet Decision made some effort to justify this move in constitutional terms, by reference to the preamble and Article 13 of the Constitution. The preamble refers to the “right to live in peace”, and Article 13 provides that the people’s “right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and other governmental affairs.”¹⁸⁵ Thus, the Cabinet Decision argued, “Article 9 cannot possibly be interpreted to prohibit Japan from taking measures of self-defense necessary to maintain its peace and security and to ensure its survival.”¹⁸⁶ It suggested that the only change now was that collective self-defense was deemed necessary, in some

182. See Nagoya High Court, 2056 *Hanrei-jihō* 74 (2008), available at http://www.haheisashidome.jp/hanketsu_kouso [hereinafter Nagoya Decision], a translation of which is available in Hudson Hamilton, *Mōri v. Japan: The Nagoya High Court Recognizes the Right to Live in Peace*, 19:3 PACIFIC RIM L. & POL. J. 549 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1767658.

183. CABINET DECISION, *supra* note 24, at 4.

184. *Id.* at 6.

185. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], ch. III, art. 13 (Japan).

186. CABINET DECISION, *supra* note 24, at 7.

circumstances, to maintain peace and security, ensure the survival of Japan, and preserve the people's right to life, liberty and pursuit of happiness.¹⁸⁷

In accordance with this logic, however, the government developed a concept of collective self-defense that is quite different in scope and contour from the understanding of the concept in international law. The Cabinet Decision qualified the concept by adding certain conditions precedent and apparent limitations, thus creating a *sui generis* concept of collective self-defense for the purpose of the reinterpreted substance of Article 9. Indeed, the Cabinet Decision explicitly stated that "a legal basis in international law and constitutional interpretation need to be understood separately."¹⁸⁸ Thus, the use of force in the exercise of this *sui generis* right of collective self-defense is only permissible in circumstances in which there has been an armed attack against "a foreign country that is in a close relationship with Japan," and when such an attack is one that "threatens Japan's survival and poses a clear danger to fundamentally overturn [the] people's right to life, liberty and pursuit of happiness, and when there is no other appropriate means available to repel the attack."¹⁸⁹ The Cabinet Decision also noted that the use of force in response must be the minimum necessary for the defense of Japan. Finally, it specified that the enabling legislation would include the condition that "in principle" the Diet should be required to approve any such use of force.¹⁹⁰ These limits were subsequently articulated by the government as constituting three clear and distinct conditions precedent to the use of force for collective self-defense, namely: (i) an armed attack on a country with close relations to Japan, and such attack poses a threat to Japan's survival and the rights of the people to life, liberty and the pursuit of happiness; (ii) there is no other means available to protect against the threat to Japan and its people; and (iii) the use of force is the minimum necessary for such defense and proportionate to the threat.¹⁹¹

187. *Id.*

188. *Id.* at 8.

189. *Id.* at 6-8.

190. *Id.* at 8.

191. See, e.g., Sachiko Miwa, *Diet Debate on Security Bills Starts with Confusion Over Limits on Collective Self-Defense*, ASAHI SHIMBUN (May 26, 2015).

This limitation of the use of force to situations in which Japan or its people are threatened by the attack on a foreign state was, it has been suggested by government representatives, designed to make for a narrower or more limited concept than the right of collective self-defense under international law. The latter, of course, permits the use of force against an aggressor that has attacked a third country, regardless of any threat posed to the state using force under this justification, or the nature of the relationship between the victim and the country exercising the right.¹⁹² But how the government's new conception of collective self-defense would operate in practice is unclear at best, and indeed the actual intent of the language itself is far from clear. Would armed attack against an ally have to pose a threat to both the survival of Japan and the people's right to life, liberty and the pursuit of happiness, or would a threat to the people's rights be sufficient to trigger the right to use force? If so, how would the standard be defined and applied in practical terms? The Prime Minister has made comments that suggest just such a "disconnection" of the conditions, and I will return to these questions below when the examination turns to the enabling legislation, and to the analysis of how the constitutionality of the reinterpretation should be assessed.¹⁹³

Such was the Cabinet Decision itself. Next, in April 2015, prior to tabling any draft legislation or providing any other opportunity for debate on the reinterpretation issues in the Diet, the Abe government moved to commit the country to these policy changes in an international agreement. The government entered into talks with the US for the purpose of revising the formal guidelines that flesh out the mutual obligations, expectations, and responsibilities under the US-Japan Security Treaty. The existing Guidelines for Japan-US Defense Cooperation, as the agreement is titled, was agreed to in 1997 (the "1997 Guidelines"), and reflected a shared understanding regarding the limitations on Japan's ability to use force, provide logistical support or deploy the SDF in accordance with treaty obligations.¹⁹⁴

192. *Blurry Limits on SDF Missions*, JAPAN TIMES, (Apr. 24, 2015), <http://www.japantimes.co.jp/opinion/2015/04/24/editorials/blurry-limits-sdf-missions/#.VO-nTKZOqA>; Sachiko Miwa, *Conditions for Exercising Right to Collective Self-Defense Open to Interpretation*, ASAHI SHIMBUN (May 12, 2015).

193. See *infra* Section III.A.

194. AMERICAN SOCIETY OF INTERNATIONAL LAW, JAPAN-UNITED STATES: JOINT STATEMENT ON REVIEW OF DEFENSE COOPERATION GUIDELINES AND DEFENSE COOPERATION GUIDELINES 1621-38 (1997) [hereinafter 1997 GUIDELINES]. These were a

The April 2015 talks led to an agreement, the 2015 Guidelines, which was finalized without any Diet deliberation, and which reflected a marked expansion of the limitations in the 1997 Guidelines.¹⁹⁵

The 2015 Guidelines pay lip-service to the idea that the fundamental rights and obligations under the treaty remained unchanged, that no legislation is required to implement the agreement, and that all actions and activities undertaken by Japan would be consistent with the Japanese Constitution.¹⁹⁶ Yet it was later revealed that during the talks senior Japanese military officials advised their US counterparts that the government could guarantee that the Cabinet Decision and the 2015 Guidelines would be implemented in the form of legislation that would be enacted in the coming summer.¹⁹⁷ Moreover, in the details of the agreement, the revised Guidelines actually reflect the expanded scope and role of the SDF articulated in the Cabinet Decision, stipulating that Japan may use force in response to infringements that do not involve an armed attack on Japan,¹⁹⁸ and that Japan and the US could cooperate in anticipatory self-defense, in response to either an imminent attack on Japan,¹⁹⁹ or indeed any “situation that will have an important

successor agreement to a set of guidelines agreed to in 1978. For more on the 1997 Guidelines generally, see TOGO, *supra* note 154, at 80-85; HUGHES, *supra* note 136, at 100-01; THOMAS A. DROHAN, AMERICAN-JAPANESE SECURITY AGREEMENTS, PAST AND PRESENT 143-51 (2007). For more detailed analysis of the legal significance of the 1997 Guidelines see, e.g., Robert A. Fisher, *The Erosion of Japanese Pacifism: The Constitutionality of the 1997 U.S.-Japan Defense Guidelines*, 32 CORNELL INT'L L.J. 393, 395-96 (1999); NICHIBEI SHINGAIDORAIN TO SHUHEN JITAIHŌ [JAPAN-U.S. NEW GUIDELINES AND THE SURROUNDING SITUATIONS LAW] (Yamauchi Toshihiro ed., 1999); MOTOAKI HATAKE, *KENPŌ 9 JŌ: KENKYŪ TO GIRON NO SAIZENSEN* [ARTICLE 9 OF THE CONSTITUTION: THE VANGUARD ON RESEARCH AND ARGUMENTS], 129 (2006). SHIGENOBU TAMURA, *et al.*, *NIHON NO BŌEIHŌSEI* [THE NATIONAL DEFENSE LEGAL SYSTEM OF JAPAN] (2008), ch. 10.

195. JAPAN MINISTRY OF DEFENSE, THE GUIDELINES FOR JAPAN-U.S. DEFENSE COOPERATION (2015), http://www.mod.go.jp/e/d_act/anpo/shishin_20150427e.html [hereinafter 2015 GUIDELINES].

196. *Id.* at 2.

197. *SDF Chief Told U.S. Late Last Year That Security Bills Would Pass This Summer*, ASAHI SHIMBUN (Sept. 3, 2015).

198. 2015 GUIDELINES, *supra* note 195, at 4 (stating that “In this increasingly complex security environment, the two governments will take measures to ensure Japan’s peace and security in all phases, seamlessly, from peacetime to contingencies, including situations when an armed attack against Japan is not involved.” In light of the Cabinet Decision, “taking measures” would include the use of force).

199. *Id.* at 9-10.

influence on Japan's peace and security."²⁰⁰ The 2015 Guidelines also commit Japan to conducting bilateral operations to "secure the safety of sea lines of communication,"²⁰¹ and quite explicitly eliminate any geographic limits (which had been controversially ambiguous in the 1997 Guidelines). The 2015 Guidelines also clearly reflect and operationalize the Cabinet Decision in an entirely new section (as compared to the 1997 Guidelines), under the title "Actions in Response to an Armed Attack against a Country other than Japan."²⁰² This section recognizes and implements the new policy position that would permit Japan to engage in the use of force for purposes of collective self-defense, using precisely the same language as was promulgated in the Cabinet Decision.²⁰³ It provides a number of examples of how the armed forces of the two countries would cooperate in the exercise of collective self-defense, including the protection of US armed forces' assets, ballistic missile defense, and the securing of sea-lanes, including minesweeping operations.²⁰⁴

Finally, in May 2015 the government submitted to the Diet the proposed national security legislation that would formally implement the changes to national security policy and posture reflected in the Cabinet Decision and the 2015 Guidelines. The draft legislation was in the form of two bills,²⁰⁵ the first of which was an omnibus bill that would implement significant revisions to ten existing national security laws.²⁰⁶ The revisions to these laws effectively implemented the

200. *Id.* at 7. (The next sentence clarifies that "Such situations cannot be defined geographically. The measures described in this section include those that may be taken, in accordance with the two countries' respective laws and regulations, in circumstances that have not yet amounted to such a situation.").

201. *Id.* at 12.

202. *Id.* at 15.

203. *Id.* at 15-16.

204. *Id.* at 16-17.

205. The bills, the short titles of which are *Heiwa Anzenhosei Seibiho* [Law for the maintenance of the peace and security legal system], and *Kokusai Heiwa Shijiho* [International peace support Law] are available online at: http://www.cas.go.jp/jp/gaiyou/jimu/housei_seibi.html. For a preliminary analysis of the legislation, see YASUO HASEBE, *KENSHO – ANPOHŌAN: DOKO GA KENPŌIHANKA* [EXAMINED – NATIONAL SECURITY LAWS: WHERE ARE THEY UNCONSTITUTIONAL?] (2015) [hereinafter HASEBE, NATIONAL SECURITY LAWS].

206. These included, most significantly, the *Self-Defense Forces Law* (*Jieitaihō*, Law No. 164, 1954), the *Maintaining Peace and Security in Situations Surrounding Japan Law* (*shūhenjitai ni saishite wagakuni no heiwa oyobi anzen wo kakuhosuru tame no sochi ni kansuru hōritsu*, Law No. 64, 1999), the *Maintaining Peace and Security in the Event of Armed Attack Law* (*Buryoku kōgeki jitai ni okeru wagakuni no heiwa to dokuritsu narabini*

policies outlined in the Cabinet Decision outlined earlier. The second bill was for the creation of an entirely new law, the International Peace Support Law,²⁰⁷ which would among other things create permanent authority for the government to deploy the SDF for participation in “international cooperation activities” upon a simple up or down vote of approval by the Diet. This would displace the current convention that requires the Diet to pass special laws authorizing the deployment of the SDF for each and every mission, with detailed limits on the scope of operations and the activity of the SDF units being deployed.²⁰⁸

As the debate over these bills developed during the summer of 2015, it provoked increasing public and professional opposition. By the time that they were finally passed in the Upper House, at 2:05 a.m. on September 19, there had been tens of thousands of people protesting in the streets of Tokyo and other major cities, and there had been a brawl among members of the Diet in the Upper House over efforts to delay the vote.²⁰⁹ Polls during the summer consistently showed that well over fifty percent of the population was opposed to the legislation.²¹⁰ The public opposition was spurred by surprising

kuni oyobi kokumin no anzen no kakuho ni kansuru hōritsu, Law No. 79, 2003), *Implementation of Measures by Japan in Relation to the Activities of the U.S. Armed Forces in a Situation of Armed Attack Law (buryoku kōgeki jitai ni okeru amerika gōshūkoku no guntai no kōdō ni tomonai wagakuni ga jisshi suru sochi ni kansuru hōritsu*, Law No. 113, 2004), and the *National Security Council Establishment Law (Kokka anzen hoshō kaigi secchihō*, Law No. 71, 1961).

207. The full title of the law is *Kokusai Heiwa Kyōdōtaisho jittai ni saishite Waga Kuni ga jisshisuru Shogaikoku no Guntai nadoni taisuru Kyōryoku Shijikatsudō nado ni kansuru Hōritsu* [Law Related to the Implementation of Japan’s Cooperative Support for the Armed Forces of Foreign Countries in Circumstances of International Peace and Security Cooperation Activity].

208. For my discussion of this convention, see Craig Martin, *Permanent SDF Overseas Deployment Law Endangers Democracy*, JAPAN TIMES (May 21, 2008), <http://search.japantimes.co.jp/opinion/2008/05/21/commentary/world-commentary/permanent-sdf-overseas-deployment-law-endangers-democracy/>.

209. Reiji Yoshida & Mizuho Aoki, *Amid Angry Scenes, Ruling Parties Force Security Bills Through Lower House Committee*, JAPAN TIMES (July 15, 2015), http://www.japantimes.co.jp/news/2015/07/15/national/politics-diplomacy/amid-angry-scenes-ruling-parties-force-security-bills-lower-house-committee/#.V_PR_jKZOqA; Tomohiro Osaki, *Thousands Protest Abe, Security Bills at Diet Rally*, JAPAN TIMES (Aug. 30, 2015), http://www.japantimes.co.jp/news/2015/08/30/national/thousands-protest-abe-security-bills-diet-rally/#.V_PSIDKZOqA.

210. Takashi Nakamichi, *Support for Abe Falls to Lowest Level on Security Bills*, WALL ST. J. (Jul. 19, 2015), <http://blogs.wsj.com/japanrealtime/2015/07/19/support-for-abe-falls-to-lowest-level-on-security-bills/>; Satoru Mori, *The New Security Legislation and*

levels of professional criticism and objection. Three former directors of the CLB publicly voiced their view that provisions of the bills were unconstitutional.²¹¹ A former Chief Justice of the Supreme Court similarly pronounced that the draft legislation was unconstitutional.²¹² The incident that galvanized the media and drew the most attention to the questioned constitutionality of the bills, and thereby catalyzed much of this opposition, was the testimony in June by three very prominent constitutional scholars in the Diet Constitutional Commission hearings. All three scholars, including Professor Yasuo Hasebe of Waseda University, who was ostensibly there as the nominee of the governing LDP, testified quite emphatically that the draft legislation would be unconstitutional if enacted.²¹³ In the wake of this testimony, which was front page news for several days, over two hundred constitutional scholars came forth to support their position, and the government was hard-pressed to find a couple of law professors from lesser universities who would voice tepid support for the legitimacy of the legislation.²¹⁴

Notwithstanding the protests and resistance in the summer of 2015, less than a year later, in July, 2016, the governing LDP was

Japanese Public Reaction, TOKYO FOUNDATION, Dec. 2, 2015, <http://www.tokyofoundation.org/en/articles/2015/security-legislation-and-public-reaction>.

211. Kotaro Ono, *Former Legislation Bureau Chiefs Criticize Security Bills as Placing Citizens in Danger*, ASAHI SHIMBUN (June 22, 2015); SAKATA, *supra* note 140, (Sakata is himself a former Director General of the CLB).

212. *Former Justice Brands Security Bills as Unconstitutional, Slams Abe for Sophistry*, JAPAN TIMES (Sept. 16, 2015), http://www.japantimes.co.jp/news/2015/09/16/national/politics-diplomacy/ex-justice-brands-security-bills-unconstitutional-upper-house-hits-abe-duping-public/#.V_PVNTKZO8U; *Ex-Chief Justice Blasts Abe's Lack of Respect for Constitutionalism*, ASAHI SHIMBUN (Sept. 3, 2015).

213. *See id.* (The other two scholars were Eiji Sasada, also of Waseda University, and Setsu Kobayashi of Keio University); *see also Constitutional Law Scholars Lash Out at Government Criticism, Insults*, ASAHI SHIMBUN (June 16, 2015).

214. *Two Legal Experts Defend Constitutionality of Contentious Security Bills*, JAPAN TIMES (June 20, 2015), http://www.japantimes.co.jp/news/2015/06/20/national/politics-diplomacy/two-experts-defend-constitutionality-contentious-security-bills/#.V_PYCjKZO8U. The two scholars were Osamu Nishi, professor emeritus of Komazawa University, who is a long-standing champion of constitutional revision; and Akira Momochi, of Nihon University. Meanwhile it was reported that as of the week following the testimony of the three scholars, fully 225 constitutional law scholars had signed a joint statement condemning the reinterpretation as unconstitutional. *See Reiji Yoshida, Japan Security Bills Reveal Irreconcilable Divide Between Scholars, Politicians*, JAPAN TIMES (June 12, 2015), http://www.japantimes.co.jp/news/2015/06/12/national/politics-diplomacy/japan-security-bills-reveal-irreconcilable-divide-scholars-politicians/#.V_PY9TKZO8U.

massively successful in the Upper House elections. The LDP had not enjoyed a majority in the Upper House since before 2000, but in the 2016 elections it not only obtained a majority, but together with the *Komeitō*, its coalition partner, it finally obtained the long-elusive two-thirds majority. Thus, for the first time the LDP was within striking distance of having the two-thirds majority within both chambers of the Diet necessary to initiate and approve a proposal to amend the Constitution. It might be tempting to see the election as thus having been an expression of public approval of the reinterpretation, or at the very least an acquiescence to it. I will return to this point in more detail below,²¹⁵ but as a factual matter it is important to note that the LDP quite prominently avoided discussion of constitutional issues in the election campaign. The focus was on economic issues, and there was virtually no mention of either the reinterpretation, the national security legislation, or of possibly amending the Constitution going forward.²¹⁶ Indeed, just days prior to the election, a representative of the government stated emphatically that there was “zero prospect” of amending the Constitution.²¹⁷ While few experts took this at face value, it does tend to undermine any argument that the election result was either a mandate for change, or a reflection of public approval of the reinterpretation. It was more a reflection of the Japanese people’s strong sense that there were few viable alternatives.²¹⁸

A final consideration, of course, is how the courts will respond when the revised laws are challenged, as they inevitably will be if the government takes military action in accordance with those aspects of the revised laws that are considered unconstitutional under the established interpretation of Art. 9.²¹⁹ Past experience would suggest

215. See discussion *infra* Section III.A.

216. Tomohiro Osaki, *LDP-led Ruling Bloc, Allies Clear Two-Thirds Majority Hurdle in Upper House Poll*, JAPAN TIMES (July 11, 2016), http://www.japantimes.co.jp/news/2016/07/11/national/politics-diplomacy/ruling-bloc-wins-big-in-upper-house/#.V_PaqTKZO8U; *Constitution as a Campaign Issue*, JAPAN TIMES (June 23, 2016), http://www.japantimes.co.jp/opinion/2016/06/23/editorials/constitution-campaign-issue/#.V_PaxTKZO8U.

217. Osaki, *LDP-led Ruling Bloc, Allies Clear Two-Thirds Majority Hurdle in Upper House Poll*, *supra* note 216.

218. Gerald Curtis, *Japan’s Election Offers Little Choice*, WALL ST. J. (June 26, 2016), <http://www.wsj.com/articles/japans-election-offers-little-choice-1466960042>.

219. As this article was in the editing process, there were reports of one lawsuit having been commenced, and another being prepared: *Lawsuit Challenging Controversial Laws Filed by Group at Hiroshima Prefecture Court*, JAPAN TIMES (Sept. 17, 2016),

that the courts, and particularly the Supreme Court, are unlikely to strike down provisions of the new legislation. This is primarily because the Supreme Court has, in the infamous *Naganuma* case, set the bar so high for standing in any Article 9 based challenge that it is difficult to imagine a scenario in which any likely applicant could clear the hurdle.²²⁰ In the unlikely event that a challenge did get passed the standing obstacles, the prospects for success on the merits would be still very uncertain.

As mentioned earlier, the Nagoya High Court in 2008 famously opined (albeit in *obiter dicta* that was severely criticized by the government) that the SDF provision of logistical support for the armed forces of the US and coalition partners in the belligerent occupation of Iraq was integral to the use of force by those foreign forces, and thus was in violation of Art. 9(1).²²¹ This was an affirmation of the “*ittaiika*” (or “integral use of force”) doctrine that the Cabinet Decision explicitly rejected.

The Supreme Court, however, has been far more cautious and deferential than the lower courts even when it has reached the substantive issues related to Article 9. The only Supreme Court decision that has squarely considered the interpretation and operation of Art. 9, the notorious *Sunagawa* case of 1959, involved the question of whether the US-Japan Security Treaty, and the presence of the US armed forces in Japan, violated the Art. 9(2) prohibition against maintaining armed forces or other war potential. In deciding the case the Court adopted in *obiter dicta* the CLB interpretation that Japan retained a right of individual self-defense. The narrow *ratio decidendi* of the judgment was that the US forces were not being maintained by Japan, and so could not constitute a maintenance of armed forces or

<http://www.japantimes.co.jp/news/2016/09/17/national/crime-legal/lawsuit-challenging-controversial-security-laws-filed-group-hiroshima-prefecture-court/> (last visited Dec. 2016), and *Collective Lawsuit Being Readied to Challenge Security Laws*, JAPAN TIMES (Sept. 19, 2016), <http://www.japantimes.co.jp/news/2015/09/19/national/crime-legal/collective-lawsuit-being-readied-to-challenge-security-laws/> (last visited Dec. 2016) (reporting on lawsuit being prepared in Mie Prefecture).

220. *Naganuma* case, 36 MINSHŪ 1679 (Sup. Ct., Sept. 9, 1982) [*Uno et al. v. Minister of Agriculture, Forestry, and Fisheries*], in LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990, at 124-26 (1996).

221. Nagoya Decision, *supra* note 182. See Craig Martin, *Rule of Law Comes Under Fire: Government Response to High Court Ruling on SDF Operations in Iraq*, JAPAN TIMES (May 3, 2008), http://www.japantimes.co.jp/opinion/2008/05/03/commentary/world-commentary/rule-of-law-comes-under-fire/#.V_J6-5MrIb1.

other war potential in violation of Art. 9(2). But the majority of the Court went further than necessary, and purported to employ a thin facsimile of the US political question doctrine to also hold that the judiciary should play no role in determining the constitutionality of government action in the national security realm unless such action was “obviously unconstitutional.”²²² The dissent was scathing in its criticism of this aspect of the judgment, and the Court has never again invoked the political question doctrine, but the precedent remains—and it is unclear whether a timid and conservative Court would find the reinterpretation to be “obviously unconstitutional.”

In my view, the primary reason for Abe’s appointment of the Advisory Panel, and his attempt to manipulate CLB support for the reinterpretation, both of which would lead to recommendations and opinions in support of the constitutionality of the reinterpretation, was to make it more difficult for the Supreme Court to subsequently find that the reinterpretation, while inconsistent with the text and long-established understanding of Article 9, is “obviously unconstitutional.” But given the extraordinary criticism of the reinterpretation by prominent constitutional scholars, former Directors of the CLB, and even a retired Supreme Court Justice, there will be strong cross-cutting pressure on the Supreme Court if it receives a case that it cannot dismiss on standing or other doctrinal grounds. While precedent would suggest that a ruling of unconstitutionality is unlikely, it is not entirely implausible.

III. THE REINTERPRETATION, INFORMAL AMENDMENT, AND LEGITIMACY

This examination of the reinterpretation efforts in Japan should leave us with some obvious questions. To begin with, how should this reinterpretation effort be characterized? Is it the kind of interpretive move that falls within the range of incremental evolutionary change in interpretation that is considered normal and entirely legitimate in most liberal democratic constitutional systems? If not, why not, and

222. Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, 13 KEISHŪ 3225, SAIBANSHO SANBANREI JŌHŌ [SAIBANSHO WEB] http://www.courts.go.jp/app/hanrei_en/detail?id=13 (Japan). For my more detailed analysis and further authority, see Martin, *Binding Dogs of War*, *supra* note 109, at 337-43. See also, Haley, *Waging War: Japan’s Constitutional Constraints*, *supra* note 141, at 25 (more charitably arguing that the Court thus importantly reserved the power to strike down laws that were obviously unconstitutional).

what then is it? Is it an informal amendment in line with the theories we examined in Part I? If so, is it thereby legitimate, and how do we know either way? And as raised at the outset, how do the factors of deliberate agency and popular will interact to affect the legitimacy of such a intentional constitutional change? How will it be seen over time? Thinking these questions through should contribute to our understanding of how these determinations get made and the lines drawn in informal amendment theory, and more importantly, how we should assess the legitimacy of informal amendments in general terms. It will also leave us with some thoughts on how to assess the legitimacy of the Japanese reinterpretation specifically.

A. The Reinterpretation as Normal Interpretive Move

In this section I will begin with the first of these questions, namely whether the reinterpretation constitutes a valid and legitimate interpretive move within Japan's constitutional system. The reinterpretation only becomes relevant to theories of informal amendment, after all, if it is not a normal interpretive development of the constitution, so we must first resolve that question. As I have suggested earlier, one of ironies of the debate over informal amendment is that those who oppose the very existence of the concept are somewhat more forgiving in their characterization of interpretive moves. That is, they are willing to accept rather radical constitutional changes as falling within the scope of "normal" and legitimate incremental interpretive moves, in order to accommodate and explain that which others are inclined to call informal amendments. However, for reasons of both process and substance, it is extremely difficult to persuasively argue that the reinterpretation of Article 9 by the Abe administration can be characterized as a legitimate interpretive development, regardless of how widely one casts the net.

The first argument to be made is that the overwhelming majority of constitutional law scholars in Japan, applying the principles of constitutional interpretation most accepted within the Japanese legal system, have concluded and publicly avowed that the reinterpretation, and the national security legislation that reflects it, are invalid and unconstitutional.²²³ What is more, both the fact that there is such a

223. See *supra* notes 211-13 and accompanying text. In addition, for recent publication on the issue, see, e.g., HASEBE, NATIONAL SECURITY LAWS, *supra* note 205.

near consensus among legal scholars against a government policy, and the very public nature in which they have expressed their opinion, is more remarkable in Japan than it might be in the US.²²⁴ Thus, this position taken by the legal academy on the validity of the reinterpretation should by itself stand as fairly persuasive evidence that it cannot be characterized as a normal interpretive move within the Japanese constitutional system.

The process and form of the change also militate against any attempt to characterize the change as a normal interpretive development. First, the agents of change are irregular. The executive, with the support of some extra-constitutional *ad-hoc* panel of experts, is not what we would typically consider to be the normal institution for advancing constitutional interpretation. This abnormality is exacerbated by the manner in which the executive has attempted to make an interpretive change here, with the Cabinet simply advancing a “new interpretation” that converts a fairly clear constitutional rule into a vague standard with ambiguous conditions precedent for the exercise of government power. Aside from the substantive problems with this, which I will return to below, there is simply no tradition or convention for limiting the frequency or range of such Cabinet “changes” to the interpretation of the Constitution, along the lines of the well-established conventions that constrain the interpretive developments of courts.²²⁵ This is all the more problematic when the executive reinterpretation is in the direction of relaxing constraints on government power. Once accepted as a valid form of change, presumably the Cabinet could revise its own interpretation at will whenever it was convenient to do so.

Some would argue that in the US context the political branches of government enjoy greater competency than the judiciary to engage in the interpretation of some aspects of the constitution, such as war

224. The legal academy tends to be more conservative and deferential to government policy than its American counterpart, and scholars in public universities are public officials, arguably having less academic freedom than tenured scholars in North America, and certainly with nothing like the tradition of public protest and criticism of public policy.

225. While *stare decisis* is not formally a principle in civil law systems, there does tend to be respect for precedent, and in Japan in particular it has been long established that an informal principle similar to *stare decisis* operates to constrain judicial decision-making. See, e.g., JOHN OWEN HALEY, *THE SPIRIT OF JAPANESE LAW* 2 (1998).

powers and foreign policy.²²⁶ But even under this view, interpretive change is still seen as being far more the province of the judiciary, even if it is primarily in the role of endorsing and explaining the legitimacy of moves made by the other branches. As we saw in our discussion of informal amendment above, it is precisely when the political branches have pursued dramatic legislative or policy changes that are difficult to reconcile with the established understanding of the constitution, even if acquiesced in by the judiciary, that such changes tend to be viewed as something other than a normal interpretive development. It is too early to tell whether the Japanese judiciary will acquiesce or endorse this move, and it remains for me to presently explain how this change is difficult to reconcile with established understanding—but the fact that this change was deliberately orchestrated by the Cabinet is in any event irregular.

Added to this is the unusual nature of the form of argument that was advanced in support of the reinterpretation. The very essence of the concept of legitimate interpretive development is that the proposed interpretation can be explained and justified as falling within a reasonable range of possible meanings for the provision in question, employing accepted principles of constitutional interpretation. The arguments advanced by the Cabinet, in its brief eight page Decision, made little attempt to conform to this idea and were not framed as constitutional analysis or interpretive argument. The basic form of the argument was largely result-oriented. It began with the claim that the increased threat levels in the region surrounding Japan required the country to have greater latitude to use force in collaboration with its allies to ensure its national security, from which it followed that Article 9 must be re-interpreted in a manner that permitted such use of force. In introducing the section on the controversial change regarding collective self-defense, the Cabinet Decision stated that:

In order to adapt to the changes in the security environment surrounding Japan and secure the lives and peaceful livelihood of its people under any situations, the Government has examined what constitutional interpretation would be appropriate, as

226. My thanks to Bill Rich for this point. On this, see, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (generally arguing against judicial supremacy, and for a more populist constitutional law, with the political branches assuming a greater role in interpreting the constitution).

sufficient responses would not necessarily be possible if the constitutional interpretation to date were maintained.²²⁷

This bald-faced process of working backward from a desired policy result to the formulation of a constitutional construction that would permit its realization, is simply not a legitimate approach to constitutional interpretation. The only constitutional argument attempted, after laying out the need for change to meet the demands of a new security situation, is a paragraph that tries to develop connections between the language of Article 9, that of the preamble of the Constitution, and Article 13. The preamble contains a clause which provides that the Japanese people recognize that “all peoples of the world have a right to live in peace”; and Article 13 provides that the right of all of the people “to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.”²²⁸ First of all, the Cabinet Decision actually misquotes the Preamble in a manner that suggests that the clause is articulating a right of the Japanese people to live in peace, when in fact it is referring to a right enjoyed by all the people of the world. In any event, it goes on to suggest that when considered within the context of these other provisions, the use of force to the “minimum extent necessary” permitted by Article 9, must be understood as allowing whatever is necessary for the “peace and security and to ensure [Japan’s] survival.”²²⁹

Moreover, this is coupled with the fact that there was a frank acknowledgment, in both the Cabinet Decision and in the many presentations by Prime Minister Abe, that the reinterpretation comprised a significant change to the long established meaning of Article 9(1).²³⁰ While the Cabinet Decision did attempt to argue that there was some continuity with the underlying “basic logic” of the established interpretation,²³¹ there was no suggestion that the reinterpretation was a mere incremental development in the evolution of the meaning of Article 9(1), but rather the Cabinet Decision

227. CABINET DECISION, *supra* note 24, § 3(1), at 6.

228. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], pmb. (Japan); *id.* art. 13.

229. CABINET DECISION, *supra* note 24, § 3(2), at 7.

230. ADVISORY PANEL REPORT 2014, *supra* note 134; CABINET DECISION, *supra* note 24.

231. CABINET DECISION, *supra* note 24, § 3(2)-(3), at 7.

conceded that the reinterpretation was a marked change to permit policy that would have been otherwise unconstitutional. This, again, is not the typical form of incremental interpretive development.

More important, of course, is the substantive analysis of the reinterpretation, and whether it can be viewed as being within a reasonable range of possible meanings of Article 9. The initial difficulty in analyzing the content of the reinterpretation for this purpose, however, is the degree of ambiguity and uncertainty that surrounds the precise contours of the reinterpretation itself. Thus far I have been focused on the Cabinet Decision, but what is less clear is the role the two Advisory Panel reports might play in any subsequent judicial interpretation of the reinterpretation. Depending on whether the Advisory Panel reports are to be considered as part of the reinterpretation, we have two distinct problems with its validity. On the one hand, if we look at the Advisory Panel reports as being part of the reinterpretation or informing how it is to be understood, then the reinterpretation could be said to render the renunciation in Article 9(1) meaningless, which offends basic canons of constitutional interpretation.²³² On the other hand, if we look at just the Cabinet Decision, then there is sufficient ambiguity and vagueness as to make the new interpretation of the provision non-justiciable.

Beginning with the 2014 Advisory Panel report, it initially described how the established interpretation of Article 9 has consistently denied and prohibited any use of force beyond that for the exercise of individual self-defense. From there it went on to not only very explicitly recommend a reinterpretation that would allow for the exercise of collective self-defense, but also collective security operations authorized by the UN Security Council. Indeed, it recommended a construction that would permit any use of force that would be permitted by public international law. It did so on the fallacious argument that the clause “as means of settling international disputes” in Article 9(1) qualifies and limits the scope of the prohibition on the use of force, in that the exercise of neither individual nor collective self-defense constitutes “a use of force for

232. The Advisory Panel report probably should play no role whatsoever in interpreting the reinterpretation, given that it is an extra-constitutional body with no constitutional authority whatsoever. But Abe clearly sought the report to bolster and lend legitimacy to the move, and it could be anticipated that it would form part of the argument in subsequent judicial review.

settling international disputes". It goes even further, for good measure, by suggesting that the words "to which Japan is a party" should be simply read into the clause. As such any use of force for self-defense or UN collective security operations would be permissible, as it would then not be for the "settlement of international disputes to which Japan is a party."²³³

The background to this argument about the meaning of the phrase "settling international disputes" is not new, and indeed the Advisory Panel quotes testimony of a former Director General of the SDF to the Diet on the issue.²³⁴ The claim is often made by conservative proponents of expanding the meaning of Article 9 that this interpretation mirrors language and accepted meaning of the Kellogg-Briand Pact, but that is entirely inaccurate—not only is the language in the treaty actually quite different, but the relevant clause has never been accepted as having the meaning that Japanese conservatives attribute to it in any event.²³⁵ What is more, there is simply no foundation whatsoever for the idea that the *jus ad bellum* regime in international law makes a conceptual distinction between uses of force based on whether they are for "settlement of international disputes" as opposed to for any other purpose. It does not recognize self-defense as being somehow distinct from an international dispute, nor for that matter accept that a state is not "a party to a dispute" if it is acting in self-defense.²³⁶ What this argument in effect attempts to do, while studiously avoiding the language itself, is to reinterpret the clause "settling of international disputes" as meaning "engaging in acts of aggression". This harkens back to older reactionary arguments that have been made within conservative circles in Japan, to the effect that Article 9 should be understood as

233. ADVISORY PANEL REPORT 2014, *supra* note 134, at 23-24.

234. *Id.* (citing Director-General of the Defense Agency Seiichi Omura, answering questions to the Diet, December 22, 1954).

235. The language of the Kellogg-Briand Pact is to "condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." Kellogg-Briand Pact 1928, *supra* note 128, art. I. There were strained interpretations at the time that suggested that wars *not* waged for the purpose of "national policy," such as wars for religious or ideological ends, might thus be legal. This was not, however, the accepted view or interpretation of the provision in international law. *See, e.g.,* DINSTEIN, *supra* note 145, at 84. In any event, the language is not the same as that of Article 9(1).

236. *See supra* note 145 for sources analyzing the international law principles of *jus ad bellum*.

only prohibiting aggressive war—arguments that were rejected with the official interpretation of 1954, and consistently rejected ever since, for reasons that I turn to next.²³⁷

Leaving aside all of these detailed objections to the basis for the Advisory Report argument, however, a more fundamental constitutional interpretation problem is posed by the implication of its argument. If, as the Advisory Panel report argued, Article 9 is to be now understood as permitting all uses of force that are permitted by the *jus ad bellum* regime in international law, or Article 9 only prohibits “aggressive war”, then we are left with Article 9(1) renouncing exactly nothing. It will be recalled that the provision states that “the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.” It is prohibiting certain uses of force that constitute sovereign rights under international law. While it is true that the English language version could be construed as identifying only “war” and not “the threat or use of force” as the sovereign rights that have been renounced, the Japanese language version makes it much more clear that it is both war and the threat or use of force that are being renounced as sovereign rights.²³⁸ But if Article 9 is construed as prohibiting only that which is already prohibited by international law, then it has renounced nothing, and the interpretation renders at least part of the text of the provision meaningless—which offends basic principles of constitutional interpretation. The meaning goes from a clear rule that renounces and prohibits the exercise of certain sovereign rights (that is, the right to collective self-defense or participation in UN authorized collective security operations), to a provision that renounces nothing, and merely confirms in ambiguous terms the country’s adherence to the *jus ad bellum* regime—which is entirely and categorically inconsistent with the original purpose of the provision, precedent, and the consistent understanding and operation of the provision for over sixty-five years.

Such is the problem with the Advisory Panel’s report. If, on the other hand, we consider only the Cabinet Decision as articulating the substance of the reinterpretation, we are presented with a different

237. For my more extensive analysis and rejection of these arguments, see Martin, *Binding the Dogs of War*, *supra* note 109, at 312-13, 310 n.114.

238. *Id.*

problem. As discussed earlier in Part II, the Cabinet Decision does not go so far as to suggest that all uses of force permitted by international law are to be henceforth constitutional under the new understanding of Article 9(1), and indeed it even creates a *sui generis* conception of collective self-defense.²³⁹ But therein lies part of the problem—this conception of collective self-defense is vague, ambiguous, and non-justiciable, if ever it came to be the basis for a constitutional challenge. Collective self-defense under Article 51 of the Charter permits states to use force against an aggressor state in response to an armed attack on any other member of the United Nations, upon a request for assistance from the victim and notification of the UN Security Council that it is exercising the right.²⁴⁰ As explained earlier, the Cabinet resolution purports to limit the use of force in collective self-defense to responses to an armed attack on a state with which Japan has close relations, *and* where the armed attack is viewed as a threat to Japan's survival or its people's rights to life, liberty and the pursuit of happiness, *and* the use of force is necessary and proportionate.²⁴¹ These additional conditions were provided as a sop to mollify the *Komeitō*, the ruling party's coalition partner, as they create an impression that the bar for using force is higher, or the right of collective self-defense is narrower, than it is in international law.²⁴² But in reality the conditions and criteria are ill-defined and difficult to either interpret or enforce, and the government pronouncements have further exacerbated the problem.

In discussing the operation and scope of the new right of collective self-defense, Prime Minister Abe and Defense Minister Nakatani have both made comments about the possibility of Japan conducting mine-sweeping operations in the Straits of Hormuz if it were mined by Iran.²⁴³ If, as they have suggested, the authority relied upon for such action would be this right of collective self-defense as defined (rather than on other international law principles that might

239. See *supra* Section II.C.

240. U.N. Charter, art. 51. See DINSTEIN, *supra* note 145; GRAY, *supra* note 145.

241. See *supra* Section II.C.

242. *LDP Set to Limit Use of Collective Self-Defense*, YOMIURI SHIMBUN, Mar. 30, 2014.

243. *Operations in Strait of Hormuz to Come Under New Defense Guidelines*, ASAHI SHIMBUN (Apr. 9, 2015); Mina Pollmann, *Could Japan Go Minesweeping in the Strait of Hormuz?*, DIPLOMAT (Feb. 18, 2015), <http://thediplomat.com/2015/02/could-japan-go-minesweeping-in-the-strait-of-hormuz/>.

authorize the clearing of mines from international straits),²⁴⁴ the comments reveal even greater uncertainty about the meaning of the new standard. They suggest that the armed attack on a country in close relations with Japan (however that relationship might be determined) may be uncoupled from the threat to Japan's survival and the people's rights to the pursuit of happiness, such that each is a separate trigger for exercising the right of collective self-defense. Abe's comments on the issue have made no reference to how Iran's mining the straits of Hormuz might even constitute an armed attack, but have instead focused on the threat posed to the livelihood of the Japanese people by such a blockade – a threat to the “people's right to life, liberty, and the pursuit of happiness” in the language of the clause. This not only uncouples the exercise of collective self-defense from an armed attack on another country, but even from a threat to the survival of Japan, and potentially conditions it solely upon a threat to the livelihood of the people of Japan – however, that might be measured or defined.²⁴⁵ Finally, if the ambiguity of these conditions were not enough, representatives of the government have actually stated publicly that not all the conditions for the use of force have been or will be disclosed, thereby quite explicitly suggesting that there are additional secret criteria for the use of force.²⁴⁶ This ambiguity and uncertainty in the standard makes it arguably non-justiciable. In the event that the national security legislation that implements this part of the reinterpretation, or some specific deployment authorized by it, is challenged in court as being a violation of Article 9, how is a court to interpret the provision in light of this ambiguous new understanding? The reinterpretation has the potential of rendering the provision, which was a relatively clear rule capable of enforcement, non-justiciable and thereby unenforceable.

244. For a review of such principles, see, e.g., CHATHAM HOUSE, *INTERNATIONAL LAW APPLICABLE TO NAVAL MINES* (2014), https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20140226NavalMines.pdf; SEAN HENSELER, *PROJECT 2049 INSTITUTE, CLARIFYING U.S. – JAPAN MINE WARFARE ROLES, MISSIONS, AND CAPABILITIES IN THE PERSIAN GULF: AN EXAMINATION OF INTERNATIONAL LEGAL ISSUES* (2013), https://project2049.net/documents/countermining_henseler.pdf.

245. This discussion is drawn from an earlier essay on this issue. See Craig Martin, *Jus ad Bellum Implications of Japan's New National Security Laws*, 14:10 *ASIA-PACIFIC J.: JAPAN FOCUS*, May 15, 2016, <http://apjff.org/-Craig-Martin/4893/article.pdf>.

246. Sachiko Miwa, *Diet Debate on Security Bills Starts with Confusion Over Limits on Collective Self-Defense*, *ASAHI SHIMBUN* (May 26, 2015).

The other problem posed by the reinterpretation as articulated by the Cabinet Decision, is that it is potentially inconsistent with the principles of *jus ad bellum* in international law. It has been argued that because the principles in Article 9(1) were drawn from international law, the interpretation of the provision should be informed by, and be consistent with the principles of *jus ad bellum*.²⁴⁷ The Cabinet Decision's articulation of collective self-defense is obviously a marked departure from any requirement to interpret the concepts in Article 9(1) in a manner consistent with the *jus ad bellum*, but the problem is far greater than that. The Cabinet Decision, and the resulting national security legislation, could authorize state action that would result in Japan being in actual violation of the principles of *jus ad bellum*. This is true with respect to the contemplated use of force in collective self-defense as indicated above—a use of force in response to conduct that does not constitute an armed attack on a third country, but is responding to a perceived threat to future survival of Japan, or even worse, merely to the Japanese people's right to life, liberty, and the pursuit of happiness, would obviously not fall within the accepted exception for self-defense. This is more radical than the infamous Bush Doctrine of preventative self-defense, which has been roundly rejected in international law.²⁴⁸

The reinterpretation does not, however, pose this problem only with respect to the use of force in collective self-defense. A careful review of the other two major elements of the Cabinet Decision reveals that it contemplates other possible uses of force that are also not at all consistent with international law. The most serious of these, is the stipulation that Japan could use force in response to “an infringement that does not amount to an armed attack,” in “situations

247. See, e.g., TOSHIO FUJII, *KENPŌ TO KOKUSAI SHAKAI* [THE CONSTITUTION AND INTERNATIONAL SOCIETY] ch. 12-14 (2d ed. 2005); Masanari Sakamoto, *Buryokukōshi ihōka gensoku no naka no kyūjōron* [The Article 9 Debate Within the Criminalization of the Use of Armed Force] 1334 *JURISTO* 50, 56 (2007); Hitoshi Nasu, *Japan's 2015 Security Legislation: Challenges to its Implementation Under International Law*, 92 *INT'L L. STUD.* 249 (2016); Hitoshi Nasu, *Article 9 of the Japanese Constitution Revisited in the Light of International Law*, 18 *J. JAPAN L.* 50 (2004).

248. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15-16 (2002), <http://www.state.gov/documents/organization/63562.pdf> (expounding the actual doctrine); see Eyal Benvenisti, *The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies*, 15 *EUR. J. INT'L L.* 677 (2004) (describing the “Bush Doctrine” as an effort to respond to various security challenges but criticizing it as upsetting the existing UN regime and creating other risks to global stability).

that are neither pure peacetime nor contingencies”.²⁴⁹ The use of force in individual self-defense in international law is permitted under Article 51 of the UN Charter, and customary international law, when either an armed attack has been carried out against the state exercising the right; or, under a more liberal interpretation that is widely accepted, when the launch of such an armed attack against the state is imminent.²⁵⁰ Depending on how the Cabinet Decision and implementing legislation is interpreted and acted upon, it could conceivably authorize Japanese military operations that would constitute a use of force in the absence of any armed attack, actual or imminent—circumstances that would not come close to satisfying the international law conditions for the lawful use of force under either Art. 51 or 42. The Advisory Panel actually sounded a note of sage caution in this regard in its 2014 Report, but was apparently ignored.²⁵¹

The second major part of the Cabinet Decision deals with the authorization for increased logistical and transportation support for the armed forces of allied forces engaged in armed conflict. The Cabinet Decision suggests that Japan’s increased support for the armed forces of belligerents is to be simply deemed as not integral to the use of force by such belligerent forces unless it is within actual theaters of combat,²⁵² however that might be determined, and so will not constitute a use of force by Japan in violation of Art. 9.²⁵³ In a sense, this is not so much a reinterpretation of Art. 9 as it is an attempted reinterpretation of what constitutes support for and involvement in the actions of belligerents so as to attract state responsibility under international law. This is of course beyond the power and jurisdiction of the government of Japan—it cannot by

249. CABINET DECISION, *supra* note 24, § 1, at 2.

250. See U.N. Charter, art. 51; DINSTEIN, *supra* note 145, GRAY, *supra* note 145; see also *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. Rep. 14, (June 27).

251. ADVISORY PANEL REPORT 2014, *supra* note 134, at 45 (“Sometimes, the right to take measures against infringements that do not amount to an armed attack is referred to as ‘minor self-defense rights’; however, the use of this term is not advisable as it has not been established in international law, and could invite criticism from at home and overseas that Japan is expanding beyond the concept of the right of self-defense under Article 51 of the Charter.”).

252. CABINET DECISION, *supra* note 24, at 4 (the precise language is: “the scene where combat activities are actually being conducted.”).

253. See *id.* at 3-4.

Cabinet resolution or domestic legislation simply “deem” its actions to be not complicit in the use of force by other nations as a matter of international law. And under international law, certain levels of support for or involvement in the operations of a belligerent state in a given armed conflict, will be sufficient to make the supporting state a belligerent to the conflict as well. It makes no distinction as to whether the support is directly to forces within theatres of combat or not, as the Cabinet Decision attempts to do. What is more, where the actions of the first belligerent constitute an act of aggression, responsibility for such aggression can be attributed to the supporting state.²⁵⁴ Neither the Cabinet Decision nor the implementing legislation includes any conditions that the belligerents that are benefiting from Japanese support are themselves complying with international law. Thus, such close logistical and transportation support could lead to Japanese operations being integrated with the unlawful use of force by other countries.²⁵⁵

There is nothing, of course, that requires a constitutional provision in general to be consistent with international law. But as explained in Part II, Article 9(1) was drafted and ratified with the purpose of not only incorporating international law constraints into the Constitution, but also to add further limitations, renouncing rights that Japan would otherwise have under international law. That purpose and understanding was formalized by the CLB, obliquely confirmed by the Supreme Court in 1959, and complied with and acknowledged by every government for close to sixty years, until 2014. The provision operated to effectively constrain policy in accordance with this understanding. The reinterpretation is a radical departure from that understanding, making permissible precisely that which had long been forbidden. Moreover, an interpretation that either renders the provision irrelevant or hopelessly ambiguous and vague, and which not only divorces its constituent concepts from their international law origins but would actually authorize state action that

254. See generally GRAY, *supra* note 145; G.A. Res. 3314 (XXIX) (Dec. 14, 1974); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27).

255. As mentioned earlier, the Nagoya High Court in 2008 found that Japanese support for coalition forces in Iraq in 2005 constituted a use of force in violation of Art. 9(1), highlighting the risk of Japan becoming complicit in the belligerent actions of countries to which it is providing support, *see supra* notes 182 and 221 and accompanying text.

would violate the *jus ad bellum* principles from which the language of Article 9(1) was drawn, simply cannot be accepted as a normal interpretive development.

B. The Reinterpretation as Informal Amendment

If the reinterpretation cannot be categorized as a normal and legitimate interpretive development, then the question is whether it can be classified as the kind of informal constitutional amendment discussed in Part I. Perhaps more importantly, if it is to be considered such an informal amendment, is it legitimate, and how would we know? And most central to our inquiry, what does that tell us about the nature of legitimacy, and the factors that determine legitimacy, within the context of informal amendment theory?

On Levinson's five-point scale, if the reinterpretation is not a formal amendment nor a normal interpretive development (leaving aside the category of "revision"), we are left with either informal amendment or revolutionary change. Informal amendment is the most likely option. And indeed there are aspects of the reinterpretation that map onto or share features of a number of the different theories of informal amendment. It could even be argued that it fits the five-stage model of Ackerman's constitutional moment, which it will be recalled is comprised of: (i) contestation; (ii) challenge to dissenting institutions; (iii) public ratification; (iv) a switch in time; and (v) another public ratification.²⁵⁶ Following Abe's return to the office of the Prime Minister in 2012, there was public discussion and some debate regarding the possible amendment, and then reinterpretation, of Article 9 of the Constitution; there was a government challenge to one of the dissenting institutions, with the political appointment of an outsider as Director of the CLB; in December 2014, some six months after the Cabinet Decision was announced, the governing LDP and *Komeitō* coalition was broadly successful in the Lower House elections; the CLB might be said to have exhibited a "switch in time" by acquiescing to the validity of the reinterpretation, which was also implemented in a fashion through the new national security legislation passed in September, 2015; and then, finally, in July of 2016 the governing LDP enjoyed considerable electoral success in the

256. See *supra* notes 100-04 and accompanying text.

Upper House elections, gaining a two-thirds majority for the first time in decades.

Rosalind Dixon and Guy Baldwin have examined the extent to which the Japanese reinterpretation conforms to Ackerman's theory of constitutional moments in a forthcoming article.²⁵⁷ They argue that despite the superficial conformity, the reinterpretation cannot be said to satisfy the criteria of Ackerman's model, in part because there was not the kind of political competition and contestation required. They point out that a key component of Ackerman's theory is that the public consider the proposed or contested change "with a seriousness that they do not normally accord to politics."²⁵⁸ But while there was extraordinary public protest against the reinterpretation, and in particular the passing of the revised national security laws, all of which would appear to reflect some level of public engagement, there was not the kind of informed debate that would produce open and searching deliberation, and thus no genuine public ratification and political consensus.

To start, the government itself attempted to stifle the public debate, leading to widespread criticism of the increasing erosion of press freedoms in Japan.²⁵⁹ This undermined the prospect for open and searching deliberation. Notwithstanding this, the public opposition to the reinterpretation has persisted, and public opinion polls have continued to show a majority of the Japanese people opposed to both the reinterpretation and the revised national security legislation, right on down to the present day,²⁶⁰ and the majority of the opposition parties also remained opposed to the entire reinterpretation effort throughout.²⁶¹ But that too does not evidence true contestation, and it certainly cuts against the idea of ratification. This is because the LDP could, and did, entirely ignore the opposition and protest without fear of punishment at the polls. The reason that such public and political opposition did not translate into electoral losses for the LDP was simply because of the fragmented and

257. See generally Rosalind Dixon & Guy Baldwin, *Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate* (unpublished manuscript) (on file with author).

258. *Id.* at 10 (citing ACKERMAN, *supra* note 1, at 6).

259. See *id.* at 11. See generally Martin Fackler, *The Silencing of Japan's Free Press*, FOREIGN POL'Y, May 27, 2016.

260. See generally Mori, *supra* note 210.

261. See Dixon & Baldwin, *supra* note 257, at 11.

impotent nature of political opposition in Japan generally. The LDP has dominated the political process in Japan since 1955, with only three short breaks. After the perceived failures of the Japanese Democratic Party (“DPJ”) during its short reign between 2009-12, there developed a prevailing view that there was no real alternative to the LDP, even though there was little support for Abe’s policies.²⁶² One result of this, Dixon and Baldwin argue, is that the process surrounding the reinterpretation has not been characterized by the kind of political and public contestation that is required by Ackerman’s theory of democratic constitutional change.²⁶³

Another consequence of this analysis, however, is that it would be very difficult to really classify either the 2014 Lower House election results or the even more successful 2016 Upper House elections, as being a public ratification of the reinterpretation policy. As was noted in Part I, critics such as John Dow have argued that even in the US context, it is extremely difficult to attribute meaning to election results, and that therefore Ackerman’s distinction between normal politics and constitutional politics, and his interpretation of election results as expressions of popular sovereignty in the process of higher law-making, is entirely misguided.²⁶⁴ This criticism is all the more powerful when applied to the Japanese political system, where one party has dominated for six decades, and the election success of individual candidates and parties as a whole are said to be little influenced by policy platforms or positions.²⁶⁵ The clear and consistent opposition to the reinterpretation effort though and after the elections, coupled with the conspicuous policy of the LDP not to refer to constitutional issues during the 2016 campaign, deprives the elections of any value as an expression of popular will in support of the constitutional change. I will return to this point below when we return to the question of legitimacy, but here it is relevant to the

262. See generally Gerald Curtis, *Japan’s Election Offers Little Choice*, WALL ST. J. (June 26, 2016), <http://www.wsj.com/articles/japans-election-offers-little-choice-1466960042>.

263. See Dixon & Baldwin, *supra* note 257, at 14 (noting that political competition does not fit explicitly into any of the five stages of Ackerman’s model, but is implicitly essential to “the actual operation of Ackerman’s theory as account of democratic constitutional change”).

264. See Dow, *supra* note 1, at 131-33.

265. See generally GERALD CURTIS, *THE LOGIC OF JAPANESE POLITICS* (1999); ETHAN SCHEINER, *DEMOCRACY WITHOUT COMPETITION IN JAPAN: OPPOSITION FAILURE IN A ONE-PARTY DOMINANT STATE* (2006).

question of whether the Japanese reinterpretation fits Ackerman's model—and it arguably does not.

It might be objected at this point that not only Ackerman's model, but the informal amendment theory I have explored more generally is simply too dependent upon the particular proclivities of the US constitutional system to be susceptible to application to a system such as Japan's. Where one party has been in power for more than sixty of the last seventy years, and Supreme Court justices rarely serve for more than two or three years,²⁶⁶ the theory of constitutional revolution through partisan entrenchment, for instance, can have little relevance. Indeed, where a Supreme Court is so weak that legislation or government action has only ever been determined unconstitutional ten times in sixty-nine years, there is actually little tradition of normal interpretive development as a process of constitutional change, far less informal amendment.²⁶⁷ These are all valid objections up to a point, but they do not, in my view, disqualify the effort of applying informal amendment theory to the Japanese situation, or make the Japanese case study irrelevant to our understanding of informal amendment. Indeed, Carlos Bernal has focused on the particular role that weak courts may play in the form of informal amendment that he terms "infra-constitutional mutation".²⁶⁸ The mechanisms and modalities of informal amendment may differ from system to system, but the underlying concept, and the problems that it raises, remain relevant. As indicated earlier, there are European analogues to theories of informal amendment, and there is similarly a theoretical debate over a form of informal amendment in Japanese constitutional law as well.²⁶⁹

One of the primary problems that is common to all of these debates (even if not the explicit focus of them), is the question of

266. See generally David Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009).

267. For discussion of the Supreme Court, see generally *id.*; Frank K. Upham, *Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary*, 30 LAW & SOC. INQUIRY 421 (2005); J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* (2003); John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust*, in *LAW IN JAPAN: A TURNING POINT* 99 (Daniel H. Foote ed., 2007).

268. See generally Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Columbia*, *supra* note 47.

269. See generally MASAHIRO AKASAKA, *RIKKEN KOKKA TO KENPŌ HENSEN* [THE CONSTITUTIONAL STATE AND CONSTITUTIONAL CHANGE] (2008).

legitimacy. At the end of the day Ackerman's model is not a theory for identifying all informal amendments, it is a theory for explaining why informal amendments that share certain characteristics deserve to be accepted as being legitimate. That is precisely why there is such an emphasis on political contestation and expressions of popular sovereignty in his theory—not as essential elements for determining whether a constitutional change that exceeds normal interpretive development *is* an informal amendment, but as necessary conditions for such changes to be blessed with the status of legitimacy. The fact that Ackerman's model does not fit the Japanese developments does not negate the reinterpretation's status as an informal amendment, but it does mean that Ackerman's model cannot be a source of support for claims that the Japanese reinterpretation is a legitimate constitutional change.

C. Clarifying the Contours of Legitimacy

This brings us directly to the question of how we are to assess the legitimacy of the reinterpretation, and from there, how we should think about the legitimacy of informal amendments more generally. As indicated at the outset, this may depend in part on contingencies that have yet to unfold, such as how the Supreme Court deals with challenges to the reinterpretation. But let us assume that the courts either dismiss any claims on doctrines such as standing, or even, under a worst/best case scenario, meekly endorses the constitutionality of the national security legislation. That would not be dispositive of the legitimacy of the change. There are other factors or criteria to be considered in assessing its legitimacy.

To begin with, I would suggest that the absence of any expression of popular will in favor of the change, is a factor that counts against its legitimacy. It is here that the Japanese case forces us to look at Ackerman's model from a slightly different perspective, and in so doing reveals some potentially under-appreciated value in his theory. As mentioned earlier, the point from Ackerman's theory to be emphasized here, is not that public ratification is a criteria for defining informal amendment, or that it is a *sufficient* condition for the legitimacy of such an informal amendment—but rather, that such

ratification should be a *necessary* condition for the legitimacy of any putative informal amendment.²⁷⁰

This insight tends to be missed in the criticisms of the theory. Dow and others have criticized Ackerman's theory on the grounds that, contrary to his assertions, it is impossible to meaningfully infer any expression of popular sovereignty from the elections surrounding the Reconstruction Amendments or the New Deal policy developments.²⁷¹ But this is first an empirical or factual critique, from which they then develop a more general normative argument, namely that one can never attribute sufficiently precise meaning to elections so as to enable us to learn whether the popular will relates at all to any given constitutional change. As Dow puts it, "the basic problem with postulating a theory whereby the political climate yields constitutional text is that reading electoral politics is only slightly less fatuous than reading tea leaves."²⁷² But none of this means that Ackerman is wrong in his basic intuition—that absent an expression of popular will in favor of the putative informal amendment, such a constitutional change cannot be legitimate. Amar's theory shares the same intuition, and goes somewhat further by arguing that informal amendment can only be legitimate if it is initiated by "we the people."²⁷³ We may be inclined to agree with the critics that it is impossible to know whether any given election actually represents some kind of ratification, and thus it is not sufficient to endow a constitutional change with legitimacy—but we could still agree with Ackerman that absent some expression of public consent the constitutional change surely cannot be legitimate. In short, what remains sound from Ackerman, even after the critics are done, is the idea that a clear expression of popular will in favor of the constitutional change may not be sufficient, but it is surely necessary. And if this is so, the Japanese reinterpretation must surely be judged to be illegitimate, at least for now. In this sense, then, the Japanese experiment may reveal that Ackerman's theory retains some considerable value.

270. Tom Ginsburg made a related point in a short essay during the reinterpretation debate. See Tom Ginsburg, *Rearmament and the Rule of Law in Japan: When is it OK to Change the Constitution with a Statute?*, HUFFINGTON POST (July 22, 2016), http://www.huffingtonpost.com/tom-ginsburg/rearmament-and-the-rule-o_b_7845402.html.

271. See Dow, *supra* note 1, at 129-31.

272. *Id.* at 129.

273. Amar, *supra* note 1, at 89. Unlike Ackerman, however, Amar denies that the government can engage in constitutional amendment outside of the Art. V process.

The second factor of legitimacy that the Japanese developments bring into stark focus, is that of the deliberate intent on the part of those trying to effect a constitutional amendment—what I have called the “deliberate agency” factor. The reinterpretation effort examined above reflects a degree of deliberation, calculation, and self-consciousness that is hard to find in any other example invoked in informal amendment theory. Consider: a public avowal that the proposed change to a core constitutional provision is dramatic and unprecedented; the employment of a process of executive reinterpretation that was a calculated circumvention of the formal amendment procedure to effect the change, after first attempting and failing to change the amendment procedure itself; political interference in the institutions that might block the change; engaging international law commitments to lock in the change before any legislative involvement or public debate; unprecedented pressure and interference in the media to attenuate media criticism; oblique implementation of the change through revisions to existing legislation; and, finally, the flagrant disregard for popular and political opposition—it is an extraordinary illustration of pre-meditated executive action to effect informal constitutional amendment, for the very purpose of relaxing the constitutional constraints on executive action.

Now, there will be some who would suggest that Roosevelt’s actions were no less pre-meditated and calculating, and that he was perhaps more disingenuous about the extent to which he understood that he was trying to alter the constitutional system.²⁷⁴ But we need not settle that question here. Regardless of what we decide the historical record may reveal about Roosevelt’s state of mind and intentions, the fact is that time has operated to legitimize the changes in any event—the third factor to which I will turn presently. But the Japanese case brings the issue of deliberate agency into such stark relief, virtually demanding that we ask and answer the question: can

274. Ackerman’s theory acknowledges, or even depends upon, a consciousness of circumvention, but he does not provide the evidence that Roosevelt was deliberately circumventing the amendment procedure. See Choudhry, *supra* note 47, at 197-208 (arguing that Ackerman fails to support the idea of conscious or deliberate circumvention with historical evidence). See generally ACKERMAN, *supra* note 1. But then Dow is also severely critical about how both Ackerman and Amar engage in a selective and result-oriented use of history to make their arguments. See Dow, *supra* note 1, at 135.

an informal amendment so deliberately implemented by a political branch of government, particularly the executive, as a calculated circumvention of the formal amendment procedure, ever be legitimate at the time it was undertaken?

I would suggest that as a theoretical matter such pre-meditated action to bring about an informal amendment lacks legitimacy *ipso facto*. It is one thing to suggest that there may be some reason to confer some degree of legitimacy upon constitutional changes, even constitutional “revolutions”, which result from the dynamic interaction of complex legal, political, and administrative forces, a process that is inherently unpredictable and not susceptible to control by any one branch or actor within the system. Even the process of constitutional revolution through partisan entrenchment described by Balkin and Levinson lacks the kind of controlled and pre-meditated manipulation of specific constitutional provisions that is exhibited in the Japanese case. It is true that in such revolutions the dominant party, which is trying to entrench its constitutional ideology in the judiciary through the appointments process, is acting in a self-conscious and pre-mediated fashion. But Balkin and Levinson note that overall the process of change that results is organic and unpredictable, “in precisely the same way as coalitions in multimember legislatures are unpredictable”.²⁷⁵ In contrast, for an executive to single-mindedly circumvent the formal amendment procedure in order to change a core provision, one that was specifically designed as a pre-commitment device to constrain the executive, seems to make a mockery of the basic principles of constitutionalism and the rule of law.²⁷⁶ It undermines the normative power of the entire constitutional system. It represents, in the most concentrated form, all the problems against which the critics of informal amendment theory rail. To say that this form of change too could be legitimate at the time that it is undertaken, without some other grounds for according it such legitimacy (such as, for argument sake, a clear and explicit mandate from the people), is simply not to take the constitution and constitutionalism seriously. As Dow argues,

275. See Balkin & Levinson, *supra* note 1, at 1068-69, 1082.

276. Richard Albert makes a similar argument regarding the illegitimacy of deliberate attempts to establish constitutional conventions, as a means of circumventing difficult amendment procedures. See Albert, *Constitutional Amendment by Stealth*, *supra* note 46, at 678, 713.

one has to distinguish between the *power* to effect change from the *authority* to effect change—and by implication, where there was no authority, there can be no legitimacy for such change.²⁷⁷

Now, it should be conceded that this argument could lead to perverse incentives for governments to engage in greater duplicity and subterfuge. Rather than being transparent and open as Abe has been in his intentions and his acknowledgement of the nature of the change, the government could have maintained that the planned change was nothing more than an incremental evolution in meaning, entirely consistent with the purpose, text, and history of the provision. Indeed, one can envision a scenario in which the government avoided any formal announcement of change along the lines of the Cabinet Decision, but simply tried to implement changes through revisions to national security legislation, with assertions that the revisions were consistent with an evolving understanding of Article 9. The constitutional system is surely not better served by that kind of duplicitous government conduct, and yet condemning deliberate and open efforts at informal change as *prima facie* illegitimate, would actually incentivize such conduct and thereby undermine the integrity of the system—or so the argument would go.²⁷⁸

My response is that such duplicitous efforts would indeed be just as illegitimate, and would add insult to injury through the additional harm caused by the deceit. But it is beside the point. We ought not to turn our face from calling out the evil of illegitimate government action because we think it may make the government add deceit to its sins. The real comparison I want to draw is between the deliberate and calculated circumvention of the formal amendment procedure on the one hand, and on the other hand the more organic and dynamic change that results from the complex interaction of forces among the different political branches of government, the bureaucracy, civil society, and the judiciary. This latter form of change, which is more in line with the kind of dialectic process described by Balkin,²⁷⁹ and the administrative constitutionalism described by Strauss,²⁸⁰ for instance, is not deliberate in the sense that there is no one entity that

277. See Dow, *supra* note 1, at 122.

278. My thanks to Rosalind Dixon for raising this issue in the presentation of the project at the University of New South Wales conference, Aug. 12, 2016.

279. See *supra* Section I.B.

280. *Id.*

planned for and orchestrated the change, and set out to circumvent the amendment procedure in a pre-meditated and calculated fashion. In this sense, in my view, such changes that occur organically are more defensible, and have a better claim to some legitimacy, than the deliberate and calculated change illustrated by the Japanese reinterpretation. If the government were more duplicitous and covert in its efforts, it would be harder to determine that it was deliberate and calculated to be sure, and such duplicity would merit even more severe criticism and opprobrium. But I do not think that this detracts from the argument that deliberate efforts at significant constitutional change are *prima facie* illegitimate.

Returning to the relationship between the deliberate nature of the change and ratification by the public, Dow and others argue that even if the majority of the people were to approve such an informal amendment it would still be illegitimate. As discussed earlier Dow and other critics argue that Ackerman and Amar, and other proponents of the idea that expressions of the popular will can legitimate informal amendment, are confusing majoritarianism and popular sovereignty. They point out that the formal amendment procedures provided for in constitutions like those of the US and Japan, in requiring super-majorities of one kind or another, reflect the idea that in the interest of protecting minority rights and entrenching values, constraints, and pre-commitment devices, compromises to majoritarian principles must be accepted—and these compromises were themselves actually accepted in a ratification process that represented an expression of popular sovereignty.²⁸¹

I find these arguments to be quite persuasive and well founded. Yet I do not propose to resolve that debate here, but want to stake out a more modest claim, and suggest that it is a claim that should be able to command broader support than some of the critics' arguments, and also add some clarity to our thinking about the contours of legitimacy. The claim is that it might be conceivable for a very explicit and unequivocal expression of popular support for an informal amendment, even one effected by a deliberate and pre-meditated government effort, to confer some legitimacy upon the change—with the proviso that changes to fundamental rights would be exempted

281. Dow, *supra* note 1, at 123-24.

from this exception.²⁸² Suppose, for instance, that given the lack of a two-thirds majority in both chambers of the Diet, the Abe government had undertaken the changes we have described, but then conducted a referendum on the very issue of the validity of the changes. It would not have been in conformity with the Article 96 amending procedure, but if a majority of the votes cast in the referendum on a clear question were in favor of recognizing the change, the government would arguably have a much stronger claim to legitimacy. Note that this argument relies on a clear referendum on the issue, not a mere election along the lines posited in Ackerman's retrospective analysis of past American changes. It might be argued that if there were such expressions of popular support, after the kind of open public political deliberation and contest that Ackerman's theory contemplates, then in such a case, but only in such case, a deliberate effort at informal amendment might have some claim to legitimacy, once having been so endorsed.

One further proviso to this argument is that to have any claim to legitimacy, the informal constitutional change so endorsed by the popular will must also be the kind of change that would have been legitimate if brought about through the formal amendment process. Thus far we have been proceeding on the assumption that any formal amendment is *ipso facto* legitimate, but this is not necessarily true. There are a number of theories, primarily in European constitutional law systems, that suggest that attempts to amend certain fundamental or core features of a constitution are illegitimate. Richard Albert, in a forthcoming article, elaborates on such theories to argue that formal amendments that are "self-conscious efforts to repudiate the essential characteristics of the constitution" and which are inconsistent with the constitution's fundamental purpose and original framework, constitute a constitutional *dismemberment*.²⁸³ There is a thread in

282. My exception, if it were to allow for the informal amendment to fundamental rights on the basis of mere majority vote in a referendum, would of course conjure up all the issues surrounding Proposition 8 in California; and the arguments of Dow and others that allowing for such informal amendment would eviscerate a constitution's protections for minority rights would be exactly right.

283. Richard Albert, *Constitutional Dismemberment* (Nov. 25, 2016) (unpublished article, Boston College Law School Research Paper 424), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875931; see also, YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS (forthcoming, 2017) (manuscript on file with author).

Japanese constitutional discourse, relying on German constitutional theory, that suggests that any amendments to Article 9 that undermined the fundamental constitutional commitment to pacifism would be impermissible and illegitimate,²⁸⁴ and Albert picks up on this in arguing that the current LDP efforts to amend Article 9 would constitute a constitutional dismemberment.²⁸⁵ In light of the analysis of the substance of the reinterpretation above, and the argument that it is fundamentally inconsistent with the established and accepted understanding and purpose of Article 9, these theories would provide one more ground for suggesting that the reinterpretation is illegitimate. But for now, without delving into that analysis, I simply flag this further proviso that for an informal constitutional change to be legitimate, the change would have to have been legitimate if effected through the formal amendment process.

Such is the relationship between deliberate agency and popular will. The last factor to be considered is that of time. The most obvious characteristic of time, as it relates to legitimacy, is that even those constitutional changes that were hotly contested as being entirely unauthorized at the time they were made, will gradually become accepted over time—so long as the change is sustained and it becomes entrenched. After the passage of sufficient time, they will at some point enjoy a full measure legitimacy. While we may still debate the extent to which some of the New Deal innovations were authorized and legitimate constitutional moves, they have become part of the constitutional system and so must be treated as legitimate in practice. The reason for this is obvious, being that over time the constitutional change becomes the foundation for new law, policy, and jurisprudence. As it goes from being an innovative constitutional construction to being the foundation for subsequent interpretation, as well as the basis for other law and policy, the prospect of trying to overturn it becomes increasingly costly and practically infeasible, to the point where it becomes accepted, and eventually recognized as legitimate. From this we might distil a general principle that informal amendments will become legitimate with the passage of time. But the significance of the concept does not end there—there is more to be said about the concept of time as a factor of legitimacy.

284. See, e.g., ASHIBE, *supra* note 48, at 365-68

285. Albert, *Constitutional Dismemberment*, *supra* note 283, at 11-16.

Consider the fact that most formal amendments are immediately legitimate. They require no passage of time whatsoever to exercise a full claim to legitimacy—precisely because they are promulgated in accordance with the procedures authorized and mandated by the constitution.²⁸⁶ Similarly, interpretive developments that are largely uncontroversial, which are accepted by all as falling within the range of possible meanings for the provision in question, likewise command almost immediate legitimacy. Where the authority for a constitutional change is apparent and agreed, time is irrelevant to the legitimacy of the change. Constitutional authority is equivalent to immediate and corresponding legitimacy. As we move along the spectrum away from full authority, however, towards more contested interpretive developments, time will begin to play a role. Authority and legitimacy may be contested at the outset, and the level of legitimacy will be as low as the perceived level of constitutional authority at the time of the change—but if the change is sustained and entrenched, over time it will have an increasingly strong claim to *de facto* validity and thus legitimacy. This is all the more true for informal amendments, where the legitimacy of the change is even more contested and questionable at the outset, but may gradually increase over time if the change remains entrenched. The (limited or even non-existent) formal authority for the change does not change, but acceptance, *de facto* validity, and hence legitimacy, will begin to increase over time. This may be so even when the apparent legitimacy is a result more of begrudging acquiescence than genuine acceptance or approval.²⁸⁷ In this way we might say that time is what separates legitimacy from authority. Legitimacy originally flows from, and is coextensive with,

286. Noting, of course, the exceptions referred to earlier, *supra* note 283. Authors such as Strauss might argue that this proposition needs to be further qualified somewhat, and that some amendments, such as the 18th Amendment, were not immediately legitimate. But my argument is that all formal amendments have at least an immediate claim to legitimacy by reason that they were promulgated in accordance with formal constitutional authority. *See* Strauss, *supra* note 1.

287. One analogy for this might be a building that is constructed in violation of zoning or architectural regulations. Over time, as other structures are built alongside and on top of it, structurally reliant upon it, the cost and difficulty of demolishing or otherwise bringing it into compliance becomes too high, and it comes to be accepted, and subsequent development upon it is seen as legitimate, even as the absence for initial authority to build it remains apparent. Thanks to Mahesh Daas for the analogy, and Richard Albert for similar arguments on acquiescence versus acceptance. *See also supra* note 54 and Part I more generally.

the constitutional authority, but over time the two concepts begin to diverge.

If we were to try to conceptualize this graphically, it begins to look quite different from the model evoked by the traditional discussion of informal amendments described in Part I. In those accounts, informal amendments tend to be characterized as being somewhere in the middle of a simple spectrum, bordered by legitimate interpretive developments at one end, and formal amendments at the other—with the form of change developing from the incremental at one end, through more radical informal change in the middle, to full formal amendment at the other end. While none of the accounts develop or explain this spectrum in detail, the inference is that movement along the spectrum reflects the magnitude of the changes at any given point, but this tends to be confusing—for while magnitude increases uniformly from interpretive change through to formal amendment, authority is weakest in the middle, for informal amendment.

In the re-conceptualization explored here, however, the focus is explicitly on legitimacy and authority—with the additional dimension of time—and this tends to re-order the types of change, and clarifies the relationships. Thus, we might conceptualize it with authority forming the X-axis and legitimacy forming the Y-axis, in which constitutional change would form a linear plot from left to right—the higher the authority for a constitutional change the higher the legitimacy, and the lower the authority the lower the legitimacy. Formal amendment would be at the far right of the axis, and the most flagrant and questionable efforts at constitutional change at the origin, with zero authority and zero legitimacy. As changes move left along the X-axis from the high of formal amendment, meaning that the constitutional authority for such changes is declining, their legitimacy on the Y-axis correspondingly declines.

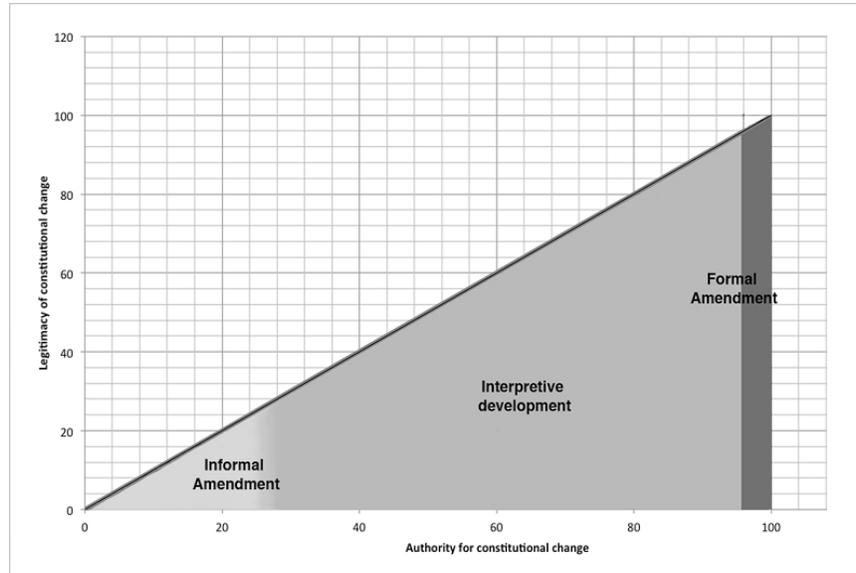


Fig. 1. – Legitimacy and Authority of Constitutional Change.

Time, however, adds a third dimension to this model. Imagine that there is a Z-axis that represents the passage of time. Then we would get a three dimensional figure (which is much more difficult to visualize or to graph—the figures here are merely two-dimensional slices of the three-dimensional model), in which changes that had a low level of both authority and legitimacy at the moment of change, say T1, would experience an increase in legitimacy as the increment of time increases, from its low starting point at T1 when legitimacy and authority exactly corresponded, to a point at T5, when legitimacy has increased to some robust number, while authority has remained constant (low or zero) over time.

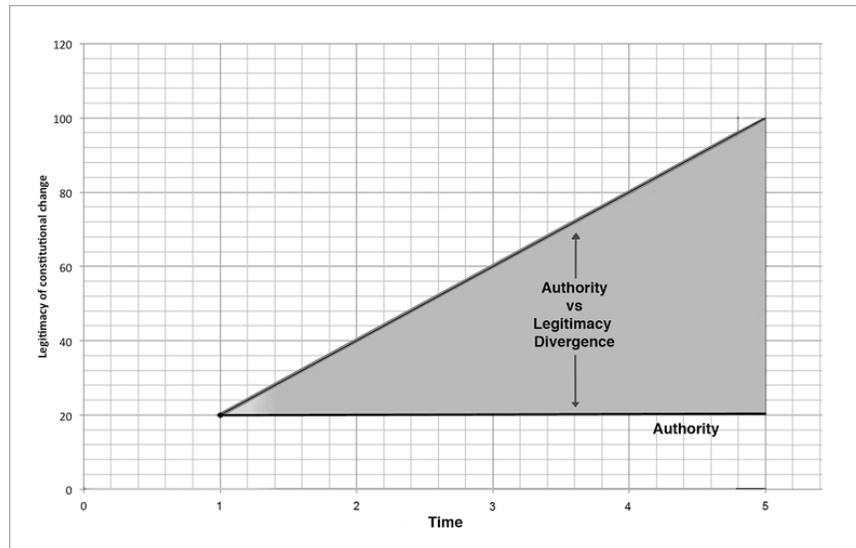


Fig. 2. – Legitimacy and Authority - Divergence Over Time*

This new conceptualization of the relationship among legitimacy, authority, and time, helps to illustrate a couple of significant features of the kind of deliberate informal change we have been discussing. The first is that it illustrates the intuition that the more unauthorized and illegitimate a constitutional change is at the outset, the longer the passage of time that will be required for it to achieve a level of legitimacy for *de facto* acceptance. This intuition can be explained by the hypothesis that the more contested a constitutional change may be, the more heated the opposition and thus the more resistance there will be to allowing new laws, policies, or judicial decisions that would depend upon the change as a foundation. There will, therefore, be some measure of uncertainty and instability surrounding the change, which will create a drag on the process of it being legitimated. This in turn will create a longer period of time during which opponents may try to overturn the change before it becomes entrenched. Thus, when applied to the arguments above,

* This depicts only the Y and Z axes, and thus a different two-dimensional slice of the three dimensional graph that would include the X and Y axes depicted in Figure 1. The units of time here could be decades, though of course the increase in legitimacy would not be linear, uniform, or at the same rate over time for different constitutional changes—both figures are highly simplified renditions merely designed to help visualize the relationships.

about the *prima facie* illegitimacy of the deliberate informal amendment efforts of the Abe government, we may predict that the reinterpretation will become legitimate over time, but it is starting at a lower point and thus should take more time to attain a robust level of legitimacy and acceptance than some contested interpretive development arising from a judicial decision.

This re-conceptualization also helps to graphically highlight another perspective from which to view the illegitimacy of the claim that deliberate and calculated informal amendment efforts are effectively trying to make. The architects of the deliberate informal amendment are in effect attempting to obtain the immediate legitimacy accorded to formal amendments, while circumventing the formal amendment procedure itself. It is an attempt to obtain immediate legitimacy for a change with neither the constitutional authority that would confer such legitimacy, nor the passage of time that might confer such legitimacy in the absence of authority.²⁸⁸ It provides yet another argument for the proposition that deliberate efforts at informal amendment lack the necessary prerequisites for any valid claim to legitimacy, at least at the time they are undertaken.

One last related point needs to be made about how we should think about the legitimacy of informal amendments. It relates to questions about the precedential value of past informal amendments that have gained legitimacy over time. For instance, let us suppose that we accept that some of the constitutional changes in American constitutional history were indeed informal amendments, as Ackerman and others have classified them, but we reject that they were legitimate at the time they were made—either because we do not accept that there was any explicit popular ratification of the change, or because we reject other aspects of the process by which they were made—but we do recognize and accept that the changes have become legitimate over time. Could that past change ever be invoked by a government as a precedent that justifies its current efforts to implement a constitutional change through a similar process, and in circumvention of the formal amendment procedure? In other words, could such justification grounded in precedent weaken or qualify the argument made earlier, that deliberate and intentional efforts to engage in informal amendment are *prima facie* illegitimate? I think

288. My thanks to David Rubenstein for this insight.

not. Even if we are forced to concede that informal amendments may occur, and that such past changes may have become legitimate over time even though they lacked authority and legitimacy at the time they were made, that provides no justification or authority for governments who seek to implement such changes in the present. In sum, explicit ratification may possibly cure the illegitimacy of deliberate agency, and time will likely legitimate unauthorized changes, but governments cannot reach back in time for precedents to justify their deliberate efforts to implement informal amendments. In concrete terms, Prime Minister Abe cannot invoke Roosevelt's New Deal programs (to the extent we think some of those constituted informal amendments) as a justification for the reinterpretation of Article 9.

So we are left with the conclusion that a deliberate informal amendment is *prima facie* illegitimate, unless, possibly, it is ratified by a very explicit and genuine expression of popular consent; but that they will nonetheless be legitimated by the passage of time if they are not quickly repudiated. It is perhaps a rather depressing conclusion. But it brings us back to Balkin and Levinson's argument for the opposition of high politics. In their discussion of constitutional revolution through partisan entrenchment, Balkin and Levinson argue that the best response to such revolutionary change is to criticize the institutions of change in terms of what they call "high politics". By high politics they mean the competing visions of the constitution, its fundamental values and principles, differing narratives of the nation's political and constitutional history, and contested conceptions of who "we the people" are as a nation.²⁸⁹ Moreover, the protest and opposition to the revolutionary change must be made not narrowly at the institution most directly responsible for the change (the Supreme Court in their US-based argument), but more broadly to the political parties, civil society, and the public at large. It is a battle for the hearts and minds of the nation as a whole. Applying this to the Japanese context, there may be some time in which to engage in such a battle of high politics, before the passage of time entrenches and legitimizes the purported constitutional change to Article 9—but the clock is running. Time is of the essence.

289. Balkin & Levinson, *supra* note 1, at 1062.

CONCLUSION

This article has suggested that more work needs to be done to clarify the contours of legitimacy in our thinking about informal constitutional amendment. The discussion has focused on three different concepts that I have suggested are factors in determining the legitimacy of an informal amendment, namely: the extent to which there is deliberate agency in orchestrating the change; the extent to which there has been a genuinely contested and explicit popular ratification of the change; and the passage of time. In considering the element of time, this examination has suggested that time is one factor that separates the concept of constitutional authority and that of legitimacy, as time will tend to legitimize a change even as the constitutional authority for the change remains constant. This distinction helps us to re-conceptualize the relationship among authority, legitimacy and time in thinking about constitutional change, and provides some support for the hypothesis that even the most unauthorized constitutional change may become legitimate over time if it can be sustained.

Using an examination of the Japanese reinterpretation as case study that brings these issues into stark relief, I have argued that informal amendments that are undertaken with deliberate intent to effect what amounts to a constitutional amendment, in a manner calculated to circumvent the formal amendment procedure, are *prima facie* illegitimate at the time. This is in contrast to the kinds of informal amendments that can arise as unorchestrated and typically unpredictable consequences of the operation of interrelated and complex political, policy, legal and popular forces. I have argued that such deliberate informal amendment might possibly be cured by a genuine and very explicit expression of popular will, such as a special referendum on a clear question about the amendment, and only in the context of genuine political contestation and open public deliberation. In this regard, the study reveals a possibly overlooked insight in Ackerman's theory. While his critics are right that public ratification is difficult to infer from normal elections, and that public ratification may not alone be sufficient for legitimacy, it is surely a necessary condition for the legitimacy of informal amendments at the time they occur, particularly where they are undertaken with deliberate agency. Finally, I have suggested that because deliberate informal amendments suffer from so little constitutional authority and legitimacy at the time they occur, that both descriptively and

normatively they should take a longer time than other contested changes to be legitimized by the passage of time.

